Ronnie's appeal

[Headnote 2]

Stephanie asserts that the district court erred in denying Ronnie's *Batson* challenge.[2] In Jermaine's appeal, we concluded that a reversal of his judgment of conviction was warranted because the district court's mishandling of Jermaine and Ronnie's *Batson* challenge was intrinsically harmful to the trial's framework. *Brass*, 128 Nev. at 754, 291 P.3d at 149. Ronnie suffered the same harm as Jermaine and is entitled to the same relief. We recognize that the jury found sufficient evidence to convict Ronnie of the conspiracy, kidnapping, and murder charges.

However, the jury was not properly constituted, and its decision does not override the constitutional error Ronnie suffered. Accordingly, we reverse the judgment of conviction.[3]

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

JOHN SCHLEINING, A MARRIED MAN; AND DECAL NEVADA, INC., AN OREGON CORPORATION, APPELLANTS, *v.* CAP ONE, INC., A NEVADA CORPORATION; PERRY M. DI LORETO, TRUSTEE OF THE PERRY M. DI LORETO AND PATRICIA E. DI LORETO FAMILY TRUST (U/T/D 10/16/81); ROGER B. PRIMM, TRUSTEE OF THE ROGER B. PRIMM FAMILY TRUST (U/T/D 1/30/90); AND DAMONTE FAMILY LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP, RESPONDENTS.

No. 57934

May 29, 2014 326 P.3d 4

Appeal from a district court judgment entered after a bench trial in a deficiency action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Lender brought deficiency action against guarantor. Following a bench trial, the district court awarded a deficiency judgment against guarantor, and he appealed. The supreme court, HARDESTY, J., held that: (1) guarantor was statutorily precluded from waiving any right

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[2]Stephanie raises several other issues on appeal. But, in light of our determination regarding the *Batson* challenge, we need not address these additional issues.

[3]A remand for further proceedings is unnecessary because Ronnie cannot be retried.

to notice of obligor's default, but (2) the statutory notice requirements afforded a guarantor of indebtedness following a default under a deed of trust can be fulfilled through substantial compliance, and (3) the district court did not abuse its discretion by finding that lender substantially complied with the notice requirements afforded guarantor.

Affirmed.

[Rehearing denied August 5, 2014]

DOUGLAS, J., with whom GIBBONS, C.J., and CHERRY, J., agreed, dissented in part.

Molof & Vohl and *Lee Molof* and *Robert C. Vohl*, Reno, for Appellants.

McDonald Carano Wilson, LLP, and *Paul J. Georgeson* and *Kerry S. Doyle*, Reno, for Respondents.

1. GUARANTY.
   Guarantor of indebtedness related to the sale of real property was statutorily precluded from waiving any right to notice of obligor's default; unlike a contractual waiver to a right to trial by jury, the statute providing for a guarantor's right to be mailed a notice of default related directly to the policy underlying the statutory scheme of which the statutory waiver of rights provision was a part, and therefore fell within the scope of prohibited waivers. NRS 40.453, 107.095.
2. APPEAL AND ERROR.
   The supreme court reviews determinations of statutory construction de novo.
3. GUARANTY.
   The statutory notice requirements afforded a guarantor of indebtedness following a default under a deed of trust can be fulfilled through substantial compliance. NRS 107.095.
4. GUARANTY.
   The district court did not abuse its discretion by finding that lender substantially complied with the notice requirements afforded a guarantor of indebtedness related to the sale of real property, despite the lack of proper statutory notice by registered or certified mail to the guarantor; guarantor admitted at trial that he had actual knowledge of the default and the date of the foreclosure sale prior to its commencement, and despite such notice, he made no effort to refinance the property or testify about any additional actions he could have or would have taken to save the property and avoid a deficiency judgment had he personally received notice of the default. NRS 107.080, 107.095.
5. COURTS; STATUTES.
   In determining whether strict or substantial compliance with a statute or rule is required, the supreme court examines whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language.

6. Appeal and Error.

The supreme court reviews determinations as to whether a trustee has substantially complied with the statutory requirement that it notify the guarantor that the loan is in default and that the lender has elected to foreclose on the secured property for an abuse of discretion. NRS 107.080, 107.095.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

In this appeal, we consider the application of NRS 40.453 and NRS 107.095 in the context of a lender's claim for a deficiency judgment against a guarantor. First, we are asked to determine whether NRS 40.453, which generally prohibits borrowers and guarantors from contractually "waiv[ing] any right secured to th[at] person by the laws of this state," invalidates a guarantor's waiver of the statutory right to be mailed a notice of default. Because the Legislature afforded guarantors a statutory right to be mailed a notice of default in the same bill in which NRS 40.453 was enacted, we conclude that the Legislature intended for NRS 40.453 to invalidate a guarantor's purported waiver of the right to be mailed a notice of default.

We next consider whether the statute guaranteeing the right to be mailed a notice of default, NRS 107.095, requires strict or substantial compliance on the part of a lender, and if substantial compliance is sufficient, whether there was substantial compliance in this case. We conclude that substantial compliance can satisfy NRS 107.095's notice requirements, and, here, the district court did not abuse its discretion in concluding that the lender substantially complied with NRS 107.095's notice requirement. Therefore, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

In 2007, while acting as a principal and sole owner of Decal Nevada, Inc., appellant John Schleining arranged for Decal's purchase of an undeveloped parcel of real property along the Truckee River in Reno, Nevada, to improve and later sell to a developer. In May 2007, Decal obtained a loan in the amount of $2.5 million from respondent lenders, whom we collectively refer to as Cap One, to help pay the purchase price for the property. The loan required

[1]The Honorable Mark R. Denton, District Judge in the Eighth Judicial District Court, was designated by the Governor to sit in place of The Honorable Ron D. Parraguirre, Justice, who voluntarily recused himself from participation in the decision of this matter. Nev. Const. art. 6, § 4.

repayment in full by December 2007 and was secured by a deed of trust on the property. Schleining signed a personal guaranty of the loan, which included a waiver of his right to receive notice of any default of the loan.

By late 2007, Decal had failed to secure a buyer to purchase the property, and Schleining personally sent a letter seeking an extension of the loan. When Cap One declined to extend the loan, Schleining made an offer to pay the December interest payment in exchange for a release of his personal guaranty. Cap One again declined the offer and refused to release him from his personal guaranty. Decal defaulted on the loan in December 2007, and on January 30, 2008, Cap One recorded a notice of default and election to sell. On February 9, 2008, Cap One mailed a copy of the notice of default to Decal at various addresses, including Decal's office in St. Helens, Oregon. At that time, Schleining and Decal shared the St. Helens, Oregon, address, but Schleining was working in a separate office in Medford, Oregon, with forwarding instructions for his mail. Cap One did not mail a separate copy of the notice of default to Schleining as guarantor, as set forth in NRS 107.095, to any address. The notice of trustee's sale was also mailed to Decal and Schleining's St. Helens, Oregon, address, but again a copy was not separately mailed to Schleining. On June 11, 2008, a trustee's sale was held at which Cap One was the only bidder on the property, purchasing it for $100,000.

Cap One then filed a complaint seeking a deficiency judgment against Schleining as guarantor. Schleining raised Cap One's failure to mail the notice of default to him separately under NRS 107.095 as an affirmative defense in his answer and moved for summary judgment. In response, Cap One argued that Schleining expressly waived his right to receive a notice of default in his guaranty. The district court ruled that the waiver was invalid pursuant to NRS 40.453. The district court further determined that issues of material fact remained, and the case proceeded to trial.

At trial, Schleining testified that although he was not mailed a copy of the notice of default or notice of trustee's sale, he was nevertheless aware of the default and that Cap One would likely foreclose. He also acknowledged that he knew of the trustee's sale prior to its commencement. He testified that, upon learning of the pending trustee's sale, he made no effort to contact Cap One to attempt to prevent or delay the sale. Following the trial, the district court concluded that the notice requirements of NRS 107.095 could be satisfied by substantial compliance. Thus, because Schleining had actual notice of the default and foreclosure sale and was not prejudiced by the lack of formal notice, the district court held that Cap One had substantially complied with NRS 107.095. Accordingly, the district court awarded a deficiency judgment against Schleining in favor of Cap One, and Schleining appealed.

DISCUSSION

[Headnote 1]

On appeal, Schleining asserts that the district court erred in concluding that strict compliance with NRS 107.095's notice of default provisions is not required and that, regardless, Cap One failed to afford him adequate notice under a substantial-compliance standard, such that he should be released from his obligation as guarantor. Cap One, on the other hand, disagrees and counters that these issues need not even be addressed because Schleining validly waived NRS 107.095 notice and, thus, the district court reached the right result.

Pursuant to NRS 40.453, Schleining could not waive the right to be mailed the notice of default

[Headnote 2]

Cap One argues that Schleining validly waived any right to notice of Decal's default. The district court, however, concluded that NRS 40.453 invalidated Schleining's waiver of his right to be mailed the notice of default. This court reviews determinations of statutory construction de novo. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857, 265 P.3d 688, 690 (2011).

NRS 40.453(1) states as follows:

> It is hereby declared by the Legislature to be against public policy for *any document relating to* the sale of real property to contain any provision whereby a mortgagor or the grantor of a deed of trust or *a guarantor* or surety of the indebtedness secured thereby, *waives any right secured* to the person by the laws of this state.[2]

(Emphases added.) Cap One argues that this court has already held that NRS 40.453 only applies to waivers of rights conferred in Nevada's antideficiency statutes, citing to *Lowe Enterprises Residential Partners v. Eighth Judicial District Court*, 118 Nev. 92, 102-04, 40 P.3d 405, 411-12 (2002), and that the right to notice of default is not one of those antideficiency rights to which the prohibition applies.[3] In *Lowe*, the real parties in interest argued that a waiver of their right to a jury trial in their loan documents and

[2]NRS 40.453 expressly excludes any waivers allowed by NRS 40.495, but that exclusion is not at issue here.

[3]Cap One also cites *McDonald v. D.P. Alexander & Las Vegas Boulevard, L.L.C.*, 121 Nev. 812, 123 P.3d 748 (2005), for the proposition that this court has already held that a guarantor may validly waive the right to be mailed a notice of default. But *McDonald* is inapposite, as this court did not address the validity of the waiver itself, much less the potential effect of NRS 40.453. Rather, we merely concluded that the applicability of an exception under NRS 40.430 (Nevada's one-action rule) did not depend on whether the guarantor waived notice under NRS 107.095. 121 Nev. at 818, 123 P.3d at 751-52.

guaranty was invalid under NRS 40.453. 118 Nev. at 95, 40 P.3d at 407. This court disagreed, holding that the right to a jury trial did not fall under the scope of NRS 40.453. *Id.* at 104, 40 P.3d at 413. In doing so, this court first noted that NRS 40.453's plain language prohibited the waiver of " 'any right secured to [the person] by the laws of this state.' " *Id.* at 102, 40 P.3d at 411 (quoting NRS 40.453 (1993)). We then recognized, however, that a literal application of this blanket prohibition would render unenforceable "such things as arbitration agreements, forum selection clauses and choice-of-law provisions." *Id.* at 102-03, 40 P.3d at 412 (footnotes omitted). Because of the potential for such absurd results, we determined that such a literal application of NRS 40.453 was not the Legislature's intent. We therefore concluded that NRS 40.453 was ambiguous, and we went on to determine the actual scope of NRS 40.453 through analysis of its legislative history. *Id.* at 102-03, 40 P.3d at 412. In concluding that NRS 40.453 does not apply to the right to a jury trial, this court stated that

> the comments solicited by the [L]egislature during the hearing on the amendment to NRS 40.453 highlight the intent of the [L]egislature to protect the rights created by Nevada's anti-deficiency legislation, not to protect the right to a jury trial. This conclusion is consistent with the fact that NRS 40.453 is codified in Chapter 40 of the Nevada Revised Statutes under the subheading "Foreclosure Sales and Deficiency Judgments."

Id. at 103-04, 40 P.3d at 412.

Cap One argues that *Lowe* restricts the scope of NRS 40.453 to the statutes dealing with deficiency judgments, NRS 40.451 through 40.459, which would preclude its application to NRS 107.095 in this case. While NRS 107.095 is not codified in the same subchapter that this court explicitly mentioned in *Lowe*, NRS 107.095 relates to the same subject matter and was enacted as part of the same bill that enacted NRS 40.453.[4] 1987 Nev. Stat., ch. 685, §§ 6, 8, at 1643-45. Additionally, the legislative hearing minutes that this court relied on in *Lowe* to determine the scope of NRS 40.453 included a discussion of the need to provide notice to guarantors in deficiency proceedings codified in NRS 107.080, which would later be separated into NRS 107.095, as part of that legislative scheme. *See* Hearing on S.B. 359 Before the Assembly Judiciary Comm., 64th Leg., Ex. D (Nev., June 10, 1987) (Memorandum from Michael K. Wall, Deputy Supervising Staff Attorney, Nevada Supreme Court to Chief Justice E.M. Gunderson, Nevada Supreme Court (June 9, 1987)); *see also Lowe*, 118

[4]When enacted in 1987, NRS 107.095 was codified as NRS 107.080(5). *See* 1987 Nev. Stat., ch. 685, § 8, at 1645 (enacting the majority of NRS 107.095's language in NRS 107.080(5)). A 1989 amendment separated that language into NRS 107.095. 1989 Nev. Stat., ch. 750, § 11, at 1770.

Nev. at 103-04, 40 P.3d at 412 (concluding that the memorandum distributed at the hearing illustrated the intent of the Legislature in enacting NRS 40.453).

Unlike the right to a trial by jury, the statute providing for a guarantor's right to be mailed a notice of default was enacted together with NRS 40.453 and relates directly to the policy underlying the statutory scheme of which NRS 40.453 is a part. Therefore, we conclude that NRS 107.095 falls within the scope of NRS 40.453's prohibited waivers. Accordingly, the district court properly invalidated Schleining's waiver of his right to be mailed the notice of default, and we must go on to address Schleining's arguments concerning Cap One's compliance with NRS 107.095.[5]

The district court did not abuse its discretion in determining that Cap One substantially complied with the notice requirement in NRS 107.095

[Headnotes 3-5]

In determining whether strict or substantial compliance with a statute is required, "we examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011). Here, we find it significant that at the time of the underlying events in this case, the Legislature had expressly imposed a substantial-compliance standard with regard to a lender's duty to provide a *borrower* with notice of a loan's default and the lender's election to foreclose. *See* NRS 107.080(5) (2007) (indicating that a trustee's sale may be declared void if, among other things, the entity conducting the sale "does not substantially comply with" the provisions of NRS 107.080).[6] In other words, the Legislature specifically envisioned that the purposes behind NRS 107.080's notice and timing requirements could be achieved even if these requirements were not strictly adhered to. *Cf. Leyva*, 127 Nev. at 475-76, 255 P.3d at 1278

[5]Cap One further argues that NRS 40.453 is inapplicable because it applies only to " 'document[s] relating to the sale of real property' " and, according to Cap One, a guaranty agreement is not a document " 'relating to the sale of real property.' " (quoting NRS 40.453). We reject this argument, as the plain language of NRS 40.453 explicitly applies to guarantors of notes secured by deeds of trust.

[6]We note that, in 2011, the Legislature added a new subsection to NRS 107.080. *See* 2011 Nev. Stat., ch. 81, § 9, at 335. This subsection, now NRS 107.080(7), sets forth specific penalties against an entity who "did not comply with" certain requirements in NRS 107.080. *See* NRS 107.080(7) (2011). Although the Legislature indicated that subsection 7's remedy "is in addition to the remedy provided in subsection 5," the Legislature did not change the substantial-compliance standard in subsection 5. Because the underlying events in this case took place before subsection 7's enactment, we need not consider what effect, if any, subsection 7 may have on subsection 5's substantial-compliance standard.

(recognizing that strict compliance with a statute's requirements may not be necessary when strict compliance is not required to serve the statute's purpose). Given that the Legislature intended for a substantial-compliance standard to apply with regard to Cap One's duty to provide notice to Decal under NRS 107.080, we see no reason why the Legislature would intend for a strict-compliance standard to apply when providing the same notice directly to Schleining under NRS 107.095.

Moreover, this court has already addressed the applicability of substantial compliance in the context of notice requirements. In considering the notice requirements for mechanics' liens, this court held that substantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice. *Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982). Similar to the notice requirements for mechanics' liens discussed in *Las Vegas Plywood*, the purpose of NRS 107.095 is simply to notify the guarantor that the loan is in default and that the lender has elected to foreclose on the secured property. Thus, we conclude that the notice requirements of NRS 107.095 can be fulfilled through substantial compliance. We must now determine whether the district court properly concluded that there was substantial compliance in this case.

[Headnote 6]

This court reviews substantial-compliance determinations for an abuse of discretion. *Redl v. Heller*, 120 Nev. 75, 81, 85 P.3d 797, 800-01 (2004); *Las Vegas Plywood*, 98 Nev. at 380, 649 P.2d at 1368. Applying the first prong of the rule articulated in *Las Vegas Plywood* to the facts of this case, we conclude that the district court properly found that Schleining had actual knowledge of the default and the pending foreclosure sale despite the lack of statutory notice. A review of the trial record clearly demonstrates that Schleining knew Decal would not be able to pay the loan when it became due. He first attempted to get an extension of the loan's due date, which Cap One rejected. Thereafter, he asked Cap One to release his personal guaranty in exchange for payment of one month's interest, which Cap One also rejected. Moreover, Schleining admitted at trial that he had actual knowledge of the default and the date of the foreclosure sale prior to its commencement.

Applying the second prong of the rule articulated in *Las Vegas Plywood*, we conclude that the district court properly determined that Schleining was not prejudiced by the lack of statutory notice. Although Schleining claimed that his failure to act to save the property at issue was because he did not receive the appropriate notice, there was no evidence presented that Schleining attempted to refinance the property but failed due to time constraints. Nor did Schleining testify about any additional actions he could have or

would have taken to save the property and avoid a deficiency judgment if he had personally received the notice of default. Accordingly, and in light of the notice that Cap One sent to Decal at the address provided in Schleining's guaranty agreement, we conclude that the district court did not abuse its discretion in determining that Cap One substantially complied with the notice requirements of NRS 107.095.

Although the dissenting justices cite to the substantial-compliance rule, they refuse to apply the rule or review the discretion exercised by the district court. Instead, they conclude as a matter of law that substantial compliance did not occur, citing to *Las Vegas Convention & Visitors Authority v. Miller* for the proposition that the "failure to even attempt to comply with a statutory requirement will result in a lack of substantial compliance." 124 Nev. 669, 684, 191 P.3d 1138, 1148 (2008). However, this statement from *Las Vegas Convention* was not a holding of the court; rather, it was a comment on the fact that "typically" this court has found no substantial compliance when no attempt is made to comply with statutory requirements. *Id.* In fact, the court actually held that there was no substantial compliance with a ballot-initiative statute because the reasonable purpose of the statute was not met when the ballot-initiative proponents failed to include certain statutorily required information on their affidavits *and* the proponents could not point to facts that would have otherwise demonstrated substantial compliance with the statute. *Id.* at 686, 191 P.3d at 1149.

In this regard, *Las Vegas Convention* was factually different from this case, as the purpose of the statute in that case was to prevent voter fraud, and the ballot initiative's proponents failed altogether to demonstrate that the statute's purpose had been achieved. *Id.* at 688-89, 191 P.3d at 1150-51. This is important because the purpose of the substantial-compliance rule is to identify a factual situation in a case whereby the reasonable purpose of the statute is met by the offending party's actions without requiring "technical compliance with the statutory . . . language." *See Leyva*, 127 Nev. at 476, 255 P.3d at 1278.

The dissent also argues that we have ignored *Las Vegas Convention*'s reliance upon *Schofield v. Copeland Lumber Yards, Inc.*, 101 Nev. 83, 692 P.2d 519 (1985). However, *Schofield* does not undermine our decision in this case. In *Schofield*, the lienholder gave notice of the lien but failed to include certain statutorily required information in the notice, namely the terms and conditions of the lienholder's contract. 101 Nev. at 84, 692 P.2d at 519-20. This court determined that without that information, the notice did not adequately advise the property owners about the contract's terms and "placed them at a considerable disadvantage in defending against

the motion for summary judgment." *Id.* at 85, 692 P.2d at 520. Thus, this court concluded that there was no substantial compliance because the purposes of the statutory notice requirements were not fulfilled. *Id.* at 85-86, 692 P.2d 520-21.

We conclude that the district court did not abuse its discretion when it determined that Schleining's actual notice of the default and foreclosure sale, coupled with the lack of prejudice, satisfied the purpose of NRS 107.095. Accordingly, we affirm the judgment of the district court.

PICKERING and SAITTA, JJ., and DENTON, D.J., concur.

DOUGLAS, J., with whom GIBBONS, C.J., and CHERRY, J., agree, concurring in part and dissenting in part:

While I concur with the majority's determination that a guarantor cannot waive the right to a notice of default, I dissent from the majority's application of substantial compliance to the notice requirement of NRS 107.095.

Cap One did not substantially comply with NRS 107.095

I agree that in determining whether strict or substantial compliance with a statute is required, "we examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011) (citing *Leven v. Frey*, 123 Nev. 399, 407 n.27, 168 P.3d 712, 717-18 n.27 (2007)). In the context of notice requirements for mechanics' liens, this court has held that substantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice. *Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982). Thus, applying that standard here, the district court incorrectly held that Cap One substantially complied with NRS 107.095.

This court reviews substantial-compliance determinations for an abuse of discretion. *Redl v. Heller*, 120 Nev. 75, 81, 85 P.3d 797, 800-01 (2004). "Courts have defined substantial compliance as compliance with essential matters necessary to ensure that every reasonable objective of the statute is met." *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 480, 50 P.3d 536, 541 (2002). "[F]ailure to even attempt to comply with a statutory requirement will result in a lack of substantial compliance." *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 684, 191 P.3d 1138, 1148 (2008); *Schofield v. Copeland Lumber Yards, Inc.*, 101 Nev. 83, 85, 692 P.2d 519, 520 (1985) ("[W]e do not think that a notice of lien may be so liberally construed as to condone the total elimination of a specific requirement of the statute.").

The majority notes that *Las Vegas Convention* involves substantial compliance in a factually different context, an election statute, but ignores this court's reliance on *Schofield* in reaching its conclusion. In *Schofield*, the failure to give notice of a lien as required in a mechanic's lien statute could not be satisfied without at least an attempt to comply with the statute. *Schofield*, 101 Nev. at 85, 692 P.2d at 520. The reasoning in *Schofield* and *Las Vegas Convention* that substantial compliance in the face of a failure to attempt compliance would negate the particular statutory provision in question is the better approach. *Schofield*, 101 Nev. at 85, 692 P.2d at 520; *Las Vegas Convention*, 124 Nev. at 686, 191 P.3d at 1149.

Here, Cap One concedes that it gave no notice to Schleining, either in a form required by NRS 107.095 and NRS 107.080 or otherwise.[1] Schleining conceded that he had become aware of the foreclosure sale two or three days prior, but neither Schleining nor Cap One alleges that it was Cap One who gave Schleining notice. Because Cap One took no action to give Schleining notice, Cap One's actions do not constitute "compliance with essential matters." *Williams*, 118 Nev. at 480, 50 P.3d at 541.

Furthermore, the rule articulated in *Las Vegas Plywood & Lumber v. D & D Enterprises*, 98 Nev. 378, 649 P.2d 1367 (1982), requires the court to review prejudice as to Schleining. The majority believes Schleining was not prejudiced; however, the district court, by finding that actual notice two or three days before the foreclosure sale was sufficient where the statute provides that such notice be effected over three months before the foreclosure sale, abused its discretion. Additionally, it must be noted that having two or three days to cure the $3 million default constitutes prejudice when Cap One took no action to give Schleining the required notice.

I dissent because I believe the test was not properly applied as to substantial compliance (notice and prejudice). I therefore, would reverse this judgment for failure to comply with NRS 107.095.

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[1]The majority points out that Cap One mailed a notice of default to Decal Nevada and that Decal Nevada's address was identical to Schleining's address as listed in the written guaranty. This notice was not addressed to Schleining specifically, and Cap One does not argue that the notice mailed to Decal Nevada was also intended to provide notice to Schleining. Accordingly, this fact should not alter the conclusion that Cap One failed entirely to comply with the requirement to provide notice.

LAS VEGAS DEVELOPMENT ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY; ESSEX REAL ESTATE PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; INTEGRATED FINANCIAL ASSOCIATES, INC.; NEXBANK, SSB, A TEXAS-CHARTERED STATE SAVINGS BANK; WESTCHESTER CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; GLENEAGLES CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; STRATFORD CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; GREENBRIAR CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; EASTLAND CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; BRENTWOOD CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; JASPER CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; LONGHORN CREDIT FUNDING LLC, A DELAWARE LIMITED LIABILITY COMPANY; GRAYSON CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS; AND RED RIVER CLO, LTD., A CORPORATION ORGANIZED UNDER THE LAWS OF THE CAYMAN ISLANDS, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, RESPONDENTS, AND KB HOME NEVADA INC., REAL PARTY IN INTEREST.

No. 62512

May 29, 2014 325 P.3d 1259

Original petition for a writ of prohibition or mandamus challenging a district court order compelling discovery of purportedly privileged documents.

Investor in suit stemming from real estate transaction filed petition for writ of prohibition or mandamus, seeking relief from order granting home builder's motion to compel production of purportedly privileged, attorney-prepared documents used by investor's witness to refresh his recollection prior to deposition. The supreme court, GIBBONS, C.J., held that: (1) the district court did not abuse its discretion in finding that builder established foundation to compel production; (2) witness's reliance on documents to refresh his recollection served as waiver of attorney-client privilege and work-product doctrine; and (3) as a matter of first impression, statute providing for production of documents relied upon by witnesses to refresh their recollection applied to both depositions and in-court hearings.

Petition denied.

Hutchison & Steffen, LLC, and *Michael K. Wall* and *Patricia Lee*, Las Vegas; *Lackey Hershman, LLP*, and *Paul B. Lackey, Michael P. Aigen*, and *Kennedy Barnes*, Dallas, Texas, for Petitioners.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli, Christopher R. Miltenberger*, and *Jordan T. Smith*, Las Vegas, for Real Party in Interest.

1. Prohibition.
   Writ of prohibition is appropriate remedy to correct an order that compels disclosure of privileged information.
2. Appeal and Error; Mandamus.
   Statutory interpretation presents a question of law subject to de novo review, even when arising in writ proceeding.
3. Statutes.
   When a statute's language is plain and its meaning clear, courts will generally apply that plain language.
4. Statutes.
   When a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and the supreme court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in manner that conforms to reason and public policy.
5. Pretrial Procedure.
   The district court did not abuse its discretion in finding that home builder established proper foundation to compel production of purportedly privileged, attorney-prepared documents used by investor's witness to refresh his recollection prior to his deposition in case stemming from real estate transaction, such that investor was not entitled to extraordinary relief from order granting builder's motion to compel production on that ground; builder verified with firm's principal that he reviewed two of the documents, the purpose of reviewing the documents, and effect his review had in refreshing his recollection. NRS 50.125.
6. Pretrial Procedure; Privileged Communications and Confidentiality.
   Investor's witness's reliance on allegedly privileged, attorney-prepared documents to refresh his recollection prior to giving deposition testimony in dispute stemming from real estate transaction served as waiver of attorney-client privilege and work-product doctrine, allowing adverse party to demand production of documents, inspect them, cross-examine witness on contents, and admit documents into evidence for impeachment purposes, despite contention that attorney-client privilege and work-product doctrine applied at all stages of proceedings; investor prepared witness by supplying him with documents that investor asserted were attorney work-product and subject to attorney-client privilege, and witness admittedly used those documents to refresh his memory, which potentially shaped and influenced his testimony. NRS 47.020(2), 50.125.
7. Witnesses.
   Without statutory language permitting the district courts' exercise of discretion to preclude disclosure of privileged documents, the district courts lack discretion to halt disclosure of privileged documents when a

witness uses the privileged documents to refresh his or her recollection prior to testifying. NRS 50.125.

8. Pretrial Procedure.

The district court was not required to redact any mental impressions, opinions, or legal theories prior to production of allegedly privileged, attorney-prepared documents used by investor's witness to refresh his memory to prepare for deposition in dispute stemming from real estate transaction; discovery commissioner conducted in camera review of redacted and unredacted documents and found that witness reviewed and relied upon the entirety of the documents in preparing for his deposition. NRS 50.125.

9. Witnesses.

Statute providing for production of documents relied upon by witnesses to refresh their recollection applied to both depositions and in-court hearings, since examination and cross-examination of witnesses would proceed as they would at trial, such that there would be no reason why documents used to refresh memory of witnesses before or during deposition would be treated differently from those used by witnesses before or at trial. NRS 50.125; NRCP 30(c).

Before the Court En Banc.[1]

OPINION

By the Court, Gibbons, C.J.:

This court recently addressed the intersection of NRS 50.125 and Nevada privilege law and concluded that "when invoked at a hearing, . . . NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying, regardless of privilege." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 118, 126, 319 P.3d 618, 623 (2014). In this opinion, we address whether NRS 50.125 applies to depositions as well as to in-court hearings. We conclude that it does. We therefore deny this petition for a writ of prohibition or mandamus.

FACTS

The underlying action stems from a dispute between petitioners Las Vegas Development Associates, LLC; Essex Real Estate Partners, LLC; and Integrated Financial Associates, Inc. (collectively, LVDA), and real party in interest KB Home Nevada, Inc. (KB Home), arising out of a real estate transaction.[2] In conducting discovery, KB Home noticed and took the deposition of Essex Real Estate Partners, LLC's principal, George Holman. Holman testified that before his deposition, he had reviewed two memoranda prepared by his attorneys, as well as his own handwritten notes, to

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

[2]Eleven intervenors joined this action.

refresh his recollection and prepare for the proceeding. Then, the following exchange occurred:

> Q. Okay. Did the documents . . . what was the purpose of reviewing all those documents?
>
> A. To be prepared and to refresh my memory.
>
> Q. Did they all refresh your recollection?
>
> A. Yes.
>
> Q. Including the memo?
>
> A. Yes.

Holman testified that the memoranda were summaries of conversations that he had with his attorneys regarding the issues in this case. KB Home then requested that Holman divulge the contents of the attorney-prepared memoranda along with Holman's own handwritten notes. Holman refused based on the attorney-client privilege and the work-product doctrine.

On the second day of Holman's deposition, he again confirmed the intent behind reviewing his handwritten notes, stating: "I looked at them to refresh my recollection, yes." KB Home asked if the notes did in fact refresh his recollection about matters he expected to testify about that day. Holman responded affirmatively. KB Home again requested to inspect the notes, but Holman refused. Later in the deposition, Holman confirmed for a third time that the notes summarized conversations that he had with his attorneys and related to his testimony. In a later installment of his deposition, Holman stated that his intent behind reviewing the memoranda and notes was to refresh his "memory about the strategy of the case going forward." Throughout his deposition, Holman refused to divulge the contents of the attorney-prepared memoranda and his handwritten notes, on the ground that they were privileged.

KB Home filed a motion to compel production of the documents, arguing that NRS 50.125 mandates disclosure of any documents used before a deposition to refresh one's recollection. The district court agreed and granted KB Home's motion. LVDA filed a motion for reconsideration, and the district court referred the matter to the discovery commissioner. While the matter was proceeding before the discovery commissioner, LVDA produced Holman's handwritten notes and provided a redacted version of the attorney-prepared memoranda. Nevertheless, the discovery commissioner ultimately recommended full production of the unredacted memoranda. The discovery commissioner found that "so much of the information was intertwined," that "it would be impossible to conclude what 'factual' information [Holman] relied on." Additionally, the discovery commissioner found that "Holman reviewed the

entirety of the documents and relied upon them in their entirety in preparing for his deposition." LVDA filed a written objection to the discovery commissioner's report and recommendation. The district court ultimately affirmed and adopted the discovery commissioner's report and recommendation, ordering production of the unredacted attorney-prepared memoranda pursuant to NRS 50.125.

The underlying proceedings have been stayed by the district court, and LVDA now seeks writ relief from this court, arguing that the district court abused its discretion in granting KB Home's motion to compel because: (1) KB Home did not lay a sufficient foundation to invoke NRS 50.125, (2) NRS 50.125 does not serve as a waiver of the attorney-client privilege, and (3) NRS 50.125 does not serve as a waiver of the work-product doctrine. Additionally, in order to properly resolve this writ petition, we will address whether NRS 50.125 applies to depositions as well as to in-court hearings.

DISCUSSION

[Headnote 1]

We exercise our discretion to consider this writ petition because this case presents a situation where "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by later appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). Further, we note that a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information. *Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171 n.5, 252 P.3d 676, 679 n.5 (2011); *Las Vegas Sands*, 130 Nev. at 122, 319 P.3d at 621.

Standard of review

[Headnotes 2-4]

Here, the parties dispute the district court's interpretation and application of NRS 50.125.[3] Statutory interpretation presents a question of law subject to our de novo review, even when arising in a writ proceeding. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). "Generally,

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[3]NRS 50.125(1) provides:

> If a witness uses a writing to refresh his or her memory, either before or while testifying, an adverse party is entitled:
>
> (a) To have it produced at the hearing;
>
> (b) To inspect it;
>
> (c) To cross-examine the witness thereon; and
>
> (d) To introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility.

when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and "construing the statute in a manner that conforms to reason and public policy." *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

KB Home laid a proper foundation to invoke NRS 50.125

As a preliminary matter, LVDA argues that even if NRS 50.125 requires production of documents otherwise protected by the attorney-client privilege and the work-product doctrine, KB Home did not lay the proper foundation to invoke the benefits of NRS 50.125 because KB Home did not establish the extent to which the documents refreshed Holman's recollection. LVDA primarily relies on *Sipsas v. State*, 102 Nev. 119, 123, 716 P.2d 231, 233 (1986), in which this court determined that the district court abused its discretion in admitting a photograph pursuant to NRS 50.125(1)(d) when that photograph was not used to refresh the memory of the witness in question. This court concluded that although the witness "had previously viewed the photograph, it was not used, nor was it needed, to refresh [the witness's] recollection of the event." *Id.* at 123, 716 P.2d at 234. Thus, "[t]he photograph . . . was improperly admitted on the grounds of NRS 50.125(1)(d)." *Id.*

[Headnote 5]

LVDA's reliance on *Sipsas* is misplaced because that case involved a situation where the witness never indicated that he was unable to recall events, and therefore the photograph was clearly not used to refresh the witness's recollection at trial. *See id.* Here, KB Home established a foundation under NRS 50.125 because KB Home verified with Holman that he reviewed the two memoranda, the purpose for reviewing the memoranda, and the effect his review had in refreshing his recollection.

NRS 50.125(1) clearly states that "[i]f a witness *uses a writing to refresh his or her memory*, either before or while testifying, an adverse party is entitled to have it produced at the hearing . . . ." (Emphasis added.) As the discovery commissioner noted, "it [was] clear that [Holman] reviewed the documents, including the alleged privileged documents to 'refresh his memory.' Therefore, this case is not one where the purported privileged communications did not refresh." Thus, we conclude that the district court did not abuse its discretion in finding that KB Home laid a proper foundation to invoke NRS 50.125.

NRS 50.125 serves as a waiver of the attorney-client privilege and the work-product doctrine when a witness reviews such writings to refresh his or her recollection prior to testifying

[Headnote 6]

LVDA argues that NRS 50.125 does not serve as a waiver of the attorney-client privilege or the work-product doctrine because those protections apply "at all stages of the proceedings." NRS 47.020(2) (providing that "the provisions of [C]hapter 49 of NRS with respect to privileges apply at all stages of all proceedings").

[Headnote 7]

We recently addressed the intersection of NRS 50.125 and Nevada privilege law in *Las Vegas Sands Corp. v. Eighth Judicial District Court*, 130 Nev. 118, 319 P.3d 618 (2014). In *Las Vegas Sands*, we noted that the language of NRS 50.125 is ambiguous, given its bare use of the term "a writing." *Id.* at 124, 319 P.3d at 622. In analyzing the statute, we compared NRS 50.125 to its federal counterpart, Federal Rule of Evidence (FRE) 612, and noted that "[w]hereas FRE 612 permits the district court's exercise of discretion to preclude disclosure of privileged documents used to refresh a witness's recollection before testifying, no such discretionary language exists in NRS 50.125." *Id.* at 125, 319 P.3d at 623. Thus, without such discretionary language, "Nevada district courts lack discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying." *Id.*

[Headnote 8]

Here, LVDA prepared Holman for his deposition by supplying him with two memoranda that LVDA asserts are attorney work-product and subject to the attorney-client privilege. Holman admittedly used those memoranda to refresh his memory before his deposition, which potentially shaped and influenced his deposition testimony.[4]

However, NRS 50.125 uses the term "hearing," without any indication as to whether the statute should apply to depositions. In order to properly resolve this writ petition, we must address whether NRS 50.125 applies to depositions as well as in-court hearings.

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[4]Additionally, we conclude that LVDA's argument that the district court was required to redact any mental impressions, opinions, or legal theories is without merit. The discovery commissioner conducted an in camera review of the redacted and unredacted memoranda and found that "Holman reviewed the entirety of the documents and relied upon them in their entirety in preparing for his deposition." In light of these findings and NRS 50.125's absolute language, we cannot say that the district court abused its discretion in affirming and adopting the discovery commissioner's recommendation that the memoranda be produced in their unredacted form.

NRS 50.125's "hearing" language applies to depositions as well as to in-court hearings

This court has not previously addressed whether depositions are included within the term "hearing" under NRS 50.125. *Black's Law Dictionary* defines hearing as "[a] judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying." *Black's Law Dictionary* 788 (9th ed. 2009). A deposition is defined as "[a] witness's out-of-court testimony that is reduced to writing (usu[ally] by a court reporter) for later use in court or for discovery purposes." *Id.* at 505. Although the two terms may be defined to encompass different specific events, there is also a significant amount of overlap in terms of the functions they serve. *See Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 241, 181 P.3d 675, 681 (2008) ("[T]hough [definitions of hearing] var[y] . . . , they all share[ ] a common element: a hearing is an official gathering at which evidence is taken."). Because these two terms can reasonably be interpreted in both manners, we look to the legislative history for guidance.

A search of the legislative history behind NRS 50.125 reveals that there was no discussion as to whether the Nevada Legislature intended depositions to be included within the term. *See* Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., Feb. 10, 1971); Hearing on S.B. 12 Before the Joint Senate & Assembly Judiciary Comms., 56th Leg. (Nev., Feb. 11, 1971) (addressing concerns regarding various proposed rules of evidence, but not addressing the provisions of NRS 50.125). However, NRS 50.125 was submitted to the Nevada Legislature based on a draft version of Federal Rule of Evidence (FRE) 612. Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., Feb. 10, 1971) ("There is a federal evidence code that is proposed; it is amended in some respects and this draft follows as closely as possible that code . . . our work here is as close as can be to [the] federal code."). And although NRS 50.125 differs from FRE 612 insofar as NRS 50.125 lacks a discretionary element, *see Las Vegas Sands*, 130 Nev. at 127, 319 P.3d at 623, both provisions refer to use of the writing at a "hearing."[5] Thus, the federal decisions interpreting FRE 612 are instructive with regard to our consideration of this issue. *Cf. Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) ("We have previously recognized that federal decisions involving the Federal

[5]FRE 612 provides in relevant part:

> [W]hen a witness uses a writing to refresh memory . . . an adverse party is entitled to have the writing produced *at the hearing*, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

(Emphasis added.)

Rules of Civil Procedure provide persuasive authority when this court examines its rules.").

Federal courts interpreting FRE 612 have concluded that the rule applies to depositions and deposition testimony by operation of FRCP 30(c), which provides that "examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence." *See, e.g.*, *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (explaining that FRE 612 "is applicable to depositions and deposition testimony by operation of Federal Rule of Civil Procedure 30(c)"); *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 76 (D. Mass. 2007); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982); *see also Doxtator v. Swarthout*, 328 N.Y.S.2d 150, 152 (App. Div. 1972) ("We think it a sound rule that writings used prior to testifying for the purpose of refreshing the memory of a witness be made available to the adversary whether at the trial or at pre-trial examination." (internal citations omitted)).

The portion of FRCP 30(c) that federal courts have relied upon to apply FRE 612 to deposition testimony states that "examination and cross-examination of a deponent proceed as they would *at trial* under the Federal Rules of Evidence." FRCP 30(c) (emphasis added). Similarly, NRCP 30(c) states that "[e]xamination and cross-examination of witnesses may proceed as permitted *at the trial* under the provisions of Rule 43(b)."[6] (Emphasis added.) Based on our review of both NRCP 30(c) and FRCP 30(c), we conclude that the two provisions are substantially similar because both provide that deposition examinations proceed as permitted at trial.

[Headnote 9]

Given that depositions proceed as permitted at trial, we see no reason why writings used to refresh the memory of a witness before or during a deposition should be treated differently than those used by a witness before or at "the trial." We find the federal caselaw on this issue to be persuasive and conclude that NRS 50.125 applies to depositions and deposition testimony as well as to in-court hearings by operation of NRCP 30(c). *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (stating that "federal court decisions discussing [an analogous federal rule of evidence] may provide persuasive authority" to help this court interpret its own rules).[7]

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[6]NRCP 43(b) provides that a "solemn affirmation" may be accepted in lieu of an oath.

[7]Unlike in *Las Vegas Sands*, this "hearing" has not been completed and the finder of fact has not yet ruled on the underlying issue. *See Las Vegas Sands*, 130 Nev. at 127, 319 P.3d at 624. Thus, because Holman's deposition can be resumed, he can still be cross-examined on the writing, and the writing can be produced, inspected, and used for cross-examination for the purpose of assessing Holman's credibility.

Therefore, we conclude that when a witness uses a privileged document to refresh his or her recollection prior to giving testimony at a deposition, an adverse party is entitled to have the writing produced at the deposition pursuant to NRS 50.125. KB Home is entitled to know the contents of those memoranda in order to properly cross-examine Holman as to their accuracy, truthfulness, and their influence on his testimony. As a result, we conclude that the district court did not err in granting KB Home's motion to compel production of the attorney-prepared memoranda.[8]

CONCLUSION

We conclude that reviewing a document for the purpose of refreshing one's memory prior to or during testimony serves as a waiver to the attorney-client privilege and the work-product doctrine under NRS 50.125, allowing the adverse party to demand production of the document, inspect it, cross-examine the witness on the contents, and admit the document into evidence for the purpose of impeachment. We also conclude that NRS 50.125 applies to deposition testimony as well as to in-court hearings. As a result, we conclude that the district court properly compelled the production of the documents that Holman used to refresh his recollection prior to his deposition, and we therefore deny this petition for a writ of prohibition or mandamus.

HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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[8]We have considered the parties' remaining arguments and conclude they are without merit.

SIMON LAVI, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE, RESPONDENTS, AND BRANCH BANKING AND TRUST COMPANY, SUCCESSOR-IN-INTEREST TO COLONIAL BANK BY ACQUISITION OF ASSETS FROM THE FDIC AS RECEIVER FOR COLONIAL BANK, A NORTH CAROLINA BANKING CORPORATION ORGANIZED AND IN GOOD STANDING UNDER THE LAWS OF NORTH CAROLINA, REAL PARTY IN INTEREST.

No. 58968

May 29, 2014 325 P.3d 1265

Petition for rehearing of this court's May 24, 2013, order granting a petition for a writ of mandamus and directing the district court to award summary judgment to petitioner in a breach of guaranty action.

Lender brought action against guarantor and others to recover the balance due under commercial property loan after borrowers defaulted. While the complaint was pending, lender foreclosed on the property and took ownership through a credit bid at a trustee's sale. The district court granted partial summary judgment in favor of lender. Guarantor filed a petition for a writ of mandamus or, alternatively, a writ of prohibition. The supreme court granted petition for writ of mandamus and ordered the district court to enter summary judgment in favor of guarantor. Lender petitioned for rehearing. The supreme court, DOUGLAS, J., held that guarantor's waiver of one-action rule did not waive statutory procedural requirements for deficiency judgments.

Rehearing denied.

PICKERING, J., with whom HARDESTY, J., agreed, dissented.

Marquis Aurbach Coffing and *Frank M. Flansburg, III*, and *Jason M. Gerber*, Las Vegas; *Baker & Hostetler LLP* and *Michael Matthias*, Los Angeles, California, for Petitioner.

Sylvester & Polednak, Ltd., and *Allyson R. Noto* and *Jeffrey R. Sylvester*, Las Vegas, for Real Parties in Interest.

1. GUARANTY; MORTGAGES.

Guarantor's waiver of statutory requirement that a lender seek payment through foreclosure prior to seeking deficiency judgment against a guarantor, known as the one-action rule, permitted lender to file action against guarantor prior to foreclosure but did not waive the statutory procedural requirements for obtaining a deficiency judgment, and therefore, lender's failure to seek deficiency judgment within six months of trustee's

sale statutorily precluded lender from seeking deficiency judgment from guarantor after foreclosing following borrowers' default on commercial real estate loan and selling property at trustee's sale. NRS 40.455.

2. GUARANTY.
   If an obligee seeks a deficiency judgment from a guarantor in an action separate from a foreclosure action, the two actions are undeniably and inextricably connected because the foreclosure sale necessarily impacts the deficiency judgment award, as an obligee is only entitled to a deficiency judgment to the extent that the debt exceeds the property's fair market value. NRS 40.455.
3. MORTGAGES.
   A right to deficiency judgment does not vest until the secured property is sold.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

Real party in interest Branch Banking and Trust Company (BB&T) has petitioned for rehearing of our earlier decision to grant a writ of mandamus in this case, based on the district court's failure to dismiss a breach of guaranty action after the property securing the underlying commercial real estate loan was sold at a trustee's sale. In that order, we concluded that BB&T was barred from recovering under the guaranty because it failed to apply for a deficiency judgment under NRS 40.455 within six months after the property's sale. On rehearing, BB&T asserts that we misapprehended the legal effect of the guarantor's waiver of certain statutory protections under NRS 40.430, otherwise known as the one-action rule. BB&T argues that the waiver effectively nullified NRS 40.455's requirements. We deny rehearing because we considered and resolved BB&T's arguments in our order granting mandamus relief, and because we are not convinced that we misread or misapplied the pertinent law.

FACTS

In addition to others not party to this proceeding, petitioner Simon Lavi personally guaranteed a commercial real estate loan that BB&T eventually purchased. After the borrowers defaulted on the loan, BB&T filed a complaint seeking full recovery of the loan's balance from Lavi and the other guarantors. While the case against the guarantors was pending, BB&T foreclosed and took ownership of the property through a credit bid at a trustee's sale. At that time, the property was worth less than what the borrowers owed BB&T under the loan.

Nearly one year later, BB&T moved for summary judgment regarding Lavi's liability for breach of the loan guaranty. In re-

sponse, Lavi filed a countermotion for summary judgment, asserting that NRS 40.455 precluded BB&T from obtaining a judgment for the deficiency on the loan balance arising after the trustee's sale. In pertinent part, NRS 40.455 requires a party who is seeking a deficiency judgment to file an application for the judgment within six months after the trustee's sale. The district court determined that NRS 40.455 did not bar BB&T's action because BB&T sufficiently notified Lavi that it intended to seek a deficiency judgment. Accordingly, the district court granted BB&T's motion for summary judgment as to Lavi's liability and denied Lavi's countermotion.

Lavi then filed a petition for a writ of mandamus or a writ of prohibition in this court, challenging the district court's order. Lavi asserted that BB&T was barred from recovering a deficiency judgment because BB&T did not apply for it within six months after the trustee's sale. We agreed and issued a writ of mandamus compelling the district court to dismiss the guaranty action against Lavi. BB&T has now petitioned this court for rehearing of our decision.

DISCUSSION

[Headnote 1]

Under NRAP 40(c)(2), this court may consider petitions for rehearing when "a material fact in the record or a material question of law in the case" has been overlooked or misapprehended, or when we have misapplied a controlling decision. A petition for rehearing will not be considered when it raises a point for the first time, or when it merely reargues matters previously presented to the court. NRAP 40(c)(1).

Our order granting the writ of mandamus was based on the conclusion that per NRS 40.455 and *Walters v. Eighth Judicial District Court*, 127 Nev. 723, 263 P.3d 231 (2011), a party seeking a deficiency judgment must file the application particularizing the reasons for the requested judgment within six months after selling the property at a trustee's sale, regardless of any purported waiver of the one-action rule. We explained that under NRS 40.495(3), Lavi was allowed to assert BB&T's failure to comply with NRS 40.455 as a defense to the breach of guaranty action. In *Walters*, a lender filed a summary judgment motion on a breach of guaranty claim, seeking to recover the unpaid balance on a loan, after the lender sold the real property that secured the loan at a trustee's sale. *Id.* at 725-26, 263 P.3d at 232-33. There, we considered whether the lender's failure to apply for a deficiency judgment within six months after the trustee's sale entitled a guarantor, who waived the one-action rule, to partial summary judgment. *Id.* at 726, 263 P.3d at 233. Ultimately, we concluded—without addressing the waiver issue—that the summary judgment motion in *Walters* sufficed as an application for a default

judgment because it was written, set forth the particular grounds for the relief sought, and was filed within NRS 40.455(1)'s six-month time frame after the trustee's sale. *Id.* at 727-28, 263 P.3d at 234.

In seeking rehearing of our decision, BB&T argues that we mistook the applicability of both NRS 40.495(3) and *Walters* to this case. According to BB&T, when Lavi waived the one-action rule, he also released BB&T from the obligation of satisfying NRS 40.455. BB&T also argues that *Walters* does not control here because, in that case, we expressly refused to consider whether any waiver of the one-action rule impacted NRS 40.455's applicability. BB&T's arguments are meritless because we neither misunderstood nor ignored these authorities. Nevertheless, we issue this opinion addressing BB&T's rehearing petition because our explanation may prove useful beyond the facts of this case. NRAP 36(c)(3).

Generally, "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive." NRS 40.430(1). We have interpreted this statute to require an obligee, who seeks to recover a debt secured by real property, to recover on the property through foreclosure before attempting to recover from the loan's guarantor personally. *See McDonald v. D.P. Alexander & Las Vegas Boulevard, L.L.C.*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005). If a guarantor waives the NRS 40.430 protections, the obligee may maintain an action to recover from the guarantor prior to completing the foreclosure process. *See* NRS 40.495(2). BB&T's interpretation that waiving the one-action rule also frees an obligee from complying with the provisions of NRS 40.455 is unreasonable. NRS 40.495(2) focuses on maintaining a separate action; nothing in the subsection implies that it also terminates the procedural requirements for that action.

[Headnote 2]

Additionally, NRS 40.495(3) allows a guarantor to assert any defenses provided under NRS 40.451 to 40.4639 if an "obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby." In our order granting Lavi's petition, the dissent suggested that allowing a guarantor to assert a defense against a breach of guaranty claim based on the obligee's foreclosure action effectively reads "separately and independently" out of NRS 40.495(2). The dissent's concerns are reasonable, but unjustified. If an obligee seeks a deficiency judgment from a guarantor in an action separate from a foreclosure action, the two actions are undeniably and inextricably connected because the foreclosure sale necessarily impacts the deficiency judgment award. *See Carrillo v. Valley Bank of Nev.*, 103 Nev. 157, 159, 734 P.2d 724, 725 (1987) (a party who buys a property at foreclosure may

seek a deficiency judgment only to the extent that the debts exceed the property's fair market value). If we disregard this fact, a party could possibly receive an excess recovery. *See id.* Also, the Legislature has shown a strong inclination towards protecting an obligor's rights under the antideficiency statutes. *See Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 103-04, 40 P.3d 405, 412-13 (2002). Allowing a guarantor to assert a defense to a deficiency action is consistent with both legislative intent and NRS 40.495(2) because it preserves the obligor's rights under the antideficiency statutes and it does not prevent an obligee from maintaining that action separately from a foreclosure action. Further, this interpretation can be fairly harmonized with NRS 40.495's 2011 amendment adding subsection 4. The subsection does not deny applicability of the deficiency judgment defenses or the six-month deadline; rather, it governs the amount due from the guarantor and implements a fair market value determination regardless of whether the property has been foreclosed. *See* 2011 Nev. Stat., ch. 311, § 5.5, at 1743-44.

When Lavi waived the one-rule action, BB&T was allowed to bring an action against him prior to completing the foreclosure on the secured property, but that waiver did not terminate the procedural requirements for asserting that separate action. Although BB&T commenced an action on the guaranty first under NRS 40.495(2), once it foreclosed on the property and sought a deficiency judgment, it was required to satisfy NRS 40.455. Thus, *Walters*' holding that timely application for a deficiency judgment must be made under NRS 40.455 applies here as well. While the guaranty action is being maintained separately from any other action to recover the debt, the defenses against a deficiency judgment nonetheless apply after the property is sold at foreclosure. So, under NRS 40.495(3), Lavi was entitled to raise any defenses to BB&T's attempt to recover a deficiency judgment.

[Headnote 3]

BB&T also asserts that even if *Walters* applies, its complaint met the same standards for being considered a deficiency judgment application as did the pre-foreclosure counterclaim in *Walters*, which the district court in that case concluded sufficed as a deficiency judgment application under NRS 40.455. But, in *Walters*, this court affirmed on the ground that the summary judgment motion met the deadline because it was filed within six months after the foreclosure sale, thus we did not consider the counterclaim argument. *See id.* Here, we have determined that BB&T's complaint could not have met NRS 40.455's requirements because BB&T filed it before the trustee's sale. A right to deficiency judgment does not vest until the secured property is sold. *Sandpointe Apartments v. Eighth Judicial Dist. Court*, 129 Nev. 813, 824, 313 P.3d 849, 856 (2013). There-

fore, a complaint filed before the foreclosure sale cannot sufficiently put an obligor on notice that the deed of trust beneficiary intends to seek further recovery from the obligor. Accordingly, *Walters* does not provide support for BB&T's rehearing petition.

As explained above, in rendering our decision in this matter we did not overlook, misapprehend, or misapply the law. As a result, rehearing is not warranted. NRAP 40(c). Therefore, we deny BB&T's petition.

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

PICKERING, J., with whom HARDESTY, J., agrees, dissenting:

The majority exonerates Lavi from his unconditional guaranty of a $6,695,000 commercial loan. It does so on the basis that the lender, BB&T, forfeited Lavi's payment guaranty by foreclosing on the real property securing the loan without "appl[ying]" for a "deficiency judgment" against Lavi "within 6 months after the date of the foreclosure sale," as NRS 40.455 would require if this were a one-action rule case. But BB&T had already applied for judgment against Lavi by suing him on the guaranty before it foreclosed, and in the guaranty, Lavi waived the one-action rule, NRS 40.430, as NRS 40.495(2) permits. This took BB&T's suit against Lavi outside the "one action . . . in accordance with the provisions of NRS 40.430 to 40.459, inclusive," that NRS 40.430 describes, and entitled BB&T to proceed to judgment against Lavi "separately and independently from . . . [t]he exercise of any power of sale [and a]ny action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby." NRS 40.495(2)(b) & (c).

A lender extends commercial credit with the expectation that the interest to be earned exceeds the risk of default and consequent loss. Where, as here, the borrower is a special-purpose entity formed to buy and develop a specific piece of commercial real estate, the lender often relies on personal guaranties to assure repayment if the real estate does not deliver the value the investors anticipate. Ordinarily, the guarantor is closer to the borrower than the lender and stands to profit beyond the interest a lender may reasonably charge, else there would be no economic incentive for the guaranty. The 6-month period in NRS 40.455 is a statute of limitations, designed to cut off stale post-foreclosure deficiency claims. To exonerate the guarantor, whom the lender sued before the foreclosure sale, because the lender sued before instead of within 6 months after the foreclosure sale, punishes the diligent lender without statutory basis or policy reason. And because such a rule is not apparent from a natural reading of the applicable statutes, and virtually unprecedented nationally, it impedes Nevada's economic growth and devel-

opment. Without predictable laws permitting efficient enforcement of commercial guaranties, commercial loans in Nevada will become increasingly expensive and difficult to obtain.

I.

A.

Some background is helpful to an understanding of the issues in this case. Nevada's one-action rule, set forth in NRS 40.430, says that "there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive." NRS 40.430(1). This statute dates back to statehood days, *Hyman v. Kelly*, 1 Nev. 179, 185 (1865), and, in general, requires a lender to proceed against a borrower's pledged security before seeking a deficiency judgment against the borrower, thereby preventing the lender from inflating its recovery with an unfairly low credit bid. *Id.*; *see McDonald v. D.P. Alexander & Las Vegas Blvd., L.L.C.*, 121 Nev. 812, 820, 123 P.3d 748, 753 (2005).

The "provisions of NRS 40.430 to 40.459, inclusive" that define the "one action" NRS 40.430(1) affords include: NRS 40.455, which provides that, "upon application of . . . the beneficiary of the deed of trust within 6 months after the date of . . . the trustee's sale, . . . and after the required hearing, the court shall award a deficiency judgment to the . . . beneficiary of the deed of trust if it appears . . . that there is a . . . balance remaining due"; NRS 40.457(1), which provides that, "Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and . . . take evidence . . . concerning the fair market value of the property sold as of the date of . . . sale"; and NRS 40.459(1), which limits the recoverable deficiency to the lesser of "the amount by which the [secured indebtedness] exceeds the fair market value of the property sold at the time of the sale" or "the difference between the amount for which the property was actually sold" and the secured indebtedness.

Before 1986, Nevada's one-action rule and its associated protections applied only to borrowers, not guarantors. *Mfrs. & Traders Trust Co. v. Eighth Judicial Dist. Court*, 94 Nev. 551, 554, 583 P.2d 444, 446 (1978) ("a creditor is not required to pursue the maker of the note, or the real property security, before suing the guarantor of a note secured by a mortgage or deed of trust for the full amount of the indebtedness remaining on the note"); *see Coombs v. Heers*, 366 F. Supp. 851, 855 (D. Nev. 1973) ("The rule that a creditor may first pursue an absolute guarantor has not been abrogated by any Nevada case and the only Nevada decision approaching the subject approves the rule." (citing *Quillen v. Quigley*, 14 Nev. 215,

218-20 (1879))); 2 Michael T. Madison, Jeffry R. Dwyer & Steven W. Bender, *The Law of Real Estate Financing* § 15:12 (2013) (few states have one-action rules; the majority of courts in those that do "have concluded that the applicable one-action statute [does] not protect guarantors"). This makes economic sense, because if the lender forecloses on a borrower's security, the guarantor can choose to pay the guaranteed debt and be subrogated to the lender's position, to bid for the property, or to claim an offset against the sums otherwise due on the guaranty. And it comports with the common law view that a guarantor's liability is "premised on a separate and distinct contract of guaranty rather than on any obligations imposed by the notes and mortgages subject to a foreclosure action." *Alerus Fin., N.A. v. Marcil Grp. Inc.*, 806 N.W.2d 160, 167 (N.D. 2011). Consistent with prevailing law, before 1986, suits on guaranties in Nevada were governed by general contract principles, not the foreclosure statutes. *Thomas v. Valley Bank of Nev.*, 97 Nev. 320, 322, 629 P.2d 1205, 1207 (1981) ("It has always been the law of this state that a contract of guaranty is not a secured obligation, even if the primary obligation is secured.").

But in 1986, this court decided *First Interstate Bank of Nevada v. Shields*, 102 Nev. 616, 730 P.2d 429 (1986). *Shields* revolutionized Nevada guaranty law by overruling *Manufacturers & Traders*, *supra*, and *Thomas*, *supra*, and extending the one-action rule and its associated protections to guarantors. *Shields*, 102 Nev. at 618, 730 P.2d at 430-31. The *Shields* decision has been widely criticized. *See In re SLC Ltd. V*, 152 B.R. 755, 773 (Bankr. D. Utah 1993) (rejecting *Shields* because "the better reasoned state court decisions" do not follow it (citing cases)); *Mut. of Omaha Bank v. Murante*, 829 N.W.2d 676, 684 (Neb. 2013) (dismissing *Shields* as not "persuasive"). And, it provoked an immediate outcry from Nevada's banking and business community, which pressed the 1987 and 1989 Nevada Legislatures to invalidate it. *See* Hearing on S.B. 359 Before the Senate Comm. on the Judiciary, 64th Leg. (Nev., April 16, 1987) (Nevada Bankers' Ass'n Summary Position Paper stating that "the *Shields* decision . . . has unfairly shifted the risk of loss to the lender, and has unilaterally destroyed reasonable lender reliance on a guarantor's contract of performance"); Hearing on A.B. 557 Before the Assembly Comm. on the Judiciary, 65th Leg. (April 19, 1989) (Nevada Bankers Ass'n Position Paper advocating legislation to "restore the status of the law as it existed prior to *Shields*" as to commercial loans over $250,000).

In response, the Legislature limited, but did not entirely invalidate, *Shields*. Insofar as relevant here, the 1989 Legislature passed NRS 40.495(2), 1989 Nev. Stats., ch. 470, § 2, at 1001, which provides that a "guarantor . . . may waive the provisions of NRS 40.430" and that, if the guarantor signs such a waiver,

> *. . . an action for the enforcement of that person's* [*i.e., the guarantor's*] *obligation* to pay, satisfy or purchase all or part of an indebtedness or obligation secured by a mortgage or lien upon real property *may be maintained* [*by the lender*] *separately and independently from*:
>
> (a) An action on the debt;
>
> (b) The exercise of any power of sale;
>
> (c) *Any action to foreclose or otherwise enforce a mortgage* or lien *and the indebtedness or obligations secured thereby*; and
>
> (d) *Any other proceeding against a mortgagor or grantor of a deed of trust*.

(Emphasis added.) NRS 40.495(2) waivers may be had only in the context of guaranteed commercial loans exceeding $500,000; guarantors of residential, agricultural, or commercial loans under $500,000 retain the full protection of *Shields*. NRS 40.495(5).

B.

This case involves a typical commercial land acquisition and development loan. BB&T (Bank) loaned $6,695,000 to a special purpose entity (Borrower) created to acquire and develop a piece of commercial real estate on the Las Vegas Strip. The loan was secured by a deed of trust on the property. The Bank required a personal payment guaranty, which Lavi supplied. In the guaranty, Lavi waived "Any right [he] may have to require Bank to proceed against Borrower, proceed against or exhaust any security held by Borrower or Bank, or pursue any other remedy in Bank's power to pursue; [and] [t]o the extent permitted in paragraph 40.495(2) of the Nevada Revised Statutes, the benefits of the one-action rule under NRS Section 40.430."

Borrower defaulted, Lavi dishonored his guaranty, and on October 19, 2009, BB&T sued Lavi for breach of guaranty, seeking damages "in excess of $10,000" per NRCP 8(a). At roughly the same time, BB&T recorded a notice of default and election to sell the property, notifying Lavi as required by NRS 107.095. Lavi understood that BB&T sought judgment against him for the post-foreclosure deficiency on the guaranteed note. Thus, when Lavi answered BB&T's complaint on November 23, 2009, almost three months before the foreclosure sale, Lavi asserted, as a "separate, and affirmative defense, . . . that Plaintiff's [BB&T's] recovery, if any, must be offset by the amounts recovered by Plaintiff in *the* foreclosure proceeding."

The trustee's sale took place on February 11, 2010. Lavi did not bid at the foreclosure sale and BB&T acquired the property with a $3,275,000 credit bid against the $6,783,372 due on the note, leaving $3,508,372 unpaid.

Meanwhile, BB&T's lawsuit against Lavi continued apace. Both sides hired experts who gave conflicting estimates of the fair market value of the foreclosed property (FMV) as of the date of its sale of $2,330,000 (BB&T) and $4,420,000 (Lavi). They also exchanged written discovery. If NRS 40.455 applied, its 6-month deadline for making "application" for a "deficiency judgment" would have expired on August 10, 2010. Lavi's answer asserting offset as an affirmative defense and his written discovery responses did not question BB&T's right to proceed to judgment against him under NRS 40.495(2), with Lavi receiving credit for the value of the foreclosed property as an offset. But on June 1, 2011, in response to BB&T's motion for partial summary judgment on liability, Lavi filed a countermotion for summary judgment in which he argued, for the first time, that BB&T forfeited its rights under the guaranty when it did not apply for a deficiency judgment against him "within 6 months after the date of the foreclosure sale," or by August 10, 2010, as required by NRS 40.455.

The district court granted partial summary judgment to BB&T. Lavi petitioned for extraordinary writ relief, which a divided en banc court granted by unpublished, or nonprecedential, order. *Lavi v. Eighth Judicial Dist. Court*, Docket No. 58968 (Order Granting Petition for Writ of Mandamus, May 24, 2013) (5-2). There followed a motion to publish the order as an opinion, which was denied, and the petition for rehearing now before us.

II.

The majority's analysis suffers three principal flaws. First, it does not deal with the fact that, if an "application [for] . . . a deficiency judgment" was required under NRS 40.455, BB&T's complaint qualified as such and was timely under the statute's 6-month limitations period. Second, given Lavi's waiver, NRS 40.495(2) authorized BB&T to pursue him on the guaranty "separately and independently" from "any action" against the Borrower or the Borrower's security, making NRS 40.455 irrelevant. Third, new NRS 40.495(4), which applies specifically to suits against guarantors who have given NRS 40.495(2) waivers, confirms that, in this context, NRS 40.455 and NRS 40.459 do not apply because they are inconsistent with NRS 40.495(4) and do not require an "application" beyond the pre-foreclosure complaint against the guarantor.

A.

The 6-month deadline in NRS 40.455 is a statute of limitations or repose. Like most such statutes, its purpose is "to protect a defendant against the evidentiary problems associated with defending a stale claim" and "to promote repose by giving security and stability to human affairs." *Nev. State Bank v. Jamison Family P'ship*, 106

Nev. 792, 798, 801 P.2d 1377, 1381 (1990). Here, Lavi conceded at oral argument that BB&T's complaint against him for breach of guaranty qualified as an "application" for a "deficiency judgment" under NRS 40.455 in every respect except one: BB&T filed it three-and-a-half months *before* instead of "*within 6 months after*" the foreclosure sale (emphasis added). *See, e.g.*, *Shields*, 102 Nev. at 618 n.2, 730 P.2d at 430 n.2 (to make *application* for a "deficiency judgment" the lender must file a *complaint* against the guarantor within the time set by NRS 40.455). This would lead most people, at least non-lawyers, to ask: So, what, exactly, is the problem here? BB&T filed its "application" 9 months before the 6-month post-foreclosure-sale limitations period expired. Thus, Lavi knew even before the foreclosure sale that BB&T expected him to satisfy the Borrower's debt, to the extent the pledged real estate did not. No "evidentiary problems associated with . . . stale claim[s]" arose, and Lavi was not left wondering if his guarantee would be called. *Id.* And, by his answer and expert exchanges, Lavi fully joined with BB&T on the FMV and offset issues in their pending suit. *Cf. Grouse Creek Ranches v. Budget Fin. Corp.*, 87 Nev. 419, 426, 458 P.2d 917, 923 (1971) (NRCP 54(c) authorized the district court to amend the pleadings to grant a primary lien where the objecting party joined issue on the matter and suffered no prejudice).[1]

In *Interim Capital, L.L.C. v. The Herr Law Group, Ltd.*, 2:09-CV-1606-KJD-LRL, 2011 WL 7053806 (D. Nev. Aug. 23, 2011), the United States District Court for the District of Nevada considered and rejected the position the majority adopts. The lender in *Herr* sued the defendant guarantors before foreclosure and the guarantors argued, as Lavi does, "that NRS 40.430, the 'one action rule' and NRS 40.455, the 'deficiency judgment statute,' protect them from a deficiency judgment, requiring application for judgment within six months after the date of the foreclosure sale." *Id.* The court disagreed. It concluded that the guarantors' argument conflated the time the lender's cause of action against the guarantors accrued (upon the borrower's default) with the outside 6-month limitations period established by NRS 40.455 (which the lender's pre-foreclosure suit satisfied):

> Plaintiff brought this action *before* the foreclosure sale, not after the foreclosure sale. The Court rejects the argument that this action could not be brought until *after* the foreclosure sale. Defendant guarantors waived the one action rule. The subject time provision acts only as a limitation of time within which an action may be brought. It does not purport to address when the cause of action accrued. Defendants' interpretation flies in the

[1]Lavi does not argue that BB&T prejudiced his subrogation rights or caused other cognizable prejudice.

> face of NRS 40.495 which allows actions against guarantors before a sale has occurred. Plaintiff's cause of action accrued upon default. The deficiency statute only functions to limit damages.

Id. (emphasis in original); *see Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 n.2 (2010) (this court may rely on unpublished federal district court opinions as persuasive, though nonbinding authority).

In other, more exacting contexts, this court has treated a premature filing as effective, so long as the proceeding has not been dismissed before the actual due date arrives. *See* NRAP 4(a)(6) (premature notice of appeal). No reason appears why a premature application for a deficiency judgment should not be treated the same way, especially since NRS 40.455's time deadline is procedural, not substantive or jurisdictional. *Nevis v. Fid. New York, F.A.*, 104 Nev. 576, 579, 763 P.2d 345, 347 (1988) (time limit in NRS 40.455 is procedural, not substantive, and so able to be judicially excused); *Vogt v. Dennett*, 105 Nev. 303, 304-05, 774 P.2d 1036, 1037 (1989) (to similar effect).

Nor does *Walters v. Eighth Judicial District Court*, 127 Nev. 723, 263 P.3d 231 (2011), counsel a different rule. *Walters* addressed the issue the parties in that case framed: whether the lender's "counterclaim, cross-claim, and written motion setting the grounds for the application and the relief sought satisfies the requirements of NRS Chapter 40 for seeking a deficiency judgment based upon a breach of guaranty." *Id.* at 724, 263 P.3d at 232. The court held that they did, noting that "NRS 40.455(1) does not state how an application should be made"[2] and that "Walters fails to argue persuasively that [the lender's] motion for summary judgment did not meet the application requirement." *Id.* at 728, 263 P.3d at 234. Given this holding, the court did not need to decide whether, in a waived one-action

[2]NRS 40.455's lack of specificity distinguishes it from the Utah statute considered in *Machock v. Fink*, 137 P.3d 779, 786-87 (Utah 2006). Even so, the Utah Supreme Court allowed the lender's pre-foreclosure complaint that did not meet Utah's technical requirements for a deficiency action to be amended after the statutory time to pursue a deficiency expired; doing so was consistent with the purposes of the statute "(1) to prevent the creditor from purchasing the property for below market value at the trustee's sale and then suing the debtor or guarantor for a large deficiency, . . . and (2) to provide a debtor or guarantor with prompt notice that the creditor intends to pursue a deficiency so as to allow the debtor or guarantor to plan its finances." *Id.* at 786. Since "these purposes were met and [the] failure to file a complaint strictly compliant with [Utah's] statutory requirements . . . was a procedural defect," the lender's right to a deficiency was preserved. *Id.* This accommodation is more consistent with Nevada's rules of pleading and practice than, in effect, requiring a superfluous filing entitled "deficiency application" to duplicate an already formally compliant complaint.

rule case, the lender's pre-foreclosure-sale pleadings (complaint, counterclaim, or cross-claim) qualified as such. Issues raised but not decided because the case is resolved on another basis do not constitute the holding of a case, much less establish binding precedent. *Cf. Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record [of earlier cases and not] ruled upon, are not to be considered as having been so decided as to constitute precedents.").

Unlike Walters, Lavi *concedes* that BB&T's complaint was, in form, a qualifying "application" under NRS 40.455. His argument is that it was filed early so it didn't count. But *Shields*, 102 Nev. at 618 n.2, 730 P.2d at 430 n.2, deems a complaint a qualifying "application" under NRS 40.455. *Accord Jamison*, 106 Nev. at 797-98, 801 P.2d at 1381 (an answer and counterclaim constitute a qualifying application). To read *Walters* as holding that BB&T's complaint—in form, a "qualifying application"—needed a post-foreclosure motion on penalty of forfeiture to satisfy NRS 40.455 is to impose a requirement nowhere stated in the statutes and that is inconsistent with *Shields* and *Jamison*. And, while a motion for summary judgment was available in *Walters* within the 6-month post-foreclosure-sale time frame, it was coincidental that the case was at the stage and in a condition to justify summary judgment practice. What about the case that is just beginning or in which, as here, factual disputes make summary judgment inappropriate? Surely it is not the rule that a pending suit, in which by their complaint and answer the parties have joined issue on the sums due under a guaranty after offset, needs to be dismissed and refiled in identical form, merely to satisfy an unstated requirement of NRS 40.455. *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (a statute should always be construed so as to avoid unreasonable or absurd results).

B.

Applying NRS 40.455 to impose a forfeiture on BB&T also cannot be squared with Lavi's waiver of "the benefits of the one-action rule under NRS Section 40.430 . . . [t]o the extent permitted in [NRS] 40.495(2)." The statute whose benefits Lavi waived, NRS 40.430, provides that, "*Except in cases where a person proceeds under subsection 2 of NRS 40.495* . . . , there may be but one action for the recovery of any debt, or for the enforcement of any right secured by a mortgage or other lien upon real estate. *That action must be in accordance with the provisions of NRS 40.430 to 40.459, inclusive* . . . ." NRS 40.430(1) (emphasis added). Since Lavi waived the protections of NRS 40.430, BB&T's action against him did not have to be pursued "in accordance with the provisions of NRS 40.430 to 40.459, inclusive." On the contrary, Lavi's waiver autho-

rized BB&T to proceed against him "separately and independently" from "[a]ny action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby [or] [a]ny other proceeding against a mortgagor or grantor of a deed of trust." NRS 40.495(2)(c) & (d).[3]

This does not deprive guarantors who waive the one-action rule of their fair value defenses, as the majority suggests. *See* NRS 40.459 (affording a deficiency defendant the right to have the deficiency calculated by using the greater of the FMV of the property as of the date of sale or the foreclosure sale price). Unlike the time deadlines in NRS 40.455, the fair market value approach is substantive, not procedural, in that it serves to avoid the unjust enrichment of the lender. *See* Restatement (Third) of Property: Mortgages § 8.4 cmt. a (1997). As an equitable defense designed to avoid unjust enrichment, a borrower or the borrower's guarantor is entitled to a fair market value offset post-foreclosure "whether a statute requires it or not." *Id.* To hold otherwise would be to sanction a double recovery, which our law does not allow. *See Elyousef v. O'Reilly & Ferrario, L.L.C.*, 126 Nev. 441, 443, 245 P.3d 547, 549 (2010). Because the fair market value approach is substantive, I would take it as applicable by virtue of NRS 40.459 to the one "action . . . in accordance with the provisions of NRS 40.430 to 40.459, inclusive" that NRS 40.430 prescribes, *and* as an available nonstatutory, equitable defense in the "separate[ ] and independent[ ] . . . action" that NRS 40.495(2) authorizes when a guarantor has waived the protections of the one-action rule. *See* Restatement (Third) of Property, *supra*, § 8.4 cmt. b. In the context of a one-action proceeding under NRS 40.430, NRS 40.459 mandates the fair value determination. As an equitable defense to a proceeding not subject to the one-action rule, it is not self-executing and thus waived if not raised as an affirmative defense. Restatement (Third) of Property, *supra*, § 8.4 cmt. a.

C.

Recognizing BB&T's right to proceed "separately and independently" from the one-action rule procedures, including NRS 40.455, harmonizes the version of NRS 40.495 at issue in this case with the Legislature's amendment of it to add new subsection 4 in 2011. NRS 40.495(4) now specifically addresses the situation where, as here, "before a foreclosure sale . . . the obligee commences an action against a guarantor . . . to enforce an obligation to pay . . . all or part of an indebtedness or obligation secured by a mortgage or lien

[3]Broad-form waiver of guarantors in the commercial loan context are routine—and routinely enforceable. *See* Cal. Civ. Code § 2856.

upon the real property." It expressly gives the guarantor who has waived the one-action rule a fair value defense. Unlike the fair value defense given one-action rule deficiency defendants in NRS 40.459, which directs the court to determine value *as of the date of the foreclosure sale*, the defense given guarantors in new NRS 40.495(4) calculates fair value according to the value of the property "*as of the date of the commencement of the action*." And, confirming that the "application" requirement in NRS 40.455 is not needed in an NRS 40.495(2) pre-foreclosure suit against a guarantor, new NRS 40.495(4) imposes no separate "application" requirement, treating the pre-foreclosure complaint as the application.

When the 2011 Legislature added new subsection 4 to NRS 40.495, it did not change a word in NRS 40.455 and NRS 40.459, as relevant to this case. Thus, today, NRS 40.495(4) conflicts with NRS 40.455 and NRS 40.459, as interpreted by the majority here to apply to NRS 40.495(2) pre-foreclosure suits by lenders against guarantors. NRS 40.459 measures FMV as of the date of the foreclosure sale, while NRS 40.495(4) measures FMV as of the date of the commencement of the action. And NRS 40.495(4) requires no "application" beyond the lender's complaint against the guarantor, while the majority reads NRS 40.455 as imposing an additional application-by-motion requirement. "[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." *Cromer v. Wilson*, 126 Nev. 106, 110, 225 P.3d 788, 790 (2010). Reading new NRS 40.495(4) in harmony with the rest of NRS 40.430-40.512, the more reasonable view is that NRS 40.455 and NRS 40.459 do not apply to suits under NRS 40.495(2).

Lavi and the majority argue that this reading of NRS 40.430 and NRS 40.495(2) repudiates NRS 40.495(3), which provides, "If the obligee maintains an action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby, the guarantor, surety or other obligor may assert any legal or equitable defenses provided pursuant to the provisions of NRS 40.451 to NRS 40.4639." But the language "action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby" in NRS 40.495(3) necessarily refers to the one action described in NRS 40.430. To read it more broadly would make NRS 40.495(2) inapplicable to all suits by a lender against a guarantor who has waived his NRS 40.430 protections except those prosecuted to final judgment before a foreclosure occurs. This is inconsistent with NRS 40.495(2)'s provision that such a suit may proceed "separately and independently" from "[a]ny action to foreclose or otherwise enforce a mortgage or lien and the indebtedness or obligations secured thereby," NRS 40.495(2)(c), and with new NRS 40.495(4). And, as noted above, Lavi's fair value defense exists with or without a statute, though today it is assured by NRS 40.495(4).

Finally, Lavi argues that NRS 40.453 mandates that NRS 40.455 and NRS 40.459 apply to NRS 40.495(2) suits. NRS 40.453(1) says that, "*Except as otherwise provided in NRS 40.495*: . . . [i]t is hereby declared by the Legislature to be against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or the grantor of a deed of trust or a guarantor or surety of the indebtedness secured thereby, waives any right secured to the person by the laws of this state." (Emphasis added.) Here, in permitting waivers by guarantors of NRS 40.430 and providing for suits against them to be maintained "separately and independently" from the proceedings, if any, against the borrower, NRS 40.495(2) "otherwise provide[s]." Thus, NRS 40.453 does not apply.

III.

"The law abhors a forfeiture." *Humphrey v. Sagouspe*, 50 Nev. 157, 171, 254 P. 1074, 1079 (1927). Yet, that is the result of today's holding, which resurrects the clearly waived one-action rule, midsuit, and springs it on a lender proceeding "separately and independently" against its guarantor as statutorily authorized by NRS 40.495(2). In my view, where a guarantor waives his NRS 40.430 rights as permitted under NRS 40.495(2), and the lender sues the guarantor before foreclosing on the borrower's deed of trust, the lender may prosecute its suit against the guarantor to conclusion, subject only to an equitable fair value defense pre-2011, and the more specific fair value defense given by NRS 40.495(4), post-2011. This is fair to both sides, avoids forfeiture and double recovery, and harmonizes NRS 40.495(2) with NRS 40.495(3) and the recently enacted NRS 40.495(4).

For these reasons, I respectfully dissent.

EUGENE P. LIBBY, D.O., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE, RESPONDENTS, AND MEGAN HAMILTON, REAL PARTY IN INTEREST.

No. 59688

May 29, 2014 325 P.3d 1276

Original petition for a writ of mandamus challenging a district court order denying a motion for summary judgment in a medical malpractice action.

The supreme court held that: (1) in a matter of first impression, three-year statute of limitations applicable to patient's medical mal-

practice claim against knee surgeon began to run on date patient suffered appreciable harm, regardless of whether she was aware of injury's cause; (2) three-year limitation period for an action for injury against a provider of health care constituted a "statute of limitations," rather than a "statute of repose"; and (3) three-year statute of limitations applicable to patient's medical malpractice action against surgeon was not tolled on basis he should have known that he had left sutures in patient's knee.

Petition granted.

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

Potter Law Offices and *Cal J. Potter, III*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   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.
2. MANDAMUS.
   Whether to consider a writ of mandamus is within the supreme court's discretion.
3. COURTS.
   As a general rule, the supreme court will not exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying summary judgment, but an exception applies when no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action.
4. APPEAL AND ERROR; MANDAMUS.
   Statutory interpretation is a question of law that the supreme court reviews de novo, even in the context of a writ petition.
5. STATUTES.
   If the statute is clear on its face, the supreme court will not look beyond its plain language.
6. STATUTES.
   When giving a statute's terms their plain meaning, the supreme court will consider the statute's provisions as a whole so as to read them in a way that will not render words or phrases superfluous or make a provision nugatory.
7. LIMITATION OF ACTIONS.
   Three-year statute of limitations applicable to patient's medical malpractice claim against orthopedic surgeon began to run on date patient suffered appreciable harm, which was when tests showed that a Methicillin-Resistant Staphylococcus Aureas (MRSA) infection had persisted despite surgical intervention, regardless of whether she was aware of injury's cause; because purpose of surgery was to fight infections, persistence of infection three months later was an appreciable and significant manifestation of patient's injury, even if she was not aware of cause of continued infection. NRS 41A.097(2).

8. Limitation of Actions.
   Three-year limitation period for an action for injury against a provider of health care constituted a "statute of limitations," rather than a "statute of repose," because it began to run from the date of patient's injury and not from the last date patient was treated by the health care provider. NRS 41A.097(2).
9. Limitation of Actions.
   A "statute of repose" bars causes of action after a certain period of time, regardless of whether damage or an injury has been discovered; whereas, a "statute of limitations" forecloses suit after a fixed period of time following the occurrence or discovery of an injury.
10. Limitation of Actions.
    Three-year statute of limitations applicable to patient's medical malpractice action against orthopedic surgeon was not tolled on basis he should have known that he had left sutures in patient's knee, absent any showing that he performed any intentional act that hindered patient from learning about sutures. NRS 41A.097(3).

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

OPINION

Per Curiam:

Nevada's medical malpractice statute of limitations, NRS 41A.097(2), provides that an action against a health care provider must be filed within one year of the injury's discovery and three years of the injury date. In the underlying district court action, Megan Hamilton brought a claim for injury against Dr. Eugene Libby more than three years after she discovered that a serious infection persisted in her knee, despite Dr. Libby's surgical intervention. Dr. Libby moved the district court for summary judgment on the basis that Ms. Hamilton's claims were barred by the three-year statute of limitation. The district court did not agree and denied the motion for summary judgment, resulting in Dr. Libby seeking this court's interlocutory review. According to Dr. Libby, NRS 41A.097(2) mandates that judgment be entered in his favor.

Based on the plain language of the statute, which establishes "date of injury" as the outer boundary for claim accrual, we conclude that NRS 41A.097(2)'s three-year limitation period begins to run when a plaintiff suffers appreciable harm, regardless of whether the plaintiff is aware of the injury's cause. Here, because Ms. Hamilton suffered appreciable harm to her knee more than three years before she filed her complaint, the district court was required to grant Dr. Libby's motion for summary judgment. Accordingly, mandamus relief is appropriate in this instance.

FACTS AND PROCEDURAL HISTORY

On November 8, 2005, petitioner Eugene P. Libby, D.O., an orthopedic surgeon, performed emergency surgery on real party in interest Megan Hamilton's left knee. During a follow-up appointment on November 28, 2005, Ms. Hamilton complained of pain in her knee that had started one week earlier. Dr. Libby aspirated the knee, and then hospitalized Ms. Hamilton and placed her on additional antibiotics. The aspirated cultures from Ms. Hamilton's knee were sent for testing and tested positive for a bacterium known as Methicillin-Resistant Staphylococcus Aureas (MRSA). At that point, an infectious disease doctor was called in for consultation. After her discharge from the hospital, Ms. Hamilton continued to be treated by the infectious disease doctor for her infection and was seen by Dr. Libby several times to monitor the healing of her knee. Ms. Hamilton's MRSA infection persisted.

On May 16, 2006, in an effort to combat the MRSA infection, Dr. Libby performed another surgery on Ms. Hamilton's knee to remove surgical screws and washers, which were apparently impeding the antibiotics from surrounding and killing the MRSA infection. But the infection continued, and on August 21, 2006, Dr. Libby lanced Ms. Hamilton's knee and removed a yellowish substance. That was the last date on which Dr. Libby treated Ms. Hamilton.

Thereafter, Ms. Hamilton had two additional surgeries on her knee each performed by a different doctor. The first surgery took place on December 15, 2006, and a "significant nonabsorbable suture nearly 4 cm in length" was removed from Ms. Hamilton's knee. The second surgery was performed on April 15, 2009, and a "large knotted permanent suture" and a retained suture were removed from Ms. Hamilton's knee. These latter sutures tested positive for the presence of MRSA.

On April 14, 2010, Ms. Hamilton filed a complaint against Dr. Libby. Her complaint generally alleged that Dr. Libby failed to remove the suture material retained in her knee during the May 16, 2006, surgery, that he knew or should have known that the suture material was present and could or would carry MRSA, and that he failed to warn Ms. Hamilton of the danger of leaving suture material in her knee, all in breach of the standard of care, and resulting in her injuries.

As more than three years had passed between the end of Dr. Libby's treatment of Ms. Hamilton and the filing of her complaint, Dr. Libby filed in the district court a motion for summary judgment on the basis that no genuine issues of material fact remained as to whether Ms. Hamilton's claims were time-barred by NRS 41A.097(2)'s three-year limitation. Ms. Hamilton opposed the motion and argued that her claims were not time-barred because she was not aware after her December 15, 2006, surgery that the sutures

removed from her knee were infected with MRSA, and that she did not discover that fact until after her final surgery in 2009. Ms. Hamilton further argued that the time for her to bring her claims was tolled by NRS 41A.097(3) because Dr. Libby concealed the existence of the MRSA-infected sutures in her knee. The district court denied Dr. Libby's motion for summary judgment, and this petition for extraordinary writ relief followed.

DISCUSSION

Standard of review

[Headnotes 1-3]

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. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to consider a writ of mandamus is within this court's discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). As a general rule, this court will not exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying summary judgment, but an exception applies when "no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

This writ petition presents an issue of first impression regarding when the three-year limitation period contained in NRS 41A.097(2) begins to run. Because the facts concerning the timeline of events are not disputed, and because NRS 41A.097(2) provides clear authority that a medical malpractice case "may not be commenced more than 3 years after the date of injury," but the Nevada district courts have inconsistently applied this statute, we elect to exercise our discretion to consider the merits of this writ petition and to clarify this question of law. *See Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) (entertaining a writ petition when district courts might contradictorily interpret and apply a statute).

[Headnotes 4-6]

"Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition." *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. If the statute is clear on its face, we will not look beyond its plain language. *Wheble*, 128 Nev. at 122, 272 P.3d at 136. When giving a statute's terms their plain meaning, this court will consider the statute's "provisions as a whole so as to read them in a way that [will] not render words or phrases superfluous or make a provision nugatory." *S. Nev. Homebuilders Ass'n v.*

Clark Cnty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation marks omitted).

NRS 41A.097(2)'s three-year limitation period begins to run once the plaintiff suffers appreciable harm

[Headnotes 7-9]

NRS 41A.097(2) provides that "an action for injury . . . against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first . . . ."[1] To resolve the novel issue presented by this writ petition—determining the catalytic event by which the three-year statute of limitation begins to run—we begin with the analytical foundation established in previous cases in which we have interpreted NRS 41A.097(2)'s one-year limitation period. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 250-51, 277 P.3d 458, 461-62 (2012); *Massey v. Litton*, 99 Nev. 723, 726-28, 669 P.2d 248, 250-52 (1983). Beginning in *Massey*, we explained that NRS 41A.097(2)'s one-year limitation period is a statutory discovery rule that begins to run when a plaintiff "knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." 99 Nev. at 726-28, 669 P.2d at 250-52. We have further explained that the term "injury," as used in the one-year limitation period, encompasses a plaintiff's discovery of damages as well as discovery of the negligent cause of the damages. *Id.* at 728, 669 P.2d at 252. Later in *Winn*, we recognized that by its terms, NRS 41A.097(2) requires a plaintiff to satisfy both the one-year discovery rule and the three-year limitations period. *Winn*, 128 Nev. at 251, 277 P.3d at 461. Thus, consistent with the statute's language, which requires the

[1]Dr. Libby acknowledges that NRS 41A.097(2)'s three-year limitation period runs from the plaintiff's "date of injury," but he also argues that the district court was obligated to dismiss Ms. Hamilton's complaint because it was brought more than three years after he last treated Ms. Hamilton. To the extent that Dr. Libby suggests that the three-year limitation period is a statute of repose, we reject that contention. A statute of repose "'bar[s] causes of action after a certain period of time, regardless of whether damage or an injury has been discovered,'" *Davenport v. Comstock Hills–Reno*, 118 Nev. 389, 391, 46 P.3d 62, 64 (2002) (alteration in original) (quoting *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988)), whereas, a statute of limitations "forecloses suit after a fixed period of time following the occurrence or discovery of an injury." *Id.* NRS 41A.097(2)'s three-year limitation period runs "3 years after the date of injury." Because the three-year limitations period begins to run from the date of the plaintiff's injury, and not from the last date the plaintiff was treated by the health care provider, NRS 41A.097(2)'s three-year limitation period is not a statute of repose, but is rather a statute of limitations. *Davenport*, 118 Nev. at 391, 46 P.3d at 64.

plaintiff to commence her action within one year of discovering her injury or within three years of the injury date, the analysis in *Massey* and *Winn* recognize that commencement of a malpractice action is bound by two time frames tied to two different events. In *Massey* and *Winn*, we construed the one-year limitation period as requiring a plaintiff to be aware of the cause of his or her injury, and while Ms. Hamilton asks us to apply the same construction to the three-year limitation period, such a reading would render NRS 41A.097(2)'s three-year limitation period irrelevant. *See S. Nev. Homebuilders Ass'n*, 121 Nev. at 449, 117 P.3d at 173. This we decline to do.

Instead, we turn to California for guidance, as its medical malpractice statute of limitations is identical to Nevada's statute,[2] and its courts have similarly concluded that a plaintiff does not need to be aware of the cause of his or her injury for the three-year limitation period to begin to accrue. *Marriage & Family Ctr. v. Superior Court*, 279 Cal. Rptr. 475, 478 (Ct. App. 1991). In so concluding, California courts have reasoned that the purpose of the three-year limitation period is "to put an outside cap on the commencements of actions for medical malpractice, to be measured from the date of the injury, regardless of whether or when the plaintiff discovered its negligent cause." *Id*. To that end, California courts examining the issue before us now have held that a plaintiff must have suffered appreciable harm as a result of the health care provider's actions for the three-year limitation period to begin to run. *See Larcher v. Wanless*, 557 P.2d 507, 512 n.11 (Cal. 1976) (concluding that the medical malpractice statute of limitation does not begin to run until the patient suffers some damage or injury); *McNall v. Summers*, 30 Cal. Rptr. 2d 914, 919 (Ct. App. 1994) (holding that the three-year limitations period begins to accrue once there is a manifestation of the injury in some significant way).

The California Court of Appeal reached the same conclusion in a case involving in relevant way facts similar to those presented by this writ petition. *Garabet v. Superior Court*, 60 Cal. Rptr. 3d 800 (Ct. App. 2007). In *Garabet*, the plaintiff patient underwent lasik eye surgery performed by the defendant doctors and within weeks after the surgery began to experience a number of adverse symptoms. *Id.* at 802. The plaintiff continued to receive treatment while experiencing ongoing vision problems and did not file a complaint alleging medical malpractice until more than six years after the surgery was performed. *Id.* at 802-03. In reviewing whether the

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[2]*See* Cal. Civ. Proc. Code § 340.5 (West 2006) (stating "the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first").

plaintiff's complaint was barred by the three-year statute of limitations, the *Garabet* court concluded that although the alleged wrongful act of performing the lasik surgery itself was not sufficient to cause the statute to run, "once there is a manifestation of the injury in some significant way, the three-year limitations period begins to accrue." *Id.* at 805. The court held that the three-year statute of limitations started running when the plaintiff began to experience adverse symptoms after the surgery, and thus, his complaint was not timely filed. *Id.* at 809 (stating that "severe damage which does not show itself (hidden cancer, for instance) is not 'injury' until it is found by diagnosis. It does not follow, however, that damage which has clearly surfaced and is noticeable is not 'injury' until either the plaintiff or her physician recognizes it." (internal quotation marks omitted)).

We adopt the reasoning of the California courts and conclude that the Nevada Legislature tied the running of the three-year limitation period to the plaintiff's appreciable injury and not to the plaintiff's awareness of that injury's possible cause. We therefore determine that NRS 41A.097(2)'s three-year limitation period begins to run once there is an appreciable manifestation of the plaintiff's injury. We further conclude that a plaintiff need not be aware of the cause of his or her injury in order for the three-year limitations period to begin to run.

Applying this interpretation of the statute to the present case, we determine that the three-year statute of limitations for Ms. Hamilton's claim against Dr. Libby began to run in August 2006 when tests showed that the MRSA infection had persisted despite the May 2006 surgical intervention. Because the purpose of the May 2006 surgery was to fight the MRSA infection, the persistence of that infection three months later was an appreciable and significant manifestation of Ms. Hamilton's injury, even if she was not aware of the cause of the continued MRSA infection. Ms. Hamilton's April 14, 2010, complaint was filed more than three years from the date of her injury, and thus, the district court erred in denying Dr. Libby's motion for summary judgment because no genuine issues of material fact remain as to whether Ms. Hamilton's claims are barred by NRS 41A.097(2)'s commencement limitations.[3] *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996) (stating that "[t]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted").

[3]Because we conclude that Ms. Hamilton's claims against Dr. Libby are barred by NRS 41A.097(2)'s three-year limitation period, we need not address Dr. Libby's argument that Ms. Hamilton's claims are barred by the one-year limitation period.

NRS 41A.097(3) did not toll the time for Ms. Hamilton to file her complaint

[Headnote 10]

Ms. Hamilton argues that even if we conclude that her complaint was filed beyond NRS 41A.097(2)'s three-year limitation period, the time to bring her claim was tolled under NRS 41A.097(3) based on Dr. Libby's concealment of the suture material remaining in her knee after the May 2006 surgery. NRS 41A.097(3) provides that the limitation period to bring a claim against a health care provider is "tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care." We have previously determined that NRS 41A.097(3)'s tolling provision applies only when there has been an *intentional act* that objectively hindered a reasonably diligent plaintiff from timely filing suit. *Winn*, 128 Nev. at 254-55, 277 P.3d at 464.

Ms. Hamilton does not point to any evidence that Dr. Libby concealed anything from her. She argues only that Dr. Libby "should have known" that he left the sutures in her knee, but does not allege that Dr. Libby performed any *intentional act* that hindered her from learning about the sutures. We therefore conclude that Ms. Hamilton has failed to satisfy *Winn*'s requirement that a plaintiff must prove that there was an *intentional* act of concealment by the health care provider, and thus, has not shown that there are any genuine issues of material fact remaining as to whether NRS 41A.097(3)'s tolling provision applied to toll the statute of limitation for her claim.[4]

In addition, Ms. Hamilton argues that because NRS 41A.097 was modeled after California's medical malpractice statute of limitations, the foreign-body tolling rule in California's statute should be applied to NRS 41A.097. Unlike NRS 41A.097, however, California's statute setting forth the statute of limitations for medical malpractice claims specifically enumerates "the presence of a foreign body" as a circumstance under which the three-year limitation period will be tolled. Cal. Civ. Proc. Code § 340.5 (West 2006). Because the Nevada Legislature has not codified a tolling provision similar to the "foreign body" exception in California's statute, we reject Ms. Hamilton's argument that California's codified

[4]Ms. Hamilton argues that NRS 41A.097(3)'s tolling provision is "affected by the provisions of NRS 41A.100[(1)](a)," which creates a rebuttable presumption of negligence when a foreign substance was unintentionally left in the patient's body following surgery. But Ms. Hamilton does not provide any explanation as to how NRS 41A.100 applies to NRS 41A.097(3)'s tolling provision, and we therefore do not address this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not cogently argued or supported by relevant authority).

foreign-body tolling exception should apply to her claim as we cannot read the language from California's foreign-body tolling rule into NRS 41A.097.

CONCLUSION

Looking at the plain language of NRS 41A.097(2), we determine that the three-year limitation period to bring actions for injury or death against health care providers begins to run once there is injury from which appreciable harm manifests. We further conclude that a plaintiff need not be aware of the cause of his or her injury in order for the three-year limitation period to begin to run. Thus, because Ms. Hamilton's claims were filed more than three years from the date when tests showed her MRSA infection persisted despite Dr. Libby's surgical intervention, and she has not shown that the statute of limitations was tolled under NRS 41A.097(3), we determine that the district court was required to grant summary judgment in Dr. Libby's favor and dismiss Ms. Hamilton's complaint.

We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to grant Dr. Libby's motion for summary judgment and dismiss Ms. Hamilton's April 14, 2010, complaint.

VIEGA GMBH; AND VIEGA INTERNATIONAL GMBH, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND AVENTINE-TRAMONTI HOMEOWNERS' ASSOCIATION, REAL PARTY IN INTEREST.

No. 59976

May 29, 2014 328 P.3d 1152

Original petition for a writ of prohibition challenging a district court order denying motions to dismiss for lack of personal jurisdiction.

Homeowners association brought construction defect complaint against, among others, manufacturers of plumbing and heating components. The district court dismissed manufacturers' motions to dismiss for lack of personal jurisdiction. Manufacturers petitioned for writ of prohibition. The supreme court, HARDESTY, J., held that subsidiaries were not acting as agents of parents so as to establish personal jurisdiction over parents.

Petition granted.

Fennemore Craig, P.C., and *John H. Mowbray, Janice Proctor-Murphy*, and *Kevin M. Green*, Las Vegas; *Lincoln, Gustafson & Cercos* and *Nicholas B. Salerno* and *Christopher A. Turtzo*, Las Vegas; *Carroll Burdick & McDonough* and *Matthew J. Kemner*, San Francisco, California, for Petitioners.

Canepa Reidy & Rubino and *Scott K. Canepa* and *Terry W. Reidy*, Las Vegas; *Carraway & Associates, LLC*, and *James D. Carraway*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *J. Randall Jones*, Las Vegas; *Lynch, Hopper & Salzano LLP* and *Francis I. Lynch*, Las Vegas; *Maddox, Isaacson & Cisneros* and *Robert C. Maddox*, Las Vegas, for Real Parties in Interest.

1. Prohibition.
   Writ relief pursuant to a writ of prohibition is an extraordinary remedy that the supreme court will only exercise its discretion to consider when there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.320.
2. Prohibition.
   As no adequate and speedy legal remedy typically exists to correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction. NRS 34.320.
3. Pretrial Procedure.
   To avoid dismissal pursuant to a motion to dismiss for lack of personal jurisdiction, plaintiffs are required to make a prima facie showing with competent evidence of essential facts that, if true, would support jurisdiction.
4. Pretrial Procedure.
   When considering a motion to dismiss for lack of personal jurisdiction, a court may consider evidence presented in affidavits to assist it in its determination.
5. Pretrial Procedure.
   When considering a motion to dismiss for lack of personal jurisdiction, a court must accept properly supported proffers of evidence as true.
6. Pretrial Procedure.
   When considering a motion to dismiss for lack of personal jurisdiction, when factual disputes arise, those disputes must be resolved in favor of the plaintiff.
7. Courts.
   Once a prima facie showing of personal jurisdiction over a defendant is made, the plaintiff then bears the burden at trial to prove jurisdiction by a preponderance of evidence.
8. Appeal and Error.
   As a question of law, the district court's determination of personal jurisdiction is reviewed de novo.
9. Courts.
   Jurisdiction over a nonresident defendant is proper only if the plaintiff shows that the exercise of jurisdiction satisfies the requirements of Nevada's long-arm statute and does not offend principles of due process. U.S. Const. amend. 14; NRS 14.065.

10. COURTS.

Nevada's long-arm statute reaches the constitutional limits of due process under the federal constitution, which requires that the defendant have such minimum contacts with the state that the defendant could reasonably anticipate being haled into court here, thereby complying with traditional notions of fair play and substantial justice. U.S. CONST. amend. 14; NRS 14.065.

11. CONSTITUTIONAL LAW.

The exercise of personal jurisdiction over a nonresident defendant satisfies due process requirements if the nonresident defendant's contacts are sufficient to obtain either: (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendants to suit in the forum. U.S. CONST. amend. 14.

12. CONSTITUTIONAL LAW.

A court may exercise general personal jurisdiction over a foreign company in compliance with due process when the company's contacts with the forum state are so continuous and systematic as to render it essentially at home in the forum state. U.S. CONST. amend. 14.

13. COURTS.

Specific personal jurisdiction arises when the defendant purposefully enters the forum's market or establishes contacts in the forum and affirmatively directs conduct there, and the claims arise from that purposeful contact or conduct. U.S. CONST. amend. 14.

14. CORPORATIONS AND BUSINESS ORGANIZATIONS; COURTS.

Corporate entities are presumed separate, and thus, the mere existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum. U.S. CONST. amend. 14.

15. CORPORATIONS AND BUSINESS ORGANIZATIONS; COURTS.

The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary's contacts to the parent company for purposes of establishing personal jurisdiction over the foreign parent company by showing that the subsidiary and the parent are one and the same.

16. COURTS.

For purposes of imputing a subsidiary's contacts to a foreign parent company for purposes of establishing personal jurisdiction over the parent, the corporate identity of the parent company is preserved under the agency theory; the parent nevertheless is held for the acts of the subsidiary agent because the subsidiary was acting on the parent's behalf.

17. COURTS.

General personal jurisdiction over a defendant allows a plaintiff to assert claims against that defendant unrelated to the forum.

18. COURTS.

General personal jurisdiction over a defendant is available only in limited circumstances.

19. COURTS.

A court may assert general personal jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state.

20. COURTS.

Typically, a corporation is "at home" for purposes of personal jurisdiction only where it is incorporated or has its principal place of business.

21. Principal and Agent.
    Generally, an agency relationship is formed when one person has the right to control the performance of another.
22. Corporations and Business Organizations; Courts.
    Corporate entities are presumed separate, and thus, indicia of mere ownership are not alone sufficient to subject a parent company to personal jurisdiction based on its subsidiary's contacts.
23. Courts.
    When describing an agency relationship between a parent company and its subsidiary for purposes of imputing the contacts of the subsidiary to the parent to establish personal jurisdiction over the parent, the control at issue must not only be of a degree more pervasive than common features of ownership, it must veer into management by the exercise of control over the internal affairs of the subsidiary and the determination of how the company will be operated on a day-to-day basis, such that the parent has moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy.
24. Courts.
    A subsidiary may be deemed to be an agent of its parent company so as to impute contacts of the subsidiary to the parent to establish personal jurisdiction over the parent in instances where the local entity as agent essentially exists only to further the business of the foreign entity, and but for the domestic entity's existence, the foreign entity would be performing those functions in the forum itself.
25. Courts.
    The agency doctrine supports personal jurisdiction over a parent company based on the contacts of its subsidiary when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business.
26. Courts.
    Where the nature and extent of the control exercised over a subsidiary by a parent is so pervasive and continual that the subsidiary may be considered nothing more than an agent or instrumentality of the parent, notwithstanding the maintenance of separate corporate formalities, personal jurisdiction over the parent may be grounded in the acts of the subsidiary/agent.
27. Courts.
    American subsidiaries of German parent companies were not acting in the forum as parents' agents, and therefore, local contacts of subsidiaries could not be imputed to parents for purposes of establishing personal jurisdiction over parents in construction defect action, where, although parent companies exerted control over subsidiaries, parent companies did not manage the day-to-day activities of subsidiaries, subsidiaries had their own production and distribution facility, and parent companies allegedly did not even sell the type of product at issue in the litigation.

Before the Court En Banc.[1]

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[1]Following oral argument before a three-judge panel, this matter was transferred to the en banc court pursuant to IOP Rule 13(b). The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, HARDESTY, J.:

In this original petition for a writ of prohibition, two foreign companies challenge the Nevada district court's assertion of personal jurisdiction over them. The district court asserted jurisdiction after determining that the foreign companies' American subsidiaries acted as their agents and then attributing to them the subsidiaries' Nevada contacts. The foreign companies argue that, in so doing, the district court violated due process.

We agree. Although a Nevada plaintiff may establish personal jurisdiction over nonresident parent companies by showing that their subsidiaries acted in the forum as the parents' agents, so that the subsidiaries' local contacts can be imputed to the parents, no agency relationship was shown here. Accordingly, in imputing the subsidiaries' contacts to the foreign parents here, the district court exceeded its jurisdiction, warranting writ relief.

FACTS AND PROCEDURAL HISTORY

Petitioners Viega GmbH and Viega International GmbH are German limited liability corporations. Viega GmbH designs and manufactures plumbing and heating components in Germany. Viega GmbH wholly owns Viega International, a holding company for Viega GmbH's international subsidiaries. In turn, Viega International wholly owns Viega Inc., a holding company incorporated in Delaware. Viega Inc. owned Viega NA, Inc., which sold Viega GmbH's plumbing products in the United States.

In October 2005, Viega Inc. purchased Vanguard, LLC, a Kansas-based yellow brass plumbing parts manufacturer and distributor. As part of the purchase, Viega Inc. assumed Vanguard's liabilities. In 2007, Viega Inc. then formed Viega LLC, a Delaware limited liability company headquartered in Kansas, to integrate Viega NA and Vanguard, along with a third company, into one entity. Viega LLC owns a distribution center in Reno and regularly conducts business in this state. According to real party in interest, Viega Inc. and Viega LLC are the sole means by which Viega GmbH and Viega International conduct any activities in, and by which Viega products enter, the American plumbing market. For purposes of this case, the parties do not dispute that Viega Inc. and Viega LLC are subject to personal jurisdiction in Nevada.

Prior to Viega Inc.'s 2005 purchase of Vanguard and assumption of its liabilities, Vanguard's yellow brass plumbing parts were distributed and installed in the Aventine-Tramonti common interest community in Las Vegas, Nevada. Asserting that the plumbing parts were defective, in 2008, real party in interest, the Aventine-

Tramonti Homeowners' Association, filed a construction defect complaint that named, among others, Vanguard, Viega Inc., and Viega LLC as being responsible for the production, distribution, and sale of the allegedly faulty plumbing parts.

The HOA later amended its complaint to add Viega GmbH and Viega International as defendants. Both German companies moved to dismiss the complaints, arguing that the district court lacked personal jurisdiction over them because neither company had a direct connection to Nevada, manufactured or distributed the allegedly faulty plumbing parts, or had responsibility or control over the American subsidiaries such that the subsidiaries' contacts with Nevada could be imputed to the German companies.

The district court held a nonevidentiary hearing on the motions, after which the court concluded that the HOA had made a prima facie showing of general and specific personal jurisdiction and thus denied the German companies' motions to dismiss. In determining whether the German companies' contacts with Nevada were sufficient to support the exercise of jurisdiction over them, the district court considered (1) whether the German companies exercised "pervasive and continual" control over Viega Inc. and whether Viega Inc. was sufficiently important to the German Viega companies such that they would undertake Viega Inc.'s activities if it did not exist. The district court found that the HOA had demonstrated that, although Viega GmbH, Viega International, and Viega Inc. were separately created entities, they essentially acted as one company. As a result, the court concluded, Viega Inc.'s contacts with Nevada could be imputed to Viega GmbH and Viega International. Based on those contacts, the district court held that both Viega GmbH and Viega International were subject to personal jurisdiction in Nevada. This writ petition followed.[2] Because the parties largely refer to Viega Inc. and Viega LLC as "American Viega" and to Viega International and Viega GmbH as "German Viega" and do not assert that they should be viewed differently, we do likewise.

DISCUSSION

[Headnotes 1, 2]

A writ of prohibition is available to arrest or remedy district court actions taken without or in excess of jurisdiction. NRS 34.320; *State, Office of the Attorney Gen. v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002). Writ relief is an extraordinary remedy that this court will

[2]Although we have considered the supplemental memorandum and responses thereto requested by this court, we deny the Viega GmbH and Viega International's January 22, 2014, motion to supplement the record on appeal and request for additional supplemental briefing.

only "exercise [its] discretion to consider . . . when there is no plain, speedy and adequate remedy in the ordinary course of law." *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (internal quotation marks omitted); NRS 34.330. As no adequate and speedy legal remedy typically exists to correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction. *South Fork Band, Te-Moak Tribe v. Sixth Judicial Dist. Court*, 116 Nev. 805, 811, 7 P.3d 455, 459 (2000). Because Viega GmbH and Viega International challenge the validity of the district court's exercise of jurisdiction over them, we exercise our discretion to consider this writ petition.

Establishing personal jurisdiction over a nonresident parent company

[Headnotes 3-8]

To avoid dismissal of the German Viega companies at this stage of the proceedings below, the HOA was required to make a prima facie showing with "competent evidence of essential facts" that, if true, would support jurisdiction. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993) (internal quotation marks omitted). "The court may consider evidence presented in affidavits to assist it in its determination," *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001), and the court must accept properly supported proffers of evidence as true. *Trump*, 109 Nev. at 692, 857 P.2d at 743. When factual disputes arise, "those disputes must be resolved in favor of the plaintiff." *Id.* at 693, 857 P.2d at 744 (internal quotation marks omitted). Once a prima facie showing is made, the plaintiff then bears the burden at trial to prove jurisdiction by a preponderance of evidence. *Trump*, 109 Nev. at 693, 857 P.2d at 744. As a question of law, the district court's determination of personal jurisdiction is reviewed de novo, even in the context of a writ petition. *Hosp. Corp. of Am. v. Second Judicial Dist. Court*, 112 Nev. 1159, 1160, 924 P.2d 725, 725 (1996).

[Headnotes 9, 10]

Jurisdiction over a nonresident defendant is proper only if the plaintiff shows that the exercise of jurisdiction satisfies the requirements of Nevada's long-arm statute and does not offend principles of due process. *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006); *see also Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458, 282 P.3d 751, 754 (2012) ("Nevada's long-arm statute permits personal jurisdiction over a nonresident defendant unless the exercise of jurisdiction would violate due process."). Nevada's long-arm statute,

NRS 14.065, reaches the constitutional limits of due process under the Fourteenth Amendment, which requires that the defendant have such minimum contacts with the state that the defendant could reasonably anticipate being haled into court here, thereby complying with "traditional notions of fair play and substantial justice." *Arbella*, 122 Nev. at 512, 134 P.3d at 712 (internal quotation marks omitted) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Accordingly, we must look to whether the exercise of jurisdiction over Viega GmbH and Viega International comports with due process.

[Headnotes 11-13]

Due process requirements are satisfied if the nonresident defendants' contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendants to suit here. *Arbella*, 122 Nev. at 512, 516, 134 P.3d at 712, 714; *see Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n.20 (2014). A court may exercise general jurisdiction over a foreign company when its contacts with the forum state are so " 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)); *see also Arbella*, 122 Nev. at 513, 134 P.3d at 712 ("[G]eneral personal jurisdiction exists when the defendant's forum state activities are so substantial or continuous and systematic that it is considered present in that forum and thus subject to suit there, even though the suit's claims are unrelated to that forum." (internal quotation marks omitted)). Specific personal jurisdiction arises when the defendant purposefully enters the forum's market or establishes contacts in the forum and affirmatively directs conduct there, and the claims arise from that purposeful contact or conduct. *Arbella*, 122 Nev. at 513, 134 P.3d at 712-13.

The parties agree that neither Viega GmbH nor Viega International directly engages in business in Nevada. Rather, the HOA attempts to establish both general and specific personal jurisdiction over these companies based on the Nevada contacts of their American subsidiaries, which concededly are subject to the jurisdiction of the Nevada court for resolution of this matter.

[Headnotes 14-16]

But corporate entities are presumed separate, and thus, the mere "existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries' minimum contacts with the forum." *Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001); *see also McCulloch Corp. v. O'Donnell*, 83 Nev. 396, 399, 433 P.2d

839, 840-41 (1967) (holding that "[t]he mere fact of stock ownership by one corporation in another does not authorize jurisdiction over the stockholder corporation"). Subsidiaries' contacts have been imputed to parent companies only under narrow exceptions to this general rule, including "alter ego" theory and, at least in cases of specific jurisdiction, the "agency" theory. *Unocal Corp.*, 248 F.3d at 926. The alter ego theory allows plaintiffs to pierce the corporate veil to impute a subsidiary's contacts to the parent company by showing that the subsidiary and the parent are one and the same. *See, e.g.*, *Goodyear*, 564 U.S. at 930 (implying, but not deciding, that an alter ego theory would be appropriate in such a situation); *see also Platten v. HG Bermuda Exempted, Ltd.*, 437 F.3d 118, 139 (1st Cir. 2006); *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir. 2002). The rationale behind this theory is that the alter ego subsidiary is the same entity as its parent, and thus, the jurisdictional contacts of the subsidiary are also jurisdictional contacts of the parent. *Patin*, 294 F.3d at 653. Unlike with the alter ego theory, the corporate identity of the parent company is preserved under the agency theory; the parent nevertheless "is held for the acts of the [subsidiary] agent" because the subsidiary was acting on the parent's behalf. *F. Hoffman-La Roche, Ltd. v. Superior Court*, 30 Cal. Rptr. 3d 407, 418 (Ct. App. 2005) (internal quotation marks omitted); *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 863 F. Supp. 186, 188-89 (D. Del. 1993) ("This [agency] theory does not treat the parent and subsidiary as one entity, but rather attributes specific acts to the parent because of the parent's authorization of those acts.").

Here, the German Viega companies assert that they neither are alter egos of their subsidiaries nor have an agency relationship with them to support the district court's attribution of contacts. The HOA, however, asserts that the American subsidiaries serve as the German Viega companies' agents and, thus, that the subsidiaries' Nevada contacts can be used to support the district court's findings of both general and specific jurisdiction.

Agency and general jurisdiction

[Headnotes 17-20]

As noted, general jurisdiction over a defendant allows a plaintiff to assert claims against that defendant unrelated to the forum. Such broad jurisdiction is available only in limited circumstances, however. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear*, 564 U.S. at 919. Typically, a corporation is "at home" only where it is incorporated or has its principal

place of business. *See Daimler AG*, 134 S. Ct. at 760 & 761 n.19 (discussing *Goodyear*, 564 U.S. at 924). In *Daimler AG v. Bauman*, the United States Supreme Court concluded that a foreign parent corporation was not amenable to general jurisdiction in California as the principal of its subsidiary when neither it nor the subsidiary was incorporated in or had its principal place of business in California, even though the subsidiary conducted substantial business there. 134 S. Ct. at 761-62.

This case is no different. The HOA has not alleged that either German Viega or American Viega are incorporated in or hold their principal places of business in Nevada. Nor has it asserted any other circumstances by which to show that German Viega, even with contacts imputed from American Viega, has formed a relationship with Nevada that is so continuous and systematic as to be considered at home in this state. Thus, even if the American Viega companies exist solely to serve at the direction of their foreign parent and therefore can be considered agents of German Viega, general jurisdiction cannot lie.

Agency and specific jurisdiction

With regard to specific jurisdiction, we have previously recognized that a plaintiff may establish personal jurisdiction over a nonresident defendant "by attributing the contacts of the defendant's agent with the forum to the defendant." *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 694, 857 P.2d 740, 745 (1993); *see In re Amerco Derivative Litig.*, 252 P.3d 681, 695 (2011) ("Under basic corporate agency law, the actions of corporate agents are imputed to the corporation."). And in *Hospital Corp. of America v. Second Judicial District Court*, we summarily extended this concept to the subsidiary-parent relationship, recognizing that a prima facie showing of personal jurisdiction over foreign parent corporations can be established by evidence demonstrating "agency or control" by the parent corporations over their local subsidiaries. 112 Nev. 1159, 1161, 924 P.2d 725, 726 (1996); *see also Daimler AG*, 134 S. Ct. at 759 n.13 (indicating that an agency relationship may be used to establish specific jurisdiction and noting that "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there"); *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998) ("Under the agency theory, the court may attribute the actions of a subsidiary company to its parent where the subsidiary acts on the parent's behalf or at the parent's direction.").

[Headnotes 21, 22]

Generally, an agency relationship is formed when one person has the right to control the performance of another. *Trump*, 109 Nev. at

695 n.3, 857 P.2d at 745 n.3; Restatement (Second) of Agency § 14 (1958) (providing that an agency relationship exists when the principal possesses the right to control the agent's conduct). In the corporate context, however, the relationship between a parent company and its wholly owned subsidiary necessarily includes some elements of control. *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824, 838 (Ct. App. 2000) ("The relationship of owner to owned contemplates a close financial connection between parent and subsidiary and a certain degree of direction and management exercised by the former over the latter."). Corporate entities are presumed separate, and thus, indicia of mere ownership are not alone sufficient to subject a parent company to jurisdiction based on its subsidiary's contacts. *F. Hoffman-La Roche, Ltd. v. Superior Court*, 30 Cal. Rptr. 3d 407, 418 (Ct. App. 2005); *Sonora*, 99 Cal. Rptr. 2d at 838 ("We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business." (citing *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336 (1925)));[3] *see MGM Grand, Inc. v. Eighth Judicial Dist. Court*, 107 Nev. 65, 68-69, 807 P.2d 201, 203 (1991) (holding that Walt Disney Company's Nevada subsidiaries' contacts could not be imputed to Disney because it "exercise[d] no more control over its [Nevada] subsidiaries than [wa]s appropriate for a sole shareholder of a corporation"); Restatement (Second) of Agency § 14M (1958) (discussing when a subsidiary can be considered an agent of its parent corporation).

Further, as pointed out by the Supreme Court, agencies can vary widely in scope and purpose. *Daimler AG*, 134 S. Ct. at 759 ("Agencies, we note, come in many sizes and shapes: 'One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.' " (quoting 2A C.J.S. *Agency* § 43 (2013) (footnote omitted))). In this case, the HOA broadly asserts that the American subsidiaries serve as the German companies' agents for all purposes concerning their plumbing activities in America—in other words, that the subsidiaries' sole purpose is to establish German Viega's presence here.

[Headnotes 23-26]

When describing such a broad agency relationship between a parent company and its subsidiary, the control at issue must not only

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[3]Although *Sonora* is based on the premise that agency in this context supports a finding of general jurisdiction, the Supreme Court has recognized that agency typically is more useful to a specific jurisdiction analysis. *Daimler AG*, 134 S. Ct. at 759 n.13 (indicating that an agency relationship may be used to establish specific jurisdiction).

be of a degree "more pervasive than . . . common features" of ownership, "[i]t must veer into management by the exercise of control over the internal affairs of the subsidiary and the determination of how the company will be operated on a day-to-day basis," such that the parent has "moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy." *F. Hoffman-La Roche*, 30 Cal. Rptr. 3d at 418-19; *Enic, PLC v. F.F. South & Co., Inc.*, 870 So. 2d 888, 891-92 (Fla. Dist. Ct. App. 2004) ("The amount of control exercised by the parent must be high and very significant. . . . The parent corporation, to be liable for its subsidiary's acts under the . . . agency theory, must exercise control to the extent the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." (internal quotation marks and citations omitted)); *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991) ("The factors relevant to this determination include the extent of overlap of officers and directors, methods of financing, the division of responsibility for day-to-day management, and the process by which each corporation obtains its business."); *see generally Hunter Min. Laboratories, Inc. v. Mgmt. Assistance, Inc.*, 104 Nev. 568, 571, 763 P.2d 350, 352 (1988) ("Only when a manufacturer controls the day to day or operative details of the dealer's business is an agency potentially created."). This may be the case in instances "where the local entity as agent essentially exists only to further the business of the foreign entity, and but for the domestic entity's existence, the foreign entity would be performing those functions in the forum itself." *F. Hoffman-La Roche*, 30 Cal. Rptr. 3d at 419 (citing *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824 (Ct. App. 2000)). "The doctrine supports jurisdiction 'when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business.' " *Id.* (quoting *Sonora*, 99 Cal. Rptr. 2d 824).

> Thus, where the nature and extent of the control exercised over the subsidiary by the parent is so pervasive and continual that the subsidiary may be considered nothing more than an agent or instrumentality of the parent, notwithstanding the maintenance of separate corporate formalities, jurisdiction over the parent may be grounded in the acts of the subsidiary/agent.

Sonora, 99 Cal. Rptr. 2d at 837-38. With these principles in mind, we turn to whether the HOA has established a prima facie showing of personal jurisdiction over Viega GmbH and Viega International under the agency theory.

Assertion of personal jurisdiction over Viega GmbH and Viega International

[Headnote 27]

The parties do not dispute that Viega Inc.'s 2005 purchase of the Vanguard companies and assumption of liabilities subjects Viega Inc. to jurisdiction in Nevada in this litigation concerning Vanguard's installation of yellow brass plumbing fixtures in the Aventine-Tramonti Community homes. The HOA argues, in essence, that Viega Inc. purchased and assumed the liabilities of the Vanguard companies directly on behalf of Viega Germany, so as to further the German companies' activities in the United States in general, and in Nevada in particular. They assert that this agency relationship is shown both by the control that the German Viega entities exercise over the American companies and by the fact that the American companies exist as German Viega's sole basis for American marketing and operations. In other words, they contend that American Viega is merely a branch division of German Viega's plumbing operations as a whole and, as such, effectively purchased Vanguard and assumed its Nevada-based liabilities directly on behalf of the German companies.

To demonstrate this interdependence, the HOA points to various Viega websites, which refer to all of the Viega entities simply as "Viega," a unified global enterprise with operations in America, sharing the same corporate logo. The HOA notes that a German Viega board member serves on the American Viega boards of directors and that American Viega submits monthly reports to German Viega for review by a German management board. Through this structure, the HOA claims, German Viega controls the hiring of Viega Inc.'s executive officers, who must obtain approval from German Viega before entering into any large financial transactions. But these factors merely show the amount of control typical in a parent-subsidiary relationship and thus are insufficient to demonstrate agency. *See F. Hoffman-La Roche*, 30 Cal. Rptr. 3d at 418 (noting that control by means of interlocking directors and officers, consolidated reporting, and shared professional services is normal); *Sonora*, 99 Cal. Rptr. 2d at 845 (explaining that monitoring a subsidiary's performance, supervising the subsidiary's budget decisions, and setting general policies and procedures are typical of the parent-subsidiary relationship); *Round Rock Research L.L.C. v. ASUSTeK Computer Inc.*, 967 F. Supp. 2d 969, 978 (D. Del. 2013) (concluding that personal jurisdiction based on agency was not demonstrated through evidence of overlapping directors and other facts reflecting the parent-subsidiary relationship, even though the two companies shared the same goals, when there was no showing of oversight of day-to-day activities or that the parent authorized the sales at issue in the case).

While the HOA also points out that Viega Inc. is a holding company with no working structure, such that its executive operations and business is conducted through Viega LLC, the HOA has not asserted that Viega Inc. has no assets or made any connection between its lack of corporate structure to German Viega's above-normal control. And even if, as the HOA asserts, American Viega is German Viega's agent for American operations and the face of American marketing, the HOA has not shown that that particular agency has resulted in the basis for the claims at issue here—the Vanguard plumbing products or the purchase of Vanguard and assumption of its liabilities. The fact that German Viega created American subsidies to conduct business in Nevada does not itself demonstrate agency. *Sonora*, 99 Cal. Rptr. 2d at 544-45 ("However, we have already pointed out that a parent corporation's formation and ownership of an independent subsidiary for the purpose of conducting business in the forum state does not itself subject the parent to jurisdiction in that state."). Further, sending representatives to attend meetings and a grand opening in Kansas does not show that Viega Germany is managing the day-to-day activities of the American Viega activities in Nevada. Although both American Viega and German Viega are engaged in the plumbing business, the subsidiaries have their own production and distribution facility in Kansas, and German Viega has claimed that it does not sell the type of plumbing fixtures at issue here.

This is not enough to show that, through the American Viega subsidiaries, Viega Germany purposefully availed itself of the privileges of doing business in Nevada, much less that it did so when Viega Inc. assumed the liabilities of Vanguard.[4] *See Daimler AG*, 134 S. Ct. at 759 n.13 (indicating that an agency relationship may

[4]The concurring justices assert that our discussion avoids the question that must be asked in determining specific jurisdiction—whether German Viega's activities in Nevada led to the claims at issue here—and ignores the simple answer that they did not, instead focusing on whether an agency relationship *currently* exists. But while the HOA focused "almost" solely on general jurisdiction, it also raised—and analyzed—the issue of specific jurisdiction, arguing that the German Viega's relationship with its subsidiaries demonstrated an overall intent to purposefully avail itself in Nevada, before and after the purchase of Vanguard, through its subsidiary agents, *including* with their purchase of Vanguard and assumption of its liabilities on German Viega's behalf. It is true we did not directly reach the question the concurring justices ask, although we noted that no such connection between the alleged agency and the claims was made. *Supra* at 380. This is because in responding to the HOA's argument, we concluded that, regardless, it had not shown an agency relationship at all. We do not answer questions rendered moot by the decision first reached, and thus our discussion of that decision does not lead to the conclusion that any proven, broad agency relationship necessarily results in specific jurisdiction. As stated earlier in this opinion, *supra* at 374 & 375, an agency relationship *might* be used to establish contacts sufficient for specific jurisdiction, so long as the contacts as an agent led to the claims at hand.

be used to establish specific jurisdiction when a corporate entity purposefully directs its agent to engage in activities in the forum). While the HOA insists that these facts are sufficient at least to allow it to proceed with jurisdictional discovery for the purpose of obtaining evidence to prove personal jurisdiction over the German Viega entities, it has shown no more than a typical parent-subsidiary relationship, the separateness of which is a basic premise of corporate law. As the Second Circuit Court of Appeals has recognized, such problems in overcoming the presumption of separateness are inherent in attempting to sue a foreign corporation that is part of a carefully structured corporate family, and courts may not create exceptions to get around them:

> We recognize that without discovery it may be extremely difficult for plaintiffs . . . to make a prima facie showing of jurisdiction over a foreign corporation. . . . [But] [t]he rules governing establishment of jurisdiction over such a foreign corporation are clear and settled, and it would be inappropriate for us to deviate from them or to create an exception to them because of the problems plaintiffs may have in meeting their somewhat strict standards.

Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 186 (2d Cir. 1998). Accordingly, for the reasons set forth above, we grant the petition and direct the clerk of the court to issue a writ of prohibition precluding the district court from allowing the case to proceed against the German Viega companies.[5]

DOUGLAS, CHERRY, and SAITTA, JJ., concur.

PICKERING, J., with whom GIBBONS, C.J., agrees, concurring in the result only:

I agree that Viega GmbH and Viega International did not submit to personal jurisdiction in Nevada when they acquired a subsidiary whose pre-acquisition activities had given rise to claims against it in Nevada. I write separately because I would resolve this case on the basis that the foreign defendants' "contact" (the acquisition of a subsidiary that committed a tort in Nevada) did not give rise to the claim asserted against them (the tort committed by the acquired company), thus defeating specific jurisdiction. The Ninth Circuit's "agency" test, on which the majority relies, has been discredited as a basis for general jurisdiction and, as formulated, does not create specific jurisdiction either.

" 'A court may assert general [personal] jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all

[5]In light of this opinion, we vacate our June 13, 2012, order staying the district court proceedings pertaining to Viega GmbH and Viega International.

claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State.' " *Daimler AG v. Bauman* (*Bauman II*), 134 S. Ct. 746, 754 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). If such "continuous and systematic" affiliations do not exist, the defendant corporations must have " 'purposefully directed' [their] activities at residents of the forum, *and the litigation* [*must*] *result*[ ] *from alleged injuries that 'arise out of or relate to' those activities*" so that the court may exercise specific personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted) (quoting *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 774 (1984) (emphasis added); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Viega GmbH's and Viega International's only affiliations with and activities in Nevada were accomplished through their second- and third-tier subsidiary, Vanguard, so a Nevada court may only exercise personal jurisdiction over the German corporations if Vanguard's conduct in Nevada can properly be imputed to them for general or specific personal jurisdiction purposes.

Under the principle of corporate separateness, the actions of a subsidiary company are generally not attributable to its parent corporation. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). But this principle may yield where a subsidiary is so dominated by its parent that the two corporations are, as a practical matter, the same entity or "alter egos," and recognizing their corporate separateness would sanction fraud or promote injustice. *See, e.g.*, *Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979); *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987). By extension, jurisdiction over a parent corporation can be established on an alter ego theory where there is such unity of interest and ownership that in reality no separate entities exist and failure to disregard the separate identities would result in fraud or injustice. *Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996). But an alter ego theory does not apply here, because the HOA does not allege that Vanguard is Viega GmbH's and Viega International's alter ego, and the HOA conceded at argument that the Viega defendants did not loot or damage Vanguard's solvency when they acquired it through an American subsidiary. *See Polaris*, 103 Nev. at 601, 747 P.2d at 886.

Although neither alter ego nor successor liability is alleged or established, the majority resorts to the more controversial "agency" test as formulated by the Ninth Circuit in *Bauman v. DaimlerChrysler Corporation* (*Bauman I*), 644 F.3d 909 (9th Cir. 2011), *rev'd sub nom. Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014). As for-

mulated by the majority, this test would allow Nevada courts to impute contacts from a subsidiary to a parent corporation for purposes of specific jurisdiction wherever "'the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business.'" Majority opinion at 376 (quoting *F. Hoffman-La Roche, Ltd. v. Superior Court*, 30 Cal. Rptr. 3d 407, 419 (Ct. App. 2005)). The majority then holds that this court lacks specific jurisdiction over Viega GmbH and Viega International even after applying this test. Thus its suggestion that this court might, given hypothetical facts other than those before it, impute contacts from a subsidiary to a parent corporation for specific jurisdiction purposes via this "agency" theory is dicta.

The HOA argued almost exclusively for *general* jurisdiction under *Bauman I*'s "agency" theory. And as the majority admits, following the Supreme Court decision in *Bauman II*, 134 S. Ct. at 746, which reversed *Bauman I*, that argument is now defunct. "With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." *Bauman II*, 134 S. Ct. at 760 (internal quotations omitted). Viega GmbH, Viega International, and Vanguard are neither incorporated in Nevada nor have their principal places of business here. There may be other bases for general jurisdiction beyond these paradigm examples, but even if Vanguard's contacts are imputed to Viega GmbH and Viega International, no such base is present here. If Vanguard's conduct in Nevada and its relationship with Viega GmbH and Viega International sufficed to establish general jurisdiction over the German companies, "the same global reach would presumably be available in every other State in which [the subsidiary's] sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,'" as due process requires. *Id.* at 761-62 (quoting *Burger King Corp.*, 471 U.S. at 472).

With agency-based *general* jurisdiction eliminated by *Bauman II*, this court should have allowed the parties to submit supplemental briefs on *specific* jurisdiction post-*Bauman II*.[1] But we denied the request for further supplemental briefing, and so are left with the general jurisdiction "agency" test stated in *Bauman I*,[2] awk-

[1]The parties' pre-*Bauman* insistence on an expansive agency theory of general jurisdiction also lost force when one of the two consolidated petitions seeking to establish personal jurisdiction over the Viega defendants settled. The claims in the settled case arose out of work by Vanguard that continued post-acquisition, unlike the claims in this matter.

[2]Because the terms "agency" and "agent" are terms of art with legal definitions that the majority's test does not reflect, *see Grand Hotel Gift Shop v.*

wardly recast without meaningful revision as a basis for *specific* jurisdiction.

A subsidiary corporation is one that is subordinate to and under a parent's control. *Black's Law Dictionary* 1565 (9th ed. 2009). So, presumably, a subsidiary's function will always be "compatible" with the business of its parent company, and its purpose will always be to "assist[ ] the parent in the pursuit of[ ] the parent's own business." Thus, the majority's specific jurisdiction "agency" test—whether "the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business"—"stacks the deck, for it will [almost] always yield a pro-jurisdiction answer." *Bauman II*, 134 S. Ct. at 759. Beyond this, the "agency" test the majority proposes is not a specific jurisdiction test at all, for it dispenses with the connection between the liability-producing act, the defendant, and the forum state that define *specific* jurisdiction.

The same rules that govern corporate liability also "form the foundation for determining when one juridical person's contacts will be attributed to another." Brief for the United States as Amicus Curiae Supporting Petitioner at 25, *Bauman II*, 134 S. Ct. 746 (2014) (No. 11-965). This legal foundation establishes that a principal may be liable for the actions of its agent where it directed (or impliedly authorized) its subsidiary to take the actions in question. *See House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc.*, 468 F.2d 64, 67 (5th Cir. 1972); *Lear v. Bishop*, 86 Nev. 709, 712-13, 713 n.1, 476 P.2d 18, 21 & n.1 (1970). Thus, in the specific jurisdiction context, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there" where that action produces the claim asserted against the parent in the forum. *See Bauman II*, 134 S. Ct. at 759 n.13.

But neither Viega GmbH nor Viega International could possibly have directed Vanguard to take the liability-producing action—Vanguard's installation of the allegedly defective pipes—*because the German companies did not acquire Vanguard until after that installation was complete.* So, even recognizing that the acts of an agent can subject the principal to specific jurisdiction when the defendant directs the agent to engage in liability-producing activity in the forum, this case does not present that issue; the liability-producing acts here were *faits accomplis before* the Viega defendants acquired Vanguard.

Granite State Ins. Co., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992) (defining an agency relationship as "when one who hires another retains a contractual right to control the other's manner of performance"), this concurrence uses quotation marks where it uses the terms to denote a relationship that satisfies the majority's test.

The majority avoids this issue and the simple conclusion to which it leads; to wit, that the current existence of an "agency" relationship between a parent and subsidiary has no relevance where, as here, specific jurisdiction is claimed over the parent company and the "agency" relationship was established after the subsidiary had already completed the liability-producing work at issue. Instead the majority blurs the line between general and specific jurisdiction by focusing on Vanguard's contacts with this State generally and whether an "agency" relationship *currently* exists between it and the German entities. By doing so, the majority suggests that actions that a subsidiary takes prior to a parent company's acquisition of it are imputable to that parent company for specific jurisdiction purposes, so long as the subsidiary is the parent's "agent" at the time litigation is brought.

This result defies the "basic agency law" that the majority invokes, and to stark effect. For an exercise of specific jurisdiction to comport with due process, the suit must arise "out of contacts that the 'defendant *himself*' creates with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (quoting *Burger King Corp.*, 471 U.S. at 475). This requirement is satisfied where a principal directs an agent to take tortious action in a forum because that principal has itself created the relevant contacts with that forum. *See Bauman II*, 134 S. Ct. at 759 n.13. But the majority's position suggests that specific jurisdiction over the defendant corporations in this case might have been proper even though such jurisdiction would have been based upon the wholly unilateral actions taken by Vanguard before it was acquired by the German Viegas. Were this court to exercise personal jurisdiction using such a theory in the future, it would certainly violate due process. *See Helicopteros Nacionales*, 466 U.S. at 417 (stating that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *see also Walden*, 134 S. Ct. at 1122 (noting that the Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State").

Moreover, inasmuch as the majority's position holds that a principal's current right to control an "agent," without more, opens the jurisdictional door for any tortious acts in which that "agent" may previously have engaged, it may chill investment in Nevada. If a parent company may face liability and be haled into court based on actions that its subsidiary-agent took at any time prior to their relationship forming, what right-minded entity would invest in a subsidiary here? And the impact on foreign-national investment has

the potential to be more pronounced. Article 18 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted in 1999 by a Special Commission of the Hague Conference on Private International Law provides that:

> 2. [J]urisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following[:]
>
> e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities.

But the majority's approach allows an exercise of jurisdiction over a defendant based solely on its commercial activity, namely its establishment of an "agency" relationship, with a company subject to specific jurisdiction in this state, whether or not that commercial activity relates to the dispute in question. Thus, separate and apart from contradicting well-established domestic law, the majority's apparent approach to jurisdiction is also the type of "[o]verly aggressive jurisdictional assertion[ ] that [is] incompatible with prevailing notions in other nations." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 166 (2001).

In sum, I join in the outcome only—neither general nor specific jurisdiction may lie over Viega GmbH and Viega International. To the extent the majority has said more, it has said too much.