REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

AND THE

COURT OF APPEALS

OF THE

STATE OF NEVADA

Volume 132

MANUELA H., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ROBERT TEUTON, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 67127

January 7, 2016 365 P.3d 497

Original petition for a writ of mandamus or prohibition challenging a district court order requiring petitioner to submit to drug testing in an abuse and neglect case.

The supreme court, CHERRY, J., held that: (1) when an action step in a case plan is not related to an allegation in abuse and neglect petition, the district court must make specific factual findings that justify the action step with which the parent must comply; and (2) the district court's failure to make any factual findings to support drug-testing requirement, which deviated from State's petition, warranted issuance of writ of mandamus.

Petition granted.

David M. Schieck, Special Public Defender, and *Abira Grigsby*, Deputy Special Public Defender, Clark County, for Petitioner.

Steven B. Wolfson, District Attorney, and *Felicia R. Quinlan*, Deputy District Attorney, Clark County, 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. NRS 34.160.
2. PROHIBITION.
   A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320.
3. MANDAMUS; PROHIBITION.
   A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted.
4. MANDAMUS; PROHIBITION.
   Determining whether to consider a petition for extraordinary relief is solely within the supreme court's discretion.
5. MANDAMUS.
   The supreme court would consider mother's writ of mandamus petition challenging the district court order establishing a case plan in an abuse and neglect proceeding, which required mother to submit to drug testing if an agent from the Department of Children and Family Services reasonably believed that she was under the influence of a controlled substance, where mother did not have an adequate legal remedy at law, and the petition presented an important issue of law that required the supreme court's clarification. NRAP 3A(b).
6. APPEAL AND ERROR.
   The supreme court reviews questions of statutory interpretation and other legal issues de novo.
7. STATUTES.
   The supreme court's goal in interpreting statutes is to effectuate the Legislature's intent; to do so, the supreme court must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.
8. STATUTES.
   When a statute does not address the issue at hand, the supreme court looks to reason and public policy to determine what the Legislature intended.
9. INFANTS.
   A district court, pursuant to statute governing abuse and neglect proceedings, has the authority to order a parent to undergo treatment or testing that deviates from State's abuse and neglect petition if it deems such treatment or testing necessary to protect the child's best interest, so long as the district court issues factual findings to support the action step. NRS 432B.560(1).
10. INFANTS; MANDAMUS.
    The district court's failure to make any factual findings to support drug-testing requirement in its order establishing a case plan in abuse and neglect proceeding, which requirement deviated from State's abuse and neglect petition, warranted issuance of writ of mandamus; State's unsubstan-

tiated representation at disposition hearing, standing alone, was insufficient to justify drug-testing requirement. NRS 432B.560(1).

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

OPINION

By the Court, CHERRY, J.:

This writ petition challenges a district court order establishing a case plan in an abuse and neglect proceeding, which requires petitioner Manuela H. to submit to drug testing if an agent from the Department of Children and Family Services (DFS) reasonably believes that she is under the influence of a controlled substance. However, the district court did not make any findings to support the drug-testing requirement in the case plan. We hold that when an action step in a case plan is not related to an allegation in the abuse and neglect petition, the district court must make specific factual findings that justify the action step with which the parent must comply. Because the district court did not make factual findings to justify the action step that Manuela submit to drug testing when a DFS agent reasonably believes she is under the influence of a controlled substance, and because Manuela has no other remedy available to her, we grant her petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

In 2014, Manuela and her two daughters—A.H., who was 2 years and 8 months at the time, and K.H., who was 15 months at the time—lived with Jonathan B., Manuela's boyfriend.[1] On the morning of February 4, 2014, a babysitter cared for the children. When she arrived, the sitter noticed that K.H.'s face was extensively bruised. Jonathan informed the sitter that K.H. received the injuries during a fight with her older sister and then left the children in the sitter's care. Thereafter, the sitter called Manuela at work and informed Manuela that K.H. needed medical care. Manuela explained that she was unable to leave work and that K.H. was injured when she fell off of her bed.

The sitter took K.H. to Sunrise Children's Hospital in Las Vegas, where K.H. was examined and treated. The treating physician, Dr. Sandra Cetl, noted several significant injuries. She opined that K.H.'s injuries were inconsistent with the claims the sitter related. Because Dr. Cetl suspected child abuse, the State of Nevada, through DFS, intervened. DFS placed both A.H. and K.H. in protective custody and gave physical custody of the children to their maternal grandmother.

[1]Jonathan is not the biological father of either child.

Two days after K.H. and A.H. were taken into protective custody, the family court conducted a protective custody hearing pursuant to NRS 432B.470 and NRS 432B.480. The court was concerned that the children were physically abused and found that cause existed to remove the children from their home. The court approved the children's placement in protective custody and granted Manuela and K.H.'s father, William T.-L., supervised visitation at Child Haven.[2]

Abuse/neglect petition

The State's amended abuse and neglect petition[3] alleged that A.H. and K.H. needed the State's protection because K.H. required medical treatment as a result of injuries caused by negligence or a deliberate and unreasonable act. The petition alleged that Manuela failed to protect K.H. from abuse by Jonathan and that Manuela either observed or knew that Jonathan twice slapped K.H. and A.H. on their faces and that Jonathan admitted to slapping the children. Additionally, the petition claimed that both Manuela and William were unable to properly care for the children because each of them had a history of domestic violence. The petition further claimed that William admitted to methamphetamine use and was therefore unable to care for K.H. The petition did not contain any allegations regarding Manuela and drug use.

Dispositional hearing and case plan

At the district court disposition hearing, the court reviewed DFS's case plans with the parties. Manuela's case plan included a provision that she must randomly submit to drug testing. She objected, claiming that drug testing was unwarranted because the petition did not allege that she used illegal drugs and because she voluntarily took a drug test, which was clean. The State explained that it sought to test Manuela for drugs because she associated with those who used drugs and because one negative test does not establish that she does not use drugs.

Instead of requiring Manuela to submit to random drug tests, the district court imposed a reasonable belief standard and ordered that a DFS agent could require Manuela to take a drug test if the agent reasonably believed Manuela was under the influence of a controlled substance. The court clarified that a DFS agent could only require the test if the agent met with Manuela and Manuela exhibited slurred speech or another sign of drug use.

According to the modified case plan, the primary goal of the State's intervention was to reunify the family. The plan established the fol-

---

[2]The record before this court tells us very little about A.H.'s father, Israel P. The abuse/neglect petition solely states that Israel P. "does not provide for the care, control, supervision, or subsistence of" A.H.

[3]The record before this court does not reflect the State's reason for amending the original abuse and neglect petition.

lowing objectives for Manuela: (1) to resolve physical abuse matters, (2) to resolve her domestic violence concerns, (3) to resolve her criminal cases, (4) to collaborate with DFS, and (5) to resolve other parenting concerns. To accomplish these objectives, the plan listed several action steps that Manuela was required to complete. Among other action steps, and under the objective of collaborating with DFS, the court ordered Manuela to take a drug test when she appeared to be under the influence of a controlled substance and then complete a substance abuse evaluation if she tested positive.

Manuela subsequently filed a writ petition requesting that this court either (1) prohibit the district court from requiring that she submit to drug tests or (2) require the district court to amend the case plan and eliminate the drug-test requirement. We denied Manuela's petition because she had an adequate remedy at law: filing a motion to revoke or modify the case plan pursuant to NRS 432B.570(1).

Accordingly, Manuela filed a motion to amend her case plan. At the hearing on her motion, Manuela stressed that mere association with drug users was not enough to require her to take a drug test. She argued that the action steps in a case plan must rationally relate to the allegations in the petition and that the petition did not allege that she had substance abuse issues. Manuela further argued that drug testing based on reasonable belief is an unreasonable search and that the State's standard of proof should be, at least, probable cause.

The district court denied Manuela's motion. The court found that the drug tests could intrude upon Manuela's constitutional rights but concluded that it had minimized the intrusion based on the court's jurisdiction over the children, the facts of the case, and the need to prevent DFS from having to remove her children in the future. Manuela's instant petition followed.

DISCUSSION

Writ relief

[Headnotes 1, 2]

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); *see also* NRS 34.160. A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[Headnotes 3, 4]

Additionally, writ relief is generally only available when there is no plain, speedy, and adequate remedy in the ordinary course of

law. NRS 34.170; NRS 34.330; *see also Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Determining whether to consider a petition for extraordinary relief is solely within this court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851.

This court will decline to consider writ petitions challenging interlocutory district court orders in most cases. *Oxbow Constr.*, 130 Nev. at 872, 335 P.3d at 1238. But we may use our discretion to consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served by considering the writ petition. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

[Headnote 5]

Neither NRAP 3A(b) nor other statutory provisions allow a party to appeal a district court's denial of a motion to amend a case plan; thus, Manuela does not have an adequate legal remedy at law, and writ relief is her only option. Moreover, the petition presents an important issue of law that requires our clarification. Therefore, we will consider this writ petition.

Factual findings

In her petition, Manuela argues that the action steps in the case plan must rationally relate to the charges in the State's abuse and neglect petition. She asserts that with no failed drug tests or evidence indicating that she has ever used or abused controlled substances, the district court exceeded its authority when it required her to submit to drug tests whenever a DFS agent reasonably believes she is under the influence of a controlled substance. Manuela also argues that NRS 432B.540 does not give the district court broad discretion to create requirements that are absent from the State's petition.

The State disagrees, arguing that NRS 432B.540 requires the district court to create an appropriate plan to provide for the permanent placement of the children. The State also contends that NRS 432B.560(1) authorizes the court to order the parent to complete any treatment that it deems to be in the best interest of the child.

[Headnotes 6-8]

We review questions of statutory interpretation and other legal issues de novo. *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). Our goal in interpreting statutes is to effectuate the Legislature's intent. *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286-87 (2003). To do so, we must "give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases

superfluous or make a provision nugatory." *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation omitted). But "[w]hen a statute . . . does not address the issue at hand," we "look to reason and public policy to determine what the Legislature intended." *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008).

When the State determines that a child needs protection from abuse or neglect, the State files a petition in the district court outlining "[t]he facts which bring the child within the jurisdiction of the court." NRS 432B.510(4)(a); *see also* NRS 432B.410(1). If the court finds that the allegations in the petition are true, then the child welfare services agency must make a report, and if the agency thinks a child needs to be removed from a parent's custody, the agency must also make a case plan. NRS 432B.540. A case plan is either a written agreement between the parent(s) and the custodial agency or an order of the court. NRS 128.0155. The action steps in the case plan are conditions "which have a primary objective of reuniting the family or, if the parents neglect or refuse to comply with the terms and conditions of the case plan, freeing the child for adoption." *Id.* In order to provide for the child's "best interests and special needs," the Legislature requires that the case plan include:

> (b) A description of the services to be provided to the child and to a parent to facilitate the return of the child to the custody of the parent or to ensure the permanent placement of the child;
>
> (c) The appropriateness of the services to be provided under the plan; and
>
> (d) A description of how the order of the court will be carried out.

NRS 432B.540(2). The Nevada Legislature has authorized district courts to order a parent under their respective jurisdictions through abuse and neglect proceedings "to undergo such medical, psychiatric, psychological, or other care or treatment as the court considers to be in the best interests of the child." NRS 432B.560(1)(a). Likewise, the court may preclude a parent from engaging in "[a]ny harmful or offensive conduct toward the child, the other parent, the custodian of the child or the person given physical custody of the child." NRS 432B.560(1)(b)(1). In preserving and reunifying families following abuse or neglect allegations, the Nevada Legislature very clearly requires that "the health and safety of the child *must* be the paramount concern." NRS 432B.393(2) (emphasis added).

[Headnote 9]

We have previously held, albeit in the context of determining child custody, that a court cannot determine the best interest of a child in custody proceedings without making factual findings. *See Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015). Accord-

ingly, we hold that a district court, pursuant to NRS 432B.560(1), has the authority to order a parent to undergo treatment or testing that deviates from the petition if it deems such treatment or testing necessary to protect the child's best interest, so long as the district court issues factual findings to support the action step. When the action steps deviate from the petition, we admonish the district court to issue "specific, relevant findings" and "an adequate explanation of the reasons for" the court's order. *See Davis*, 131 Nev. at 451-52, 352 P.3d at 1143. Without findings that provide a "factual basis" for the district court's order, "this court cannot say with assurance" whether the action steps were ordered "for appropriate legal reasons." *See id.* at 452, 352 P.3d at 1143-44.

[Headnote 10]

Here, the record does not contain any factual findings that support the court's order that Manuela submit to drug testing when a DFS agent reasonably believes she is under the influence of a controlled substance. The State's petition did not allege that Manuela used or abused controlled substances at any time. At the hearing, the State represented that it sought to drug test Manuela because it believed she continuously associated with drug users and because a single, clean drug test did not indicate that Manuela did not use drugs infrequently. The State's unsubstantiated representation at the hearing, standing alone, is insufficient to justify the drug-testing requirement. *See A Minor v. State*, 85 Nev. 323, 325, 454 P.2d 895, 896 (1969) ("It has long been a recognized rule of law that any statement or argument made by counsel before the trier of facts, concerning the fact of a case, cannot be regarded as evidence."). Accordingly, the district court's authority to prescribe an additional requirement rests in its express findings that the additional requirement is in the best interest of the child due to the specific facts of the case. Because there are no explicit factual findings that show why this action step in Manuela's case plan is justified, we grant Manuela's petition.

Therefore, we grant the petition[4] and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate the portion of its order establishing the drug-testing requirement in the case plan and to proceed consistent with this opinion.

Parraguirre, C.J., and Douglas, J., concur.

---

[4]We decline to reach Manuela's constitutional claims because we are granting her petition on other grounds. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that we need not address issues, even constitutional issues, if they are unnecessary to resolve the case at hand).

PRINCIPAL INVESTMENTS, INC., DBA RAPID CASH; GRANITE FINANCIAL SERVICES, INC., DBA RAPID CASH; FMMR INVESTMENTS, INC., DBA RAPID CASH; PRIME GROUP, INC., DBA RAPID CASH; AND ADVANCE GROUP, INC., DBA RAPID CASH, APPELLANTS, *v.* CASSANDRA HARRISON; CONCEPCION QUINTINO; AND MARY DUNGAN, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, RESPONDENTS.

No. 59837

January 14, 2016 366 P.3d 688

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Borrowers, against whom payday loan company had received default judgments, brought class action against company and its process server, alleging fraud upon the court, abuse of process, negligent hiring, supervision, and retention, negligence, civil conspiracy, and violation of fair debt collection laws and sought, inter alia, declaratory relief deeming default judgments void and uncollectible. The district court denied company's motion to compel arbitration. Company appealed. The supreme court, PICKERING, J., held that: (1) claims of waiver of the right to arbitration based on active litigation in court are presumptively for court to decide; (2) company's arbitration agreements with borrowers did not provide clear and unmistakable evidence to overcome presumption that litigation-conduct waiver of right to arbitration was issue for court; (3) company waived its right to arbitrate; and (4) company was not entitled to differentiation of borrowers' claims in context of determining waiver.

Affirmed.

Lewis Roca Rothgerber, LLP, and *Daniel F. Polsenberg, Joel D. Henriod*, and *Ryan T. O'Malley*, Las Vegas; *Gordon Silver* and *Mark S. Dzarnoski* and *William M. Noall*, Las Vegas, for Appellants.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones, Jennifer C. Dorsey*, and *Carol L. Harris*, Las Vegas; *Legal Aid Center of Southern Nevada, Inc.*, and *Dan L. Wulz, Venicia Considine*, and *Sophia A. Medina*, Las Vegas, for Respondents.

1. ALTERNATIVE DISPUTE RESOLUTION.
   Claims of waiver of the right to arbitration based on active litigation in court are presumptively for a court, not an arbitrator, to decide.
2. ALTERNATIVE DISPUTE RESOLUTION.
   Because arbitration is fundamentally a matter of contract, whether enforcing an agreement to arbitrate or construing an arbitration clause, courts

and arbitrators must give effect to the contractual rights and expectations of the parties.

3. Alternative Dispute Resolution.
The right to enforce an agreement to arbitrate, like any contract right, can be waived.

4. Alternative Dispute Resolution.
Given the strong presumption in favor of arbitration, waiver of the right to arbitration is not to be lightly inferred.

5. Alternative Dispute Resolution.
Issues that are presumptively for the court, not an arbitrator, to solve involve gateway questions of arbitrability, such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.

6. Alternative Dispute Resolution.
Because courts presume that the parties intend courts, not arbitrators, to decide gateway questions of arbitrability, these gateway questions are for the court to decide, unless the parties' agreement or, possibly, conduct, provides clear and unmistakable evidence that they intended to commit the questions to the arbitrator in the first instance.

7. Alternative Dispute Resolution.
Payday loan company's arbitration agreements with its borrowers did not provide clear and unmistakable evidence to overcome presumption that litigation-conduct waiver of right to arbitration was issue for court, not arbitrator, to decide; agreements did not manifest contrary intent to presumption that waiver was issue for court to decide, had company intended to delegate issue of waiver to arbitrator, agreements could and should have been written to say that explicitly, and litigants would have expected court to decide question of waiver.

8. Alternative Dispute Resolution.
An issue that is presumptively for the court to decide will be referred to the arbitrator for determination only where the parties' arbitration agreement contains clear and unmistakable evidence of such an intent.

9. Alternative Dispute Resolution.
Presumption that courts decide litigation-conduct waiver of the right to arbitration is rooted in presumed party intent and probable expectations.

10. Alternative Dispute Resolution.
Silence or ambiguity is resolved against the party seeking to overcome the presumption that courts decide litigation-conduct waiver of the right to arbitration.

11. Alternative Dispute Resolution.
Payday loan company waived its right to arbitrate, in class action brought by borrowers, against whom company had received default judgments, against company and its process server, alleging fraud upon the court, abuse of process, negligent hiring, supervision, and retention, negligence, civil conspiracy, and violation of fair debt collection laws; borrowers' claims arose out of and were integrally related to individual collection actions company previously conducted against them.

12. Alternative Dispute Resolution.
Payday loan company waived for appellate review claim that the supreme court should differentiate among claims borrowers, against whom company had received default judgments, brought in their class action against company and its process server, alleging fraud upon the court, abuse of process, negligent hiring, supervision, and retention, negligence, civil conspiracy, and violation of fair debt collection laws; company did not

make claim to the district court before that court entered its order denying company's second motion to compel arbitration.

13. Alternative Dispute Resolution.

Payday loan company was not entitled to differentiation of claims borrowers, against whom company had received default judgments, brought, in context of determining whether company waived right to arbitration, in borrowers' class action against company and its process server, alleging fraud upon the court, abuse of process, negligent hiring, supervision, and retention, negligence, civil conspiracy, and violation of fair debt collection laws; claims concerned, at their core, validity of default judgments company obtained against borrowers.

Before the Court En Banc.[1]

OPINION

By the Court, Pickering, J.:

This is an appeal from an order denying a motion to compel arbitration. The district court held that the moving party waived its right to arbitrate by litigating collection claims against its borrowers to default judgment in justice court. We must decide whether the district court erred in addressing waiver, instead of referring the question to the arbitrator. We hold that litigation-conduct waiver is presumptively for the court to decide, unless the arbitration agreement clearly commits the question to the arbitrator, which the agreements here do not. On the merits, we uphold the district court's finding of waiver and therefore affirm.

I.

A.

Appellant Rapid Cash is a payday loan company that provided short-term, high-interest loans to the named plaintiffs Mary Dungan, Cassandra Harrison, and Concepcion Quintino, among others.[2] The named plaintiffs and other borrowers did not repay their loans, prompting Rapid Cash, over a seven-year period, to file more than 16,000 individual collection actions in justice court in Clark County, Nevada. Rapid Cash hired Maurice Carroll, d/b/a On-Scene Mediations, as its process server. Relying on On-Scene's affidavits of service, Rapid Cash secured thousands of default judgments against the named plaintiffs and other borrowers who failed to appear and defend the collection lawsuits.

At some point, a justice of the peace noticed that On-Scene's affidavits attested to an improbably high number of same-day receipts

[1]The Honorable Ron D. Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

[2]We refer to appellants collectively as "Rapid Cash," the name by which they are all alleged to do business.

and service of process, and initiated an investigation. The investigation revealed that Carroll and On-Scene had engaged in "sewer service"—the practice of accepting summonses and complaints for service, failing to serve them, then falsely swearing in court-filed affidavits that service had been made when it was not. Carroll and On-Scene were cited for serving process without a license, and a cease and desist order was entered against them. Ultimately, Carroll was charged with and convicted of 17 counts of forgery and offering false instruments.

Carroll's criminal convictions involved false affidavits of service for clients other than Rapid Cash. Nonetheless, Carroll and On-Scene were Rapid Cash's exclusive agent for service of process in southern Nevada, and the named plaintiffs sued Rapid Cash, On-Scene, and others in district court, alleging that Rapid Cash improperly obtained its default judgments against them and other similarly situated borrowers without their knowledge via On-Scene's "sewer service." The first amended complaint is styled as a class action and asserts claims for fraud upon the court, abuse of process, negligent hiring/supervision/retention, negligence, civil conspiracy, and violation of Nevada's fair debt collection laws. The relief requested includes declaratory relief deeming the justice court default judgments void and uncollectable; injunctive relief; disgorgement, restitution, or a constructive trust for funds already collected; forfeiture by Rapid Cash of all loan amounts; return of all principal, interest, charges, or fees associated with the loans; punitive damages and statutory penalties; and attorney fees and costs. The first amended complaint disavows claims for individual tort or consequential damages, stating:

> This Class action does not seek to, nor will it, actually litigate any additional claims for compensatory damage, which may include but not be limited to damage to credit reputation, fear, anxiety, mental and emotional distress, nor damages arising from wrongful garnishment or attachment, such as bank fees, bounced check fees, finance charges or interest on bills which would have otherwise been paid, and the like.

B.

Rapid Cash moved to compel arbitration based on the arbitration provisions in its loan agreements, which take one of two forms, depending on the date of the loan. The Dungan/Harrison form of agreement provides that either party may elect binding arbitration of any "Claim," and broadly defines "Claim" as follows:

> 2. DEFINITION OF "CLAIM." The term "Claim" means any claim, dispute or controversy between you and us (including "related parties" identified below) that arises from or relates in any way to Services you request or we provide, now, in the past or in the future; the Application (or any prior

> or future application); any agreement relating to Services ("Services Agreement"); any of our marketing, advertising, solicitations and conduct relating to your request for Services; our collection of any amounts you owe; our disclosure of or failure to protect any information about you; or the validity, enforceability or scope of this Arbitration Provision. "Claim" is to be given the broadest possible meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims, cross-claims and third-party claims, and claims based on any constitution, statute, regulation, ordinance, common law rule (including rules relating to contracts, negligence, fraud or other intentional wrongs) and equity. It includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief.

The Dungan/Harrison form of agreement specifies that litigating one claim does not waive arbitration as to other claims:

> Even if all parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in that lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision.

Quintino's form of agreement differs. It includes a preliminary "Mediation Agreement," requiring that before either party proceeds with arbitration or litigation, the party must submit all "Claims . . . to neutral, individual (and not class) mediation." If mediation does not resolve the dispute, then the "Arbitration Agreement" controls:

> If you and we are not able to resolve a Claim in mediation, then you and we agree that such Claim will be resolved by neutral, binding individual (and not class) arbitration. You and we may not initiate arbitration proceedings without first complying with the Mediation Agreement.

The Quintino form of agreement also defines "Claims" broadly:

> "Claims" means any and all claims, disputes or controversies that arise under common law, federal or state statute or regulation, or otherwise, and that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees. "Claims" also includes any and all claims that arise out of (i) the validity, scope and/or applicability of this Mediation Agreement or the Arbitration Agreement appearing below, (ii) your application for a Loan, (iii) the Agreement, (iv) any prior agreement between you and us, including any prior loans we have made to you[,] or (v) our collection of any Loan. "Claims" also includes all claims asserted as a representative, private attorney general,

> member of a class or in any other representative capacity, and all counterclaims, cross-claims and third party claims.

The Quintino agreement specifies that either party may "bring a Claim in a small claims or the proper Las Vegas Justice Court, as long as the Claim is within the jurisdictional limits of that court," without submitting the claim to mediation or arbitration, but that "[a]ll Claims that cannot be brought in small claims court or Las Vegas Justice Court . . . must be resolved consistent with . . . the Arbitration Agreement."

Both forms of agreement state that they are "made pursuant to a transaction involving interstate commerce" and shall "be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended," or the "FAA." They also include class-action and class-arbitration waivers.

The district court denied Rapid Cash's motions to compel arbitration of the claims asserted in the original and first amended complaints. It held that Rapid Cash waived its right to an arbitral forum by bringing collection actions in justice court, employing Carroll and On-Scene as its agent for service of process, and obtaining default judgments allegedly based on On-Scene's falsified affidavits of service. Rapid Cash appeals. We have jurisdiction under NRS 38.247(1)(a) and 9 U.S.C. § 16(a)(1)(B) (2012), which allow interlocutory appeals from orders denying motions to compel arbitration, and affirm.

II.

A.

[Headnotes 1, 2]

As the loan documents stipulate, the arbitration agreements evidence transactions involving commerce, so the Federal Arbitration Act (FAA) applies. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 723-25, 359 P.3d 113, 121-22 (2015). Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision expresses "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract."[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotations and internal citations omitted). Because arbitration is fundamentally a matter of

[3]Nevada has adopted the Uniform Arbitration Act of 2000 (UAA), *see* NRS 38.206, which expresses Nevada's similarly fundamental policy favoring the enforceability of arbitration agreements as written. *See* NRS 38.219(1); *Tallman*, 131 Nev. at 720, 359 P.3d at 119 ("As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." (quoting *State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009))).

contract, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

[Headnotes 3, 4]

The right to enforce an agreement to arbitrate, like any contract right, can be waived. But the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Given the "strong presumption in favor of arbitration[,] . . . waiver of the right to arbitration is not to be lightly inferred." *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 57 (2d Cir. 2001) (internal quotations omitted); *accord Tallman*, 131 Nev. at 727, 359 P.3d at 123 (quoting *Clark Cty. v. Blanchard Constr. Co.*, 98 Nev. 488, 491, 653 P.2d 1217, 1219 (1982)). Under the FAA, "any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 229 (2d Cir. 2001) (quoting *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995)).

B.

We must decide whether Rapid Cash waived its right to arbitrate the named plaintiffs' equitable, common-law and statutory claims against them by its litigation activities in justice court. Before we can do so, we must address the threshold issue of who decides the question of waiver-by-litigation-conduct—the court or the arbitrator? The answer depends on presumptions the Supreme Court has developed to guide division-of-labor determinations under the FAA and the text of the arbitration agreements themselves. *See BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 33-34 (2014) (stating that since arbitration is a matter of contract, "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. . . . If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

[Headnotes 5, 6]

Despite the FAA's robust pro-arbitration presumption, *Moses H. Cone*, 460 U.S. at 24-25, the Supreme Court has instructed that

certain issues—the kind that "contracting parties would likely have expected a court to have decided"—are presumptively for the court, not the arbitrator, to resolve. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). These court-committed issues involve gateway questions of arbitrability, "such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Grp.*, 572 U.S. at 34 (quoting *Howsam*, 537 U.S. at 84). Because "courts presume that the parties intend courts, not arbitrators, to decide [gateway questions of] arbitrability," *id.*, these gateway questions are for the court to decide, unless the parties' agreement (or, possibly, conduct) provides "clear and unmistakable evidence" that they intended to commit the questions to the arbitrator in the first instance. *First Options*, 514 U.S. at 944 (internal quotation omitted). But the Supreme Court applies an exactly opposite set of rules to *procedural* gateway matters: "On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *BG Grp.*, 572 U.S. at 34. Procedural gateway matters "include the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* (internal quotations omitted).

In *Howsam*, and again in *BG Group*, the Supreme Court characterized "waiver" as a procedural gateway question, not a gateway "question of arbitrability," stating that, under the FAA, the *arbitrator* presumptively "should decide 'allegation[s] of *waiver*, delay, or a like defense to arbitrability.'" 537 U.S. at 84 (emphasis added) (alteration in original) (quoting *Moses H. Cone*, 460 U.S. at 25); *BG Grp.*, 572 U.S. at 34-35. These pronouncements have generated uncertainty in the lower courts as to who decides litigation-conduct waiver. *See* Thomas J. Lilly, Jr., *Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 Neb. L. Rev. 86, 100-01 (2013). Before *Howsam*, most courts held that, under the FAA, litigation-conduct waiver challenges were for the court to resolve. *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 11-12 (1st Cir. 2005) (noting the First Circuit's "long history of deciding such waiver claims itself" and observing that "[t]his was in accord with the overwhelming weight of pre-*Howsam* authority, which held that waiver due to litigation conduct was generally for the court and not for the arbitrator"); *see Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005) (judicially addressing litigation-conduct waiver without questioning whether the arbitrator should have decided the matter); *see also Tallman*, 131 Nev. at 727, 359 P.3d at 123 (upholding

order rejecting litigation-conduct waiver claim but noting that all parties assumed "that waiver was for the court, not the arbitrator to decide"). After *Howsam*, courts have divided on who decides litigation-conduct waiver. *Compare Marie*, 402 F.3d at 14 ("We hold that the Supreme Court in *Howsam* . . . did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court."), *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007) ("[W]aiver of the right to arbitrate based on litigation conduct remains presumptively an issue for the court to decide [even] in the wake of *Howsam*."), *and Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011) ("[I]t is presumptively for the courts to adjudicate disputes about whether a party, by earlier litigating in court, has waived the right to arbitrate."), *with Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003) (summarily holding that *Howsam* mandates that the court refer all waiver challenges to the arbitrator, even litigation-conduct waiver).

Howsam considered a procedural rule of the contractually chosen arbitral forum, the National Association of Securities Dealers (NASD), which provided that "no dispute 'shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.'" *Howsam*, 537 U.S. at 81 (quoting NASD Code of Arbitration Procedure § 10304 (1984)). The "waiver" *Howsam* deemed the province of the arbitrator, not the court, thus did not grow out of litigation conduct but, rather, delay in initiating arbitration, a procedural matter the NASD rules controlled. The courts that have retained the traditional rule that litigation-conduct waivers are for the court to decide have distinguished *Howsam* by limiting its waiver pronouncement to the context in which it arose, specifically, waiver "arising from non-compliance with contractual conditions precedent to arbitration." *Grigsby*, 664 F.3d at 1353 (internal quotation marks omitted). That *Howsam* presumed the arbitrator would decide the NASD time-limit bar makes sense: The NASD arbitrator was "comparatively better able to interpret and to apply" the NASD's procedural rule, so the parties would have expected that issue to go to the arbitrator as the decision-maker with the better comparative expertise. *Howsam*, 537 U.S. at 85.[4] But litigation-conduct "waiver impli-

[4]The Court's quotation of *Howsam*'s waiver language in *BG Group*, 572 U.S. at 34-35, is not inconsistent with the distinction *Grigsby* and other post-*Howsam* cases have drawn between waiver by litigation-conduct and waiver by failure to comply with procedural prerequisites to arbitration. In *BG Group*, the Supreme Court deemed a foreign sovereign's local litigation provision the province of the arbitrators because it constituted "a purely procedural

cates courts' authority to control *judicial* procedures or to resolve issues . . . arising from *judicial conduct*." *Ehleiter*, 482 F.3d at 219. Arbitrators are not comparatively better able than courts to interpret and to apply litigation-conduct waiver defenses, *see Grigsby*, 664 F.3d at 1354 (stating that a court is "the decisionmaker with greater expertise in recognizing and controlling abusive forum-shopping"), and, thus, it is reasonable to assume that "parties would expect the court to decide [litigation-conduct waiver] itself." *Ehleiter*, 482 F.3d at 219.

Litigation-conduct waiver questions commonly arise out of proceedings before the court being asked to compel arbitration. Having the court assess waiver not only comports with party expectations but also is more efficient than reconstructing the litigation history before the arbitrator and deferring the question to the arbitral forum, only to have the dispute return if the arbitrator finds waiver.

> Questions of litigation-conduct waiver are best resolved by a court that "has inherent power to control its docket and to prevent abuse in its proceedings (i.e. forum shopping)," which has "more expertise in recognizing such abuses, and in controlling . . . them," and which could most efficiently and economically decide the issue as "where the issue is waiver due to litigation activity, by its nature the possibility of litigation remains, and referring the question to an arbitrator would be an additional, unnecessary step."

See Am. Gen. Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 551-52 (Ky. 2008) (internal footnote omitted) (quoting David LeFevre, Note, *Whose Finding Is It Anyway?: The Division of Labor Between Courts and Arbitrators With Respect to Waiver*, 2006 J. Disp. Resol. 305, 313-14 (2006)); *see* UAA of 2000, § 6, cmt. 5, 7 U.L.A., part 1A 28 (2009) (stating that litigation-conduct "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause," and noting that "[a]llowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract" and that "[i]t is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver").

We therefore hold, as the majority of courts have, that *Howsam*'s reference to "waiver, delay, or a like defense" being for the arbitrator encompasses "defenses arising from non-compliance with con-

---

requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute." *Id.* at 35-36.

tractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, [but] not . . . claims of waiver based on active litigation in court." *Ehleiter*, 482 F.3d at 219 (internal quotations omitted); *see Marie*, 402 F.3d at 14. A party to an arbitration agreement likely would expect a court to determine whether the opposing party's conduct in a judicial setting amounted to waiver of the right to arbitrate. Thus, even post-*Howsam*, litigation-conduct waiver remains a matter presumptively for the court to decide.

C.

[Headnote 7]

We still must consider Rapid Cash's argument that its arbitration agreements provide for the arbitrator to decide litigation-conduct waiver, notwithstanding any presumption to the contrary. *See First Options*, 514 U.S. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (internal citations omitted)). In this regard, the Dungan/Harrison form of agreement requires arbitration of "any claim, dispute or controversy . . . that arises from or relates in any way to . . . the *validity, enforceability or scope* of this Arbitration Provision," while the Quintino form of agreement requires the parties to arbitrate "any and all claims that arise out of . . . *the validity, scope and/or applicability* of this . . . Arbitration Agreement." (Emphases added.)

Rapid Cash argues that the district court's finding of litigation-conduct waiver defeats the "enforceability" of its arbitration agreements and so, at minimum, Dungan's and Harrison's waiver challenge should have been referred to the arbitrator under *First Options* and its progeny. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (upholding district court's referral of substantive unconscionability defense to the arbitrator based on a delegation clause that sent to the arbitrator questions as to the "applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable" (internal quotation omitted)). Rapid Cash argues that Quintino's agreement, too, delegates litigation-conduct waiver to the arbitrator, since Quintino's waiver challenge amounts to a defense to the "applicability" of her arbitration agreement. We do not agree.

[Headnotes 8-10]

"An issue that is presumptively for the court to decide will be referred to the arbitrator for determination only where the parties' arbitration agreement contains 'clear and unmistakable evidence' of such an intent." *Ehleiter*, 482 F.3d at 221 (quoting *First Options*, 514 U.S. at 944); *see also Rent-A-Center*, 561 U.S. at 70 n.1. The general language in both forms of Rapid Cash agreements falls short

of the "clear and unmistakable evidence" required to overcome the presumption that litigation-conduct waiver is for the court to decide. The presumption that courts decide litigation-conduct waiver is rooted in presumed party intent and probable expectations. The agreements between Rapid Cash and its borrowers provide specifically for litigation of some claims in some courts without loss of the right to arbitrate other claims in other courts, yet are silent on the issue of who decides on which side of the line such later-asserted claims fall. A corollary of the *First Options* rule requiring "clear and unmistakable evidence" of contrary intent to overcome a division-of-labor presumption is the rule that "silence or ambiguity" is resolved against the party seeking to overcome the presumption. *First Options*, 514 U.S. at 944-45. Had Rapid Cash intended to delegate litigation-conduct waiver to the arbitrator, rather than the court, the agreements could and should have been written to say that explicitly. Absent an explicit delegation, litigation-conduct waiver remains a matter for the court to resolve. *See Marie*, 402 F.3d at 15 (declining to interpret agreement delegating "arbitrability" determinations to the arbitrator as "evinc[ing] a clear and unmistakable intent to have waiver issues decided by the arbitrator" and holding that "[n]either party should be forced to arbitrate the issue of waiver by conduct without a clearer indication in the agreement that they have agreed to do so").[5]

Here, as in *Ehleiter*, "[l]itigants would expect the court, not an arbitrator, to decide the question of waiver based on litigation conduct, and the Agreement . . . does not manifest a contrary intent." 482 F.3d at 222. We thus "cannot interpret the Agreement's silence regarding who decides the waiver issue here 'as giving the arbitrators that power, for doing so . . . [would] force [an] unwilling part[y] to arbitrate a matter he reasonably would have thought a judge, not an arbitrator, would decide.'" *Id.* (alteration in original) (quoting *First Options*, 514 U.S. at 945).

D.

[Headnote 11]

We turn to Rapid Cash's contention that the district court erred in finding it waived its right to arbitrate. Waiver is not a favored finding and should not be lightly inferred. *Coca-Cola Bottling*, 242 F.3d at

[5]*Rent-A-Center* is not to the contrary. In *Rent-A-Center*, the party opposing arbitration conceded that the text of the delegation clause—referring to the arbitrator claims that the arbitration agreement was "void or voidable" and so not enforceable or applicable—encompassed his substantive unconscionability challenge. *See Rent-A-Center*, 561 U.S. at 66 (internal quotation omitted). In this case, by contrast, the parties opposing arbitration hotly contest the delegation clauses in their agreements, which, unlike the *Rent-A-Center* clause, stop at "enforceability" and "applicability" without adding a description of what the term means.

57; *Clark Cty.*, 98 Nev. at 491, 653 P.2d at 1219. "A party seeking to prove the waiver of a right to arbitrate must demonstrate these elements: knowledge of an existing right to compel arbitration; acts inconsistent with that existing right; and prejudice to the party opposing arbitration resulting from such inconsistent acts." 3 Thomas H. Oehmke, *Commercial Arbitration* § 50:28, at 28-29 (3d ed. Supp. 2015); *see Nev. Gold*, 121 Nev. at 90, 110 P.3d at 485.

Rapid Cash knew of its arbitration rights and acknowledges that it waived its right to arbitrate its collection claims by bringing them in justice court. Its point is that the claims the named plaintiffs have asserted against Rapid Cash in district court are separate and distinct from the collection claims Rapid Cash sued on in justice court. Especially since its arbitration agreements permit it to litigate a collection claim in justice court without losing the right to arbitrate other, distinct claims, Rapid Cash sees no inconsistency in enforcing arbitration of the named plaintiffs' claims despite its prior litigation in justice court. Rapid Cash also disputes whether the class representatives have made a sufficient showing of prejudice to justify a finding of waiver.

Consistent with the policy disfavoring waiver, caselaw teaches that "only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate." *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997); *see MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999); *Cottonwood Fin., Ltd. v. Estes*, 810 N.W.2d 852, 860-61 (Wis. Ct. App. 2012). The reasoning underlying these cases is that litigating one claim is not necessarily inconsistent with seeking to arbitrate another, separate claim and does not prejudice rights of the opposing party that the arbitration agreement protects. *See Distajo*, 107 F.3d at 133 ("Finding waiver where a party has previously litigated an unrelated yet arbitrable dispute would effectively abrogate an arbitration clause once a party had litigated *any* issue relating to the underlying contract containing the arbitration clause."). Thus, the franchisor in *Distajo* did not waive its right to arbitrate its franchisees' claims for breach of the franchise agreement by obtaining eviction orders against its franchisees in state court because the eviction actions did not prejudice rights secured by the arbitration agreement, as required to find waiver of arbitration rights under the FAA. 107 F.3d at 134 ("[P]rejudice as defined by our [waiver] cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue."). Similarly, the payday lender in *Cottonwood Financial* did not waive its right to compel arbitration of its borrower's counterclaim alleging violation of the Wisconsin Consumer Act by bringing a collection action in small claims court;

the arbitration agreement provided that a small claims action did not waive the right to compel arbitration of other claims and the borrower's counterclaim converted the case from a small to a large claims action, triggering the arbitration agreement. 810 N.W.2d at 860-61; *see Fid. Nat'l Corp. v. Blakely*, 305 F. Supp. 2d 639, 642 (S.D. Miss. 2003) (holding lender's state-court collection action did not waive its right to seek arbitration of counterclaim asserting tort claims associated with the transaction).

This case differs from the cases just cited in one crucial respect: The claims the named plaintiffs have asserted in district court arise out of, and are integrally related to, the litigation Rapid Cash conducted in justice court. By initiating a collection action in justice court, Rapid Cash waived its right to arbitrate to the extent of inviting its borrower to appear and defend on the merits of that claim. The entry of default judgment based on a falsified affidavit of service denied the defendant borrower that invited opportunity to appear and defend. Allowing the borrower to litigate its claim to set aside the judgment and be heard on the merits comports with the waiver Rapid Cash initiated. If the judgment Rapid Cash obtained was the product of fraud or criminal misconduct and is unenforceable for that reason, it would be unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside, to enjoin its enforcement, and otherwise to remediate its improper entry. We recognize that the arbitration agreements specify that bringing one claim does not result in waiver of the right to arbitrate another, but a no-waiver clause can itself be waived, *see Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964), and should not be applied to sanctify a fraud upon the court allegedly committed by the party who itself elected a litigation forum for its claim. *Cf. S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998) (declining to enforce a "no waiver" clause where to do so would hamper a judge's authority to control the proceedings and correct any abuse in them); *Gen. Elec. Capital Corp. v. Bio-Mass Tech, Inc.*, 136 So. 3d 698, 703 (Fla. Dist. Ct. App. 2014) (holding that an "antiwaiver or 'no waiver' provision is not itself determinative and does not operate as a complete bar to finding a waiver of the right to arbitration").

E.

[Headnotes 12, 13]

Rapid Cash urges us to differentiate among the claims the named plaintiffs have brought, arguing that the named plaintiffs have an adequate remedy under Rule 60(c) of the Nevada Justice Court Rules of Civil Procedure, which provides:

> When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and

> who has not entered a general appearance in the action, the court, after notice to the adverse party, upon motion made within six months after the date of service of written notice of entry of such judgment may vacate such judgment and allow the party or the party's legal representatives to answer to the merits of the original action,

and that all other claims should be dismissed or sent to arbitration. Rapid Cash did not make this argument to the district court before that court entered its order denying Rapid Cash's second motion to compel arbitration, and thus, this argument is not properly before us on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").[6] More to the point, while we do not pass upon the validity of any of the named plaintiffs' claims and we recognize that the FAA "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), we do not accept Rapid Cash's view of their separability for waiver purposes. The named plaintiffs' claims all concern, at their core, the validity of the default judgments Rapid Cash obtained against them in justice court, as to which issue the district court correctly concluded that Rapid Cash waived its right to an arbitral forum.

We therefore affirm.

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

SAITTA, J., concurring:

In large part, I agree with the majority's opinion. However, I disagree with the majority's inclusion as dicta of two cases, *Cottonwood Financial, Ltd. v. Estes*, 810 N.W.2d 852 (Wis. Ct. App. 2012), and *Fidelity National Corp. v. Blakely*, 305 F. Supp. 2d 639 (S.D. Miss. 2003). The *Cottonwood* court based its decision on its interpretation of the arbitration clause in that case and did not perform an analysis of whether the "same legal and factual issues" were at issue in the lender's collection action as the borrower's counterclaim. *Compare Cottonwood Financial*, 810 N.W.2d at 860-61, with Majority Opinion at 21 (holding that " 'only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate.' " (quoting *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997))). Therefore, I believe that *Cottonwood* is inapposite to the majority's analysis under the standard it set out in its opinion.

---

[6]A separate proceeding regarding this issue whereby Rapid Cash seeks original writ relief from the district court's orders partially granting class certification and declining to dismiss certain claims for relief is pending before this court as *Principal Investments, Inc. v. Eighth Judicial District Court*, Docket No. 61581.

In the case of *Blakely*, I respectfully note that the holding in that case directly contradicts the majority's holding in the current case. *Compare Blakely*, 305 F. Supp. 2d at 642 (holding lender's state court collection action *did not waive* its right to seek arbitration of counterclaim asserting tort claims associated with the transaction), with Majority Opinion at 21-22 (holding that lender's state-court collection action *waived* its right to seek arbitration of claims associated with the transaction). Therefore, I am puzzled by its inclusion in the majority's opinion.

Lastly, I note that the above caselaw originates from the Wisconsin Court of Appeals and a federal district court in Mississippi. Thus, beyond the issue of their applicability to the current case, I question their persuasiveness as authority in Nevada. Therefore, although I concur with most of the majority's opinion, I do not join with them as to the use of those two cases as dicta.

SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, Appellant, *v.* SAN FLORENTINE AVENUE TRUST; and JPMORGAN MORTGAGE ACQUISITION CORPORATION, Respondents.

No. 66177

January 14, 2016 365 P.3d 503

Appeal from a district court order granting a preliminary injunction. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Purchaser of property at first foreclosure sale, which was conducted by first homeowners' association (HOA) that had lien on property for unpaid association dues, sought preliminary injunction to enjoin second foreclosure sale by second HOA, which, after first sale, also recorded lien against property for unpaid dues. The district court granted preliminary injunction. Second HOA appealed. The supreme court, Parraguirre, J., held that: (1) first HOA and second HOA had equal priority; and (2) when one equal priority HOA lienholder forecloses, other equal priority HOA lienholders are entitled to proceeds in same priority position as foreclosing lienholder and their liens are extinguished.

Affirmed.

Alverson, Taylor, Mortensen & Sanders and *Seetal N. Tejura*, Las Vegas, for Appellant.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn* and *Jeffrey Arlitz*, Las Vegas, for Respondent San Florentine Avenue Trust.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Jordan J. Butler*, Las Vegas, for Respondent JPMorgan Mortgage Acquisition Corporation.

1. Appeal and Error.
   A district court's decision to grant a preliminary injunction will be reversed only when the district court abused its discretion or based its decision on an erroneous legal standard.
2. Appeal and Error.
   When the underlying issues in the motion for preliminary injunction involve questions of statutory construction, including the meaning and scope of a statute, the supreme court reviews those questions of law de novo.
3. Statutes.
   When a statute's language is clear and unambiguous, it must be given its plain meaning.
4. Statutes.
   A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons.
5. Statutes.
   When construing an ambiguous statute, the meaning of the words used in the statute may be determined by examining the context and the spirit of the law or the causes that induced the legislature to enact it.
6. Common Interest Communities.
   First homeowners' association (HOA), which conducted foreclosure sale and had lien on property for unpaid association dues, and second HOA, which recorded lien for unpaid dues after sale, had equal priority; plain language of statute governing liens against units of common-interest communities for assessments unambiguously gave equal priority to two or more HOA liens on same property when those liens secured unpaid fees or charges, including unpaid dues, regardless of when underlying assessment arose or became due. NRS 116.011, 116.3102, 116.3115, 116.3116(4).
7. Common Interest Communities.
   When one equal priority homeowners' association (HOA) lienholder forecloses, the other equal priority HOA lienholders are entitled to proceeds in the same priority position as the foreclosing lienholder, and their liens are extinguished; if the sale proceeds are insufficient to pay all equal priority lienholders, the funds are distributed among all equal priority lienholders on a pro-rata basis. NRS 116.1108, 116.3116(4).
8. Appeal and Error.
   The supreme court does not need to agree with the district court's rationale to affirm its ultimate disposition.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, C.J.:

According to NRS 116.3116(4) (2013), "[u]nless the declaration otherwise provides, if two or more [homeowners'] associations have liens for assessments created at any time on the same property, those

liens have equal priority."[1] Here we are asked to resolve how "equal priority" liens interact during a foreclosure. Specifically, this court must determine when multiple homeowners' association liens have equal priority, and whether one equal priority lienholder's foreclosure (1) has no effect on other equal priority liens, such that they survive the foreclosure sale and continue encumbering the property; or (2) extinguishes the other equal priority liens and entitles those lienholders to share in the sale proceeds. We conclude NRS 116.3116(4) (2013) unambiguously explains when liens have equal priority. We further conclude that when one equal priority lienholder forecloses on its lien, any other equal priority liens: (1) are extinguished, and (2) must be paid from the sale proceeds in full or on a pro-rata basis if the sale proceeds are insufficient to fully pay all equal priority liens. Accordingly, we affirm the district court's order granting a preliminary injunction.

FACTS

The property at the center of this dispute is a part of two homeowners' associations (HOAs): appellant Southern Highlands Community Association (Southern Highlands) and nonparty The Foothills at Southern Highlands Homeowners Association (Foothills). Foothills foreclosed on the subject property after the former owner failed to pay association dues, and respondent San Florentine Avenue Trust (San Florentine) purchased it. San Florentine paid $45,100 for the property, resulting in approximately $35,000 in excess proceeds over the amount of Foothills' lien. Southern Highlands then recorded a lien against the property for unpaid association dues pre-dating Foothills' sale. Southern Highlands' lien was left unpaid, and eventually Southern Highlands set a foreclosure sale date.

San Florentine sought to preliminarily enjoin Southern Highlands' foreclosure sale. It argued NRS 116.3116(4) (2013) gives equal priority to multiple HOA liens, and thus, Foothills' foreclosure sale extinguished Southern Highlands' lien, while also entitling Southern Highlands to satisfy its lien from the foreclosure sale proceeds. The district court granted the preliminary injunction without addressing the merits of San Florentine's argument. Southern Highlands now appeals.

DISCUSSION

Southern Highlands contends that the preliminary injunction was improperly granted because, according to NRS Chapter 116, South-

[1]NRS 116.3116 was amended by the 2015 Legislature; former subsection (4) was renumbered and, with identical language, is now NRS 116.3116(8). 2015 Nev. Stat., ch. 266, § 1, at 1335.

ern Highlands and Foothills had equal priority liens, and an equal priority lien survives the foreclosure sale of a competing equal priority lien.

[Headnotes 1, 2]

A district court's decision to grant a preliminary injunction " 'will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard.' " *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (quoting *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)). "[W]hen the underlying issues in the motion for preliminary injunction 'involve[ ] questions of statutory construction, including the meaning and scope of a statute, we review . . . those questions [of law] de novo.' " *State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 366, 294 P.3d 1223, 1226 (2012) (alterations in original) (quoting *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006)).

[Headnotes 3-5]

"When a statute's language is clear and unambiguous, it must be given its plain meaning . . . ." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.* "When construing an ambiguous statute, '[t]he meaning of the words used [in the statute] may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it.' " *Id.* at 476, 168 P.3d at 737-38 (alterations in original) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)).

The Foothills and Southern Highlands liens had equal priority

[Headnote 6]

First, this court must determine the lien priority between the Foothills and Southern Highlands liens. NRS 116.3116(4) (2013) governs priority among competing HOA liens, stating: "[u]nless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority."

According to NRS 116.3116(4) (2013)'s plain language, liens will have "equal priority" if the lienholders are "associations" and the liens secure "assessments" on the same property. An "association" is "the unit-owners' association organized under [the statute setting forth the rules for establishing an HOA]." NRS 116.011. Although "assessment" is not a defined term, NRS Chapter 116

consistently uses the term to describe various fees and charges levied by HOAs.[2] *See, e.g.*, NRS 116.3102; NRS 116.3115; NRS 116.3116. Although this court presently declines to catalogue every charge that may or may not be an assessment, the Legislature clearly envisioned "assessments" as including an HOA's monthly dues. *See* NRS 116.3116(2) (2013) (giving HOAs a superpriority as to "assessments for common expenses based on the periodic budget adopted by the association");[3] *see also SFR Invs. Pool 1 v. U.S. Bank*, 130 Nev. 742, 744-45, 334 P.3d 408, 410-11 (2014). Finally, NRS 116.3116(4) (2013)'s plain language states that HOAs' assessment-based liens have "equal priority" regardless of when the underlying assessments were created. Thus, we conclude NRS 116.3116(4) (2013)'s plain language unambiguously gives "equal priority" to two or more HOA liens on the same property when those liens secure unpaid HOA fees or charges, including unpaid HOA dues, regardless of when the underlying assessment arose or became due.[4]

Based on NRS 116.3116(4) (2013)'s plain language, the Foothills and Southern Highlands liens will have "equal priority," regardless of when the underlying assessments were created, if (1) Foothills and Southern Highlands are "associations," (2) with liens for unpaid "assessments," (3) attached to the same property. Here, the parties agree that Southern Highlands and Foothills are HOAs subject to NRS Chapter 116; thus, the lienholders here are two "associations" for the purposes of NRS 116.3116(4) (2013). Further, Foothills and Southern Highlands both had liens for unpaid HOA dues, which are "assessments" for the purposes of NRS 116.3116(4) (2013). Finally, both Southern Highlands and Foothills had liens against the subject property.

Therefore, NRS 116.3116(4) (2013) unambiguously gives Foothills' and Southern Highlands' liens "equal priority" regardless of when the underlying assessments arose or became due. However, this court must still determine what effect, if any, Foothills' foreclosure sale had on Southern Highlands' equal priority lien.

---

[2]That usage is consistent with *Black's* definition: an assessment is an "[i]mposition of something, such as a tax or fine, according to an established rate; [or] the tax or fine so imposed." *Assessment*, *Black's Law Dictionary* (10th ed. 2014).

[3]The 2015 Legislature amended NRS 116.3116 such that the material language from subsection (2) now appears at subsection (3)(b). 2015 Nev. Stat., ch. 266, § 1, at 1334.

[4]Although NRS 116.3116(4) (2013) allows an HOA's declaration to alter this "equal priority" default rule, neither party here contends its declaration establishes which lien has priority. *See* NRS 116.3116(4) (2013) (stating that HOA liens have equal priority "[u]nless the declaration otherwise provides").

Foothills' foreclosure sale extinguished Southern Highlands' lien, but Southern Highlands is entitled to a share of the sale proceeds

[Headnote 7]

Although NRS 116.3116(4) (2013) unambiguously identifies when HOA liens have equal priority, the term "equal priority" is, itself, ambiguous because NRS Chapter 116 never clarifies how equal priority liens interact when one equal priority lienholder forecloses. One commentator described the trouble with labeling liens as "equal priority," noting: "if two liens are equal in priority, the foreclosure of one lien cannot eliminate the other, else the foreclosed lien would be superior. However, neither can the non-foreclosed lien remain, else it would be superior." Guy Lamoyne Black, Comment, *Tax Titles in Utah: Caveats for Potential Purchasers and Proposals for Change*, 1991 BYU L. Rev. 1573, 1605 (1991). Accordingly, the term "equal priority" in NRS 116.3116(4) (2013) is ambiguous because reasonably well-informed people could differ on whether (1) an equal priority lien survives the foreclosure sale of another equal priority lien, or (2) an equal priority lien is extinguished but entitles the lienholder to sale proceeds when another equal priority lienholder forecloses. *See D.R. Horton*, 123 Nev. at 476, 168 P.3d at 737. Having concluded that the term "equal priority" is ambiguous, we must look outside NRS 116.3116(4) (2013)'s text to determine the Legislature's intended meaning. *See id.* at 476-77, 168 P.3d at 737-38.

Both parties erroneously contend that NRS 116.31164(3) (2005)[5] resolves the question of how equal priority liens interact during a foreclosure.[6] NRS 116.31164(3) (2005) provides that

> After the sale, the person conducting the sale shall . . .
>
> (c) [a]pply the proceeds of the sale for the following purposes in the following order:

---

[5]The 2015 Legislature amended NRS 116.31164 such that the material language from subsection (3) is now found in subsection (7). 2015 Nev. Stat., ch. 266, § 5, at 1341-42.

[6]San Florentine focuses on a portion of NRS 116.31164(3)(c)(4) (2005) that requires "[s]atisfaction in the order of priority" after a foreclosure sale. According to San Florentine, this shows that Southern Highlands' lien was extinguished by the sale but that Southern Highlands is also entitled to proceeds from that sale in an equal priority position. Conversely, Southern Highlands contends that NRS 116.31164(3)(c)(4) (2005) expressly requires payment for "the association's lien," then "[s]atisfaction in the order of priority of any *subordinate claim* of record." (Emphasis added.) Thus, Southern Highlands argues, NRS 116.31164(3) shows *equal* priority lienholders are never entitled to proceeds, so such lien claims must survive a foreclosure sale. These arguments lack merit because, as discussed below, NRS 116.31164(3) (2005) was never intended to resolve equal priority lien claims.

> (1) The reasonable expenses of sale;
>
> (2) The reasonable expenses of securing possession before sale . . . ;
>
> *(3) Satisfaction of the association's lien;*
>
> *(4) Satisfaction in the order of priority of any subordinate claim of record . . . .*

(Emphasis added.) NRS 116.31164(3) (2005)'s plain language and legislative history do not discuss or contemplate equal priority liens. The statute was modeled after § 3-510 of the Uniform Land Transactions Act (ULTA). *See* 1982 UCIOA § 3-116, comment 4 (the language codified at NRS 116.31164(3) (2005) was modeled after 1975 ULTA § 3-510); 1975 ULTA § 3-510. However, ULTA never discusses or clarifies how to resolve disputes between equal priority lienholders. *See* 1975 ULTA § 3-301; *see also* 1978 ULTA § 3-301, cmts. 1-6. NRS 116.31164(3) (2005) does not textually explain how equal priority liens interact during a foreclosure sale, and the Legislature never intended for NRS 116.31164(3) (2005) to provide such guidance.

Furthermore, no provision of NRS Chapter 116 explains what happens to equal priority liens during a foreclosure, and thus, no plain meaning analysis is possible. The legislative history for NRS Chapter 116 never discusses what equal priority liens are or how they interact with each other. Nor does the UCIOA or its comments explain how equal priority liens interact with one another. *See SFR Invs.*, 130 Nev. at 744, 746, 334 P.3d at 410, 413 (noting that NRS Chapter 116 is derived from the 1982 UCIOA, and thus, UCIOA's comments should be given considerable interpretive weight).

However, more generally, NRS 116.1108 provides that "[t]he principles of law and equity . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter." Although we have found no settled "principles of law" clarifying how equal priority liens interact during a foreclosure, we find California's approach for equal priority mechanics' liens persuasive. There, when one equal priority mechanic's lienholder forecloses, the other equal priority mechanic's lienholders are entitled to proceeds in the same priority position as the foreclosing lienholder, and their liens are extinguished. 5 Miller & Starr, *Cal. Real Estate* § 11:130 (3d ed. 2009); *see Santa Clara Land Title Co. v. Nowack & Assocs., Inc.*, 277 Cal. Rptr. 497, 500-01 (Ct. App. 1991). If the sale proceeds are insufficient to pay all equal priority mechanic's lienholders, the funds are distributed among all equal priority lienholders on a pro-rata basis. Miller & Starr, *supra*, § 11:130; *see Idaco Lumber Co. v. Nw. Sav. & Loan Ass'n*, 71 Cal. Rptr. 422, 424-29 (Ct. App. 1968). Although we have never so held, Nevada's mechanic's lien statutes appear to follow the same approach. *See* NRS 108.236; NRS 108.239(11).

We find this approach persuasive for three reasons. First, even if NRS Chapter 116 does not compel this approach, it is not inconsistent with the chapter. *See* NRS 116.1108. Second, we conclude this approach better fits the term "equal priority" because (1) it allows all equal priority lienholders to be paid at the same time; and (2) if the sale proceeds are insufficient to satisfy all equal priority liens, all equal priority lienholders, including the foreclosing lienholder, share that loss pro-rata. Finally, this approach avoids scenarios where multiple equal priority lienholders attempt to foreclose on the same property at different times even though the initial foreclosure sale produced sufficient sale proceeds to pay off all equal priority liens. Therefore, we choose to adopt this approach and find its reasoning sound.

Accordingly, Southern Highlands cannot hold a foreclosure sale on the property because Foothills' foreclosure sale extinguished Southern Highlands' lien. Nevertheless, Southern Highlands is entitled to proceeds from that sale in the amount of its lien on the date of the foreclosure sale. If the sale proceeds are insufficient to satisfy Southern Highlands' lien, Foothills and Southern Highlands must share that loss pro-rata.

CONCLUSION

[Headnote 8]

NRS 116.3116(4) (2013) unambiguously gives "equal priority" to two or more HOA liens on the same property when those liens secure unpaid HOA fees or charges, including unpaid HOA dues, regardless of when the underlying assessment arose or became due. Thus, NRS 116.3116(4) (2013) gave the Foothills and Southern Highlands liens equal priority. When one equal priority lienholder forecloses, all other equal priority liens are extinguished. However, all equal priority lienholders share in the foreclosure sale proceeds in one of two ways: (1) all equal priority liens are paid in full whenever the proceeds are sufficient to do so; or (2) when the sale proceeds are inadequate to fully satisfy all the equal priority liens, all equal priority lienholders receive a pro-rata share of the proceeds. Under this methodology, Foothills' foreclosure sale extinguished Southern Highlands' lien, but Southern Highlands remains entitled to its proper share of the sale proceeds.[7]

---

[7]Southern Highlands' briefing raised additional and colorable arguments challenging the district court's preliminary injunction order; however, we decline to address them. Our holding is that Foothills' foreclosure sale extinguished Southern Highlands' lien; therefore, Southern Highlands simply has no legal right to foreclose on the property. Regardless of any error the district court may have committed, the preliminary injunction was a proper method for preventing Southern Highlands from foreclosing on a lien that no longer existed, and we need not agree with the district court's rationale to affirm its ultimate disposition. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010).

Accordingly, we affirm the district court's preliminary injunction order.

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

CITY OF FERNLEY, NEVADA, A NEVADA MUNICIPAL CORPORATION, APPELLANT, *v.* THE STATE OF NEVADA, DEPARTMENT OF TAXATION; THE HONORABLE DAN SCHWARTZ, IN HIS CAPACITY AS TREASURER OF THE STATE OF NEVADA; AND THE LEGISLATURE OF THE STATE OF NEVADA, RESPONDENTS.

No. 66851

January 14, 2016 366 P.3d 699

Appeal from a district court order granting summary judgment in a tax matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

City filed complaint against Nevada Department of Taxation, challenging constitutionality of Local Government Tax Distribution Account and seeking declaratory and injunctive relief and damages for violations of state constitutional prohibition on special or local legislation. The district court granted the Department summary judgment and awarded the Department costs. City appealed. The supreme court, PICKERING, J., held that: (1) City knew or had reason to know of its claim for retrospective relief against the Department on date of its incorporation, (2) failure to file claim within default statute of limitations did not bar claim for injunctive and declaratory relief, (3) Local Government Tax Distribution Account was a general law, and (4) distribution classifications applied uniformly and Legislature had legitimate purpose for enacting different classifications.

Affirmed.

[Rehearing denied February 19, 2016]

Brownstein Hyatt Farber Schreck, LLP, and *Joshua J. Hicks*, Las Vegas; *Brandi L. Jensen*, City Attorney, Fernley; *Holley, Driggs, Walch, Fine, Wray, Puzey, Thompson* and *Clark V. Vellis*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, *Gina C. Session*, Chief Deputy Attorney General, and *Andrea Nichols*, Senior Deputy Attorney General, Reno; *Brenda J. Erdoes*, Legislative Counsel, *Kevin*

C. Powers, Chief Litigation Counsel, and *J. Daniel Yu*, Principal Deputy Legislative Counsel, Carson City, for Respondents.

1. Appeal and Error; Costs.
   The supreme court does not disturb an award of costs absent abuse of discretion, but does require that award be authorized by statute, rule, or contract.
2. Municipal Corporations; States.
   The district court did not abuse its discretion in awarding costs to Nevada Department of Taxation in City's suit against the Department challenging constitutionality of Local Government Tax Distribution Account and seeking declaratory and injunctive relief and damages for violations of state constitutional prohibition on special or local legislation; even though City's lawsuit involved a good-faith challenge to tax distribution legislation, the Department was the prevailing party in action for recovery of money damages where City sought to recover more than $2,500. Const. art. 4, §§ 20, 21; NRS 18.020(3), 18.025, 360.660.
3. Appeal and Error.
   The supreme court reviews a district court's order granting summary judgment de novo.
4. Judgment.
   Summary judgment is proper if pleadings and evidence demonstrate that no genuine issues of material fact exist and that moving party is entitled to judgment as a matter of law.
5. Limitation of Actions.
   Statute of limitations serves to prohibit suits after a period of time that follows the accrual of the cause of action.
6. Limitation of Actions.
   Limitation periods under statutes of limitations are meant to provide a concrete time frame within which plaintiff must file a lawsuit and after which defendant is afforded a level of security.
7. Limitation of Actions.
   Public policies embodied in statutes of limitations are important considerations because they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.
8. Constitutional Law.
   Although statute of limitations may time-bar a claim, it does not prohibit the supreme court from reviewing the constitutionality of an enacted statute.
9. Statutes.
   Legislature has considerable law-making authority, but it is not unlimited.
10. Constitutional Law.
    State constitution is the supreme law of the state, which controls over any conflicting statutory provisions.
11. Constitutional Law.
    It is fundamental to our federal, constitutional system of government that a state legislature does not have the power to enact any law conflicting with the federal constitution, laws of Congress, or constitution of its particular state.
12. Constitutional Law.
    While courts will try to construe statutes to be in harmony with the constitution, if statute is irreconcilably repugnant to a constitutional amendment, statute is deemed to have been impliedly repealed by amendment.

13. Constitutional Law.
Statutes are construed to accord with constitutions, not vice versa.

14. Constitutional Law.
Principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to rights and privileges protected by Nevada's Constitution.

15. Limitation of Actions.
Statute of limitations applies differently depending on type of relief sought.

16. Action.
There are two types of relief that can be sought in a civil action: (1) retrospective relief, such as money damages; and (2) prospective relief, such as injunctive or declaratory relief.

17. Limitation of Actions.
City knew or had reason to know of its claim for retrospective relief against Nevada Department of Taxation that Local Government Tax Distribution Account was unconstitutional under constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes, triggering default statute of limitations of four years, on date of its incorporation as city, since City was aware that its base distributions under Local Government Tax Distribution Account would be calculated as of that date. Const. art. 4, §§ 20, 21; NRS 11.220, 360.660.

18. Constitutional Law.
Political subdivision does not have standing to sue under the separation of powers doctrine.

19. Limitation of Actions.
City's failure to file claim within default four-year statute of limitations that Local Government Tax Distribution Account was unconstitutional under state constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes did not bar City's claims for injunctive and declaratory relief from allegedly unconstitutional statute; City retained right to prevent future violations of constitutional rights. Const. art. 4, §§ 20, 21; NRS 11.220, 360.660.

20. Statutes; Taxation.
If a statute be either a special or local law, or both, and comes within any one or more of the cases enumerated in constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes, such statute is unconstitutional. Const. art. 4, §§ 20, 21.

21. Statutes.
If statute be special or local, or both, but does not come within any of the cases enumerated in constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes, then its constitutionality depends upon whether a general law can be made applicable. Const. art. 4, §§ 20, 21.

22. Statutes; Taxation.
First inquiry when determining whether law violates constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes is whether the legislation is general or whether it is special or local. Const. art. 4, §§ 20, 21.

23. Statutes; Taxation.
Law is "general," therefore rendering constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes inapplicable, if it is operative alike upon all persons

similarly situated, but need not be applicable to all counties in the state. Const. art. 4, §§ 20, 21.

24. STATUTES; TAXATION.
Law is "general," therefore rendering constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes inapplicable, when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction. Const. art. 4, §§ 20, 21.

25. STATUTES; TAXATION.
Purpose underlying requirement under constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes that all laws shall be general is that when a statute affects entire state, it is more likely to have been adequately considered by all members of Legislature, whereas localized statute is not apt to be considered seriously by those who are not affected by it. Const. art. 4, §§ 20, 21.

26. STATUTES; TAXATION.
Law is considered "local" under constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes if it operates over a particular locality instead of over the whole territory of the state. Const. art. 4, §§ 20, 21.

27. STATUTES; TAXATION.
Law is considered "special legislation" under constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes if it confers particular privileges or imposes peculiar disabilities, or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected, from the general body of those who stand in precisely the same relation to the subject of the law. Const. art. 4, §§ 20, 21.

28. MUNICIPAL CORPORATIONS; STATUTES.
Local Government Tax Distribution Account was general law, as required to defeat City's claim that tax distribution legislation was unconstitutional under state constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes; City was not singled out in legislation, but rather was classified with similarly situated local governments. Const. art. 4, §§ 20, 21; NRS 360.660.

29. MUNICIPAL CORPORATIONS; STATUTES.
Distribution classifications under Local Government Tax Distribution Account applied uniformly to all entities that were similarly situated, and Legislature had legitimate government purpose for enacting different classifications, as required to defeat City's claim that tax distribution legislation was unconstitutional under state constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes; tax distribution legislation did not specify recipients, but rather had different formulas it used for any entity that fell within that classification, and classifications that Legislature used when enacting legislation were rationally related to achieve its legitimate government interests of promoting general-purpose governments. Const. art. 4, §§ 20, 21; NRS 360.660.

30. STATUTES; TAXATION.
When classification applies prospectively to all counties that might come within its designated class, it is neither local nor special under constitutional provision prohibiting Legislature from passing local or special laws for assessment and collection of taxes, but legislative classification still must be rationally related to the subject matter and must not create odious or absurd distinctions to be constitutional. Const. art. 4, §§ 20, 21.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

The Nevada Constitution prohibits the Legislature from passing local or special laws "[f]or the assessment and collection of taxes for state, county, and township purposes," Nev. Const. art. 4, § 20, and further requires that "[i]n all cases enumerated in [Section 20], and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." Nev. Const. art. 4, § 21; *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 310, 255 P.3d 247, 253-54 (2011). Here, we are asked to decide whether the Local Government Tax Distribution Account under NRS 360.660 is special or local legislation in violation of Sections 20 and 21 of the Nevada Constitution. We conclude that the district court properly found the Local Government Tax Distribution Account to be general legislation. Accordingly, we affirm the district court's order granting summary judgment.

I.

A.

Some background on the C-Tax system is needed to make sense of the legal issues presented by this appeal. In 1997, the Legislature enacted the Local Government Tax Distribution Account, referred to as the C-Tax. 1997 Nev. Stat., ch. 660, § 1, at 3278. The C-Tax is designed to fund local governments and their corresponding entities by "creat[ing] a system that would be a little bit more responsive to where growth is occurring within each one of the counties." Hearing on S.B. 254 Before the Senate Comm. on Government Affairs, 69th Leg. (Nev., March 31, 1997). The C-Tax replaced a series of different systems; "some of [the previous systems] dealt with population solely, some of them dealt with assessed valuations, some of them included counties, some of them excluded counties, and various combinations in between." *Id.* Under previous systems, new cities would emerge to take advantage of their share in revenues without necessarily providing any benefit to the public. The previous systems also created an atmosphere of competition instead of cooperation. For example, before the C-Tax, "if one entity was to dissolve and be absorbed by another . . . the allowed revenues that they had from various taxes would otherwise go away" instead of allowing entities to receive the revenues from assuming new responsibilities. *Id.*

To eliminate these inefficiencies, the Legislature "consolidate[d] a series of six different distribution formulas into one that . . . is also

more responsive to growth . . . and in the long run, proves to be a more simplified and effective way of distributing the six revenues." *Id.* It is from this consolidation that the C-Tax derives its name: the Consolidation Tax. The C-Tax comprises six different tax pools: liquor tax, cigarette tax, real property transfer tax, basic city-county relief tax, supplemental city-county relief tax, and the basic motor vehicle privilege tax.

All of the revenue from the six different tax pools is consolidated into the C-Tax Account, which is regulated by the Department of Taxation. The C-Tax Account is then distributed to local governments under a two-tier system. First, as per the statutory formula, the State disburses revenue to Nevada's 17 counties under the Tier 1 distribution.[1] Second, following a different statutory formula, the counties disburse revenue to qualifying Tier 2 entities in their county. Only three types of entities qualify for a Tier 2 distribution: (1) Enterprise Districts, such as water, sewer, television, and sanitation services; (2) Local Governments, including counties, cities, and towns; and (3) Special Districts, such as fire departments, hospitals, and public libraries. *See* NRS 360.620; NRS 360.650.

Under the Tier 2 distribution system, there are two components: base distributions and excess distributions. NRS 360.680; NRS 360.690. If a Tier 2 entity—such as a county, city, or town—received taxes prior to July 1, 1998, it will continue to receive that same base amount, which increases as per the Consumer Price Index. NRS 360.670. After all of the base amounts are paid, if there is a surplus in the account, it is distributed as an "excess" distribution to the Tier 2 entities (except Enterprise Districts). NRS 360.690. The excess distributions are calculated using a statutory formula that measures changes in population and assessed valuation of taxable property. NRS 360.690(4)-(9).

If a Tier 2 entity—such as a city or a town—did not exist before July 1, 1998, or did exist, but wants to increase its base amount, there are three ways to qualify for an increased C-Tax distribution. First, a new local government is eligible for increased C-Tax distributions if it provides police protection and at least two of the following services: (1) fire protection; (2) construction, maintenance, and repair of roads; or (3) parks and recreation. NRS 360.740. Second, a new local government can assume the functions of another local government (i.e., merger of entities). NRS 354.598747. Third, a new local government can enter into a cooperative "interlocal" agreement with another local government (i.e., taking over services provided by the other local government or agreeing to pay costs). NRS 360.730.

---

[1]Under the C-Tax system, Carson City is treated as a county for purposes of Tier 1 distributions. NRS 360.610.

All three options involve the new local government providing services by either creating or assuming the responsibilities for the services. The Legislature feared that new entities could form and take money away from counties without having "any of the responsibility to share in any of the social parts of government." Hearing on S.B. 254 Before the Senate Comm. on Government Affairs, 69th Leg. (Nev., March 31, 1997). These options demonstrate that the object of the C-Tax was to foster general-purpose governments. Hearing on S.B. 254 Before the Senate Comm. on Government Affairs, 69th Leg. (Nev., April 14, 1997) ("[T]he distribution formula was a deliberate attempt to promote the formation of general-purpose governments, as opposed to special-purpose governments."). The Legislature found general-purpose governments desirable because "of all the little forms of government that we have . . . they can make a conscious decision, on an annual basis, about service levels." Hearing on S.B. 254 Before the Senate Comm. on Government Affairs, 69th Leg. (Nev., March 31, 1997).

B.

When the Legislature enacted the C-Tax system in 1997, Fernley was an unincorporated town, thus qualifying for a Tier 2 distribution as a local government entity. To facilitate the transition between the previous tax system and the C-Tax system, the Legislature "would begin in the base year with the amounts of revenue that [the Tier 2 entities] otherwise would have realized under the former series of distribution formulas." *Id.* Thus, Fernley's initial year of C-Tax distributions—base and excess—were calculated based on its status as an unincorporated town.

In 1998, Fernley began taking the steps required by NRS Chapter 266 to bring about its incorporation. One of the required steps was to submit an incorporation petition, which must include the plans for providing police protection, fire protection, road maintenance, and other governmental services, plus a cost estimate and sources of revenue to pay for those services. Over the next two years, Fernley corresponded with the Department of Taxation to obtain estimates of the C-Tax distributions it would receive if it incorporated. However, the Department of Taxation informed Fernley on multiple occasions that it would not receive increased C-Tax distributions if it did not provide services under NRS 360.740, assume responsibilities of another government, or enter into an interlocal agreement. At the time, Lyon County provided Fernley's fire protection, police protection, and construction, maintenance, and repair of roads, while also funding Fernley's three public parks.

In its incorporation petition, Fernley planned to provide governmental services after it incorporated. However, this plan was contin-

gent upon Lyon County approving an interlocal agreement in which Lyon County would continue providing those services while Fernley negotiated to fund those services. The Committee on Local Government Finance expressed concern about Fernley's plan because the plan depended "largely on how willing and how able the city is to reach an agreement with the County." But, the Committee went on to conclude that "if indeed, the working with the County goes smoothly I think we clearly have the ability to provide the revenues needed for a city [but if] the County says no, go take a walk, then you've got big problems."

Despite notice that its C-Tax distributions may not increase unless it creates, assumes, or enters into an interlocal agreement to provide services, Fernley incorporated on July 1, 2001. Fernley is the only government entity to incorporate after the enactment of the C-Tax. After its incorporation, Fernley neither entered into an interlocal agreement with Lyon County, nor did Fernley create or assume public services. Instead, Lyon County continued to provide Fernley with all of its services.

Although Fernley incorporated as a city, its C-Tax base distribution was first created when Fernley was an unincorporated town. Because Fernley did not create, assume, or enter into an interlocal agreement to provide services, Fernley never became eligible to receive an increase in its C-Tax distribution. Without the increase, Fernley's C-Tax distribution only grew with an adjusted percentage rate to reflect the Consumer Price Index, even though Fernley's population more than doubled. Specifically, Fernley's population grew from 8,000 people in 1997 to 19,000 people in 2015, which accounts for 36 percent of Lyon County's population.

Fernley argues that it receives far less revenue than other cities that are similar in population and assessed valuation, such as Mesquite, Boulder City, and Elko. For example, in 2013, Fernley received $133,050.30 in C-Tax distributions, while Mesquite, Boulder City, and Elko received $7,336,084.71, $8,885,664.66, and $13,521,334.12, respectively. Although Fernley maintains that the C-Tax is unfair, Fernley recognizes that cities such as Mesquite, Boulder City, and Elko all provide the traditional general-purpose governmental services, while Fernley does not.

[Headnotes 1, 2]

Before bringing this litigation, in an effort to explore its ability to obtain an increase in its C-Tax distribution, Fernley sought an advisory opinion from the Department of Taxation. In the Department's advisory opinion, dated December 20, 2011, it told Fernley that Fernley is not eligible to create services under NRS 360.740—police protection and two other services—and thereby gain an increase in C-Tax distributions. The Department stated that

the language of NRS 360.740[2] only allows a new local government to create those services within one year of its incorporation.[3] Because Fernley did not create police protection services and two other services within its first year of incorporation in 2001, the Department opined that Fernley could only reach its goal of receiving a C-Tax distribution increase if it assumed the services of another local government or entered into an interlocal agreement. Although Fernley did attempt to assume services or enter into an interlocal agreement with Lyon County, its attempts were unsuccessful. Consequently, Fernley filed its complaint on June 6, 2012, seeking declaratory and injunctive relief for violations of the Separation of Powers Doctrine and the prohibition on special or local legislation under the Nevada Constitution, Article 4, Section 20.[4] On October 6, 2014, the district court entered summary judgment in favor of the State.

II.

[Headnotes 3, 4]

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings

---

[2]The relevant language of the statute is as follows:

> *On or before December 31 of the year immediately preceding the first fiscal year* that the local government or special district would receive money from the Account, a governing body that submits a request pursuant to subsection 1 must: (a) submit the request to the Executive Director; and (b) provide copies of the request . . . .

NRS 360.740(2) (emphasis added).

[3]Although the advisory opinion interpreted NRS 360.740 to only give a one-year window in which Fernley could create services, the State has reversed course in its answering brief on this appeal and now maintains that the advisory opinion was incorrect and that, in fact, the one year runs, not from the date of incorporation, but from the date the city commits to provide services.

[4]Fernley initially sought money damages of $42,670,000, but abandoned that claim on appeal. Nevertheless, Fernley appeals the district court's order awarding costs of $8,489.04 to the State, claiming that it should be immune from an award of costs because its lawsuit involved a good-faith challenge to the C-Tax. This court does not disturb an award of costs absent an abuse of discretion, but does require that the award be authorized by a statute, rule, or contract. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673, 137 P.3d 1110, 1129 (2006). NRS 18.020(3) provides that "[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered, in the following cases: . . . (3) In an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." Also, NRS 18.025 prohibits the district court from reducing or refusing costs solely because the prevailing party is the State. We recognize Fernley's challenge as brought in good faith but cannot conclude under these statutes that the district court abused its discretion in awarding costs to the State. We therefore decline to disturb the cost award.

and evidence demonstrate that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Id.*

A.

The district court granted the State's motion for summary judgment, concluding the complaint was time-barred. It did so based on its holding that NRS 11.220—a default statute of limitations period of four years—applies to Fernley's constitutional claims because "no other specific statute prescribes a different limitations period for those claims."

[Headnotes 5-7]

Under the Nevada Revised Statutes, an action for relief that is not otherwise provided for "must be commenced within 4 years after the cause of action shall have accrued." NRS 11.220. The statute of limitations serves to prohibit suits "after a period of time that follows the accrual of the cause of action." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). "[S]uch limitation periods are meant to provide a concrete time frame within which a plaintiff must file a lawsuit and after which a defendant is afforded a level of security." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 257, 277 P.3d 458, 465 (2012). The public policies embodied in statutes of limitation are important considerations because they "stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Peterson v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 19 (1990).

[Headnote 8]

Although the statute of limitations may time-bar a claim, it does not prohibit this court from reviewing the constitutionality of an enacted statute. *See Black v. Ball Janitorial Serv., Inc.*, 730 P.2d 510, 515 (Okla. 1986) (reaching the merits of a special legislation constitutional challenge even after holding the statute of limitations had passed); *see also State ex rel. State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1409, 148 P.3d 717, 721 (2006) ("[W]e will declare a government action invalid if it violates the Constitution."); *King v. Bd. of Regents of Univ. of Nev.*, 65 Nev. 533, 542, 200 P.2d 221, 225 (1948) ("It is undoubtedly the duty of courts to uphold statutes passed by the legislature, unless their unconstitutionality clearly appears, in which case it is equally their duty to declare them null." (quoting *State v. Arrington*, 18 Nev. 412, 4 P. 735, 737 (1884))).

[Headnotes 9-11]

The Legislature has considerable law-making authority, but it is not unlimited. *Clean Water Coal.*, 127 Nev. at 309, 255 P.3d at 253 (interpreting the constitutionality of legislation under Nev. Const.

art. 4, §§ 20-21); *We the People Nev. ex rel. Angle v. Miller*, 124 Nev. 874, 890 n.55, 192 P.3d 1166, 1177 n.55 (2008). "The Nevada Constitution is the 'supreme law of the state,' which 'control[s] over any conflicting statutory provisions.'" *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014) (quoting *Clean Water Coal.*, 127 Nev. at 309, 255 P.3d at 253). "It is fundamental to our federal, constitutional system of government that a state legislature 'has not the power to enact any law conflicting with the federal constitution, the laws of congress, or the constitution of its particular State.'" *Thomas*, 130 Nev. at 487-88, 327 P.3d at 520-21 (quoting *State v. Rhodes*, 3 Nev. 240, 250 (1867)).

[Headnotes 12-14]

While this court will try to construe statutes to be in harmony with the constitution, if the "statute 'is irreconcilably repugnant' to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment." *Thomas*, 130 Nev. at 488, 327 P.3d at 521 (quoting *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972)). "Statutes are construed to accord with constitutions, not vice versa." *Thomas*, 130 Nev. at 489, 327 P.3d at 521. "If the Legislature could change the Constitution by ordinary enactment, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it." *Id.* at 489, 327 P.3d at 522 (internal quotations omitted). Therefore, "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Id.*

[Headnotes 15, 16]

The statute of limitations applies differently depending on the type of relief sought. *Taxpayers Allied for Constitutional Taxation v. Wayne Cty.*, 537 N.W.2d 596, 599 (Mich. 1995); *Kirn v. Noyes*, 31 N.Y.S.2d 90, 93 (App. Div. 1941) (holding that no statutory limitation applies "when a declaratory judgment will serve a practical end in determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations"). There are two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief. *Tenneco, Inc. v. Amerisure Mut. Ins. Co.*, 761 N.W.2d 846, 862-63 (Mich. Ct. App. 2008). For example, in *Taxpayers Allied*, taxpayers challenged a Michigan tax statute claiming that it exceeded the constitutional limit. 537 N.W.2d at 599. The taxpayers sought a tax refund and also declaratory relief from future application of the allegedly unconstitutional statute. *Id.* However, the county sought to dismiss the taxpayers' challenge, arguing that the one-year statute of limitations period had expired. *Id.* The Michigan Supreme Court distinguished

between the taxpayers' rights to sue for a refund and their ability to sue to prospectively vindicate constitutional rights. *Id.*

> Taxpayers may sue for a refund within one year of the date the tax was assessed. Even if taxpayers cannot obtain refunds for past tax payments exceeding the constitutional limit because they did not dispute them within one year of the date the taxes were assessed, the constitutional right does not disappear because they retain the right to prevent future violations of their rights.

Id. The court concluded that the statutes of limitations applicable to a refund claim did not bar their declaratory judgment claims. *Id.* at 601. Consequently, the one-year statute of limitations under the Michigan statute "does not prevent a taxpayer from seeking to enjoin a governmental unit from imposing on him in the future taxes that violate the [constitution]. To hold otherwise would truncate the constitutional right." *Id.* at 600.[5]

[Headnotes 17, 18]

Here, Fernley challenges the constitutionality of the C-Tax under Article 4, Sections 20 and 21 of the Nevada Constitution and the separation of powers doctrine.[6] Because Fernley was aware at the time of its incorporation in 2001 that its C-Tax base distributions would be calculated as of that date, this court used 2001 as the beginning of its limitations period.[7] In this case, NRS 11.220

---

[5]Although some courts have held that the statute of limitations does apply to declaratory relief, those issues involved a personal injury and not a constitutional challenge to the prospective application of an assertedly invalid statute. *See, e.g.*, *Snyder v. Cal. Ins. Guarantee Ass'n*, 177 Cal. Rptr. 3d 853, 861 (Ct. App. 2014) (seeking declaratory relief to determine if money is owed to plaintiff); *Hill v. Thompson*, 297 S.W.3d 892, 898 (Ky. Ct. App. 2009) (prisoner seeking declaratory relief that his due process rights were violated when he did not receive awards of meritorious good time credit).

[6]We decline to address the merits of Fernley's separation of powers challenge because Fernley, as a political subdivision, does not have standing to sue under the separation of powers doctrine. *See City of Reno v. Washoe Cty.*, 94 Nev. 327, 331-32, 580 P.2d 460, 463 (1978) (refusing to give standing to political subdivisions to enforce constitutional provisions that were not created to protect political subdivisions, but allowing standing for challenges to legislation as a local or special law); *State ex rel. List v. Douglas Cty.*, 90 Nev. 272, 280, 524 P.2d 1271, 1276 (1974), *overruled on other grounds by Att'y Gen. v. Gypsum Res.*, 129 Nev. 23, 294 P.3d 404 (2013) (holding that a political subdivision does not have standing under the Fourteenth Amendment "in opposition to the will of its creator"). Further, the language of the separation of powers provision in the Constitution does not extend any protection to political subdivisions. Nev. Const. art. 3, § 1 ("The powers of the Government of the *State* of Nevada shall be divided into three separate departments . . . ." (emphasis added)).

[7]In 2012, on its first time before this court, the State sought writ relief, which this court granted for the federal constitutional claims. *State, Dep't of Taxation v. First Judicial Dist. Court*, Docket No. 62050 (Order Granting in Part and Denying in Part Petition for a Writ of Mandamus, January 25, 2013). This court

applies to any action for relief that was not specifically provided for. Under NRS 11.220—the catch-all statute of limitations period of four years—Fernley had until July 1, 2005, to file its complaint. Nevertheless, Fernley did not file its complaint until June 6, 2012. Accordingly, the statute of limitations bars Fernley's claim for retrospective relief.

[Headnote 19]

But the statute of limitations does not bar Fernley's claims for injunctive and declaratory relief from an allegedly unconstitutional statute. To hold otherwise would undermine the doctrine of constitutional supremacy. Similar to *Taxpayers Allied*, Fernley originally had two claims for relief: (1) retrospective relief in the form of past money damages that Fernley did not receive from the allegedly unconstitutional C-Tax distributions;[8] and (2) prospective relief in the form of an injunction and declaratory judgment from future application of the allegedly unconstitutional statute. Like *Taxpayers Allied*, where the statute of limitations had already expired for the retrospective relief, 537 N.W.2d at 601, here, the four-year limitations period expired in July 2005—almost seven years before Fernley filed its complaint. Nevertheless, similar to the court in *Taxpayers Allied*, we hold that the failure to file a claim within the statute of limitations period does not render all relief time-barred because claimants retain the right to prevent future violations of their constitutional rights.

B.

Fernley argues that the C-Tax violates Article 4, Sections 20 and 21 of the Nevada Constitution. The district court found that the C-Tax is a general law—therefore rendering Article 4, Sections 20 and 21 inapplicable—because the law applies equally to all similarly situated entities. We agree.

[Headnotes 20-22]

The Nevada Constitution prohibits the Legislature from passing local or special laws "[f]or the assessment and collection of taxes for state, county, and township purposes," Nev. Const. art. 4, § 20, and further requires that "[i]n all cases enumerated in [Section 20], and in all other cases where a general law can be made applicable,

---

held that Nevada's statute of limitations for personal injury claims time-bars Fernley's federal constitutional claims. *Id.* This court acknowledged the City of Fernley's notice of its C-Tax distributions not increasing: "Neither party disputes that, at the time of the City's incorporation in 2001, the City was aware that absent specific circumstances, its base consolidated-tax distributions would be set by its previous distributions and would remain at that level." *Id.*

[8]Although Fernley dropped its claim for retrospective relief on appeal, Fernley still prays for prospective relief.

all laws shall be general and of uniform operation throughout the State." Nev. Const. art. 4, § 21; *Clean Water Coal.*, 127 Nev. at 309, 255 P.3d at 253-54. This court adheres to the following explanation on the prohibition against special or local laws under the Nevada Constitution:

> [I]f a statute be either a special or local law, or both, and comes within any one or more of the cases enumerated in section 20, such statute is unconstitutional; if the statute be special or local, or both, but does not come within any of the cases enumerated in section 20, then its constitutionality depends upon whether a general law can be made applicable.

Clean Water Coal., 127 Nev. at 310, 255 P.3d at 254 (quoting *Conservation Dist. v. Beemer*, 56 Nev. 104, 116, 45 P.2d 779, 782 (1935)). Therefore, the first inquiry is whether the legislation is general or whether it is special or local. *See Youngs v. Hall*, 9 Nev. 212, 218 (1874).

1.

[Headnotes 23-25]

A law is general if it is "operative alike upon all persons similarly situated," but "need not be applicable to all counties in the state." *Id.* at 222. Stated more recently, "[a] law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction." *Clean Water Coal.*, 127 Nev. at 311, 255 P.3d at 254 (quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990)). The purpose underlying the general law requirement "is that when a statute affects the entire state, it is more likely to have been adequately considered by all members of the Legislature, whereas a localized statute is not apt to be considered seriously by those who are not affected by it." *Id.* at 311, 255 P.3d at 254.

[Headnotes 26, 27]

Conversely, a law is considered local "if it operates over 'a particular locality instead of over the whole territory of the State.'" *Att'y Gen. v. Gypsum Res.*, 129 Nev. 23, 28, 294 P.3d 404, 407 (2013) (quoting *Damus v. Cty. of Clark*, 93 Nev. 512, 516, 569 P.2d 933, 935 (1977)). Further, a law is considered "special legislation if it confers particular privileges or imposes peculiar disabilities, or burdensome conditions in the exercise of a common right; upon a class of persons arbitrarily selected, from the general body of *those who stand in precisely the same relation to the subject of the law*." *Clean Water Coal.*, 127 Nev. at 311, 255 P.3d at 254 (emphasis added) (quoting *Colman*, 795 P.3d at 636).

In *Clean Water Coalition*, this court considered whether legislation that required the Clean Water Coalition (CWC)—a political

subdivision of the State—to turn over $62 million to benefit the state general fund was a special or local law in violation of the Nevada Constitution. 127 Nev. at 305, 255 P.3d at 250. The Legislature enacted the law, A.B. 6, Section 18, to confront a statewide budget crisis. *Id.* However, the law only applied to the CWC. *Id.* While drafting the law, "the Legislature found and declared that '[a] general law cannot be made applicable to the provisions of this section because of special circumstances.'" *Id.* at 313, 255 P.3d at 255. This court stated that, while it accords great weight to legislative findings when interpreting a statute, those findings are not binding. *Id.* Nonetheless, regarding A.B. 6, this court found that "[t]he Legislature's express finding and declaration that section 18 is not a general law, however, is consistent with the bill section's text." *Id.* Hence, this court found that A.B. 6, Section 18 was not a general law because it applied only to the CWC. *Id.* at 305, 255 P.3d at 250.

[Headnote 28]

Here, the C-Tax is a general law. Although the Legislature found that "a general law cannot be made applicable for all provisions" of the C-Tax,[9] this court is not bound by the legislative findings, as this court held in *Clean Water Coalition*. Instead, similar to *Clean Water Coalition*, this court may look at the actual text to determine if it is a general law or special or local law. In this case, Fernley does not challenge the C-Tax classifications at the time of its enactment when Fernley was an unincorporated town. At the time of enactment, the C-Tax did not single out Fernley; rather, it made constitutional distinctions to determine C-Tax distributions based on the old tax formula, assessed property values, and population. Fernley has not made the argument that its initial C-Tax distribution as an unincorporated town violates any laws. Instead, Fernley argues that the State's refusal to award more C-Tax distributions to Fernley after its changed status as an incorporated city singles out Fernley and only maintains the status quo of "participants in the system at that time," and should, therefore, be held unconstitutional.

Fernley cites *Clean Water Coalition* for support because Fernley is the only city to have incorporated after the enactment of the C-Tax—making it the only entity to be burdened, like CWC. However, Fernley's situation is distinguishable from the CWC's. Unlike CWC, where it was singled out in the legislation, here, Fernley was

---

[9]The beginning of the C-Tax statute states the following:

> WHEREAS, The legislature finds and declares that *a general law cannot be made applicable* for all provisions of this act because of the economic diversity of the local governments of this state, the unusual growth patterns in certain of those local governments and the special conditions experienced in certain counties related to the need to provide basic services.

S.B. 254, 69th Leg. (Nev. 1997) (emphasis added).

not singled out, but was classified with similarly situated local governments. When Fernley incorporated without creating or assuming services, it singled itself out from increased C-Tax distributions.

2.

[Headnote 29]

The State argues that the distribution classifications apply uniformly to all those entities that are similarly situated, with which the district court agreed. Further, the State contends that under this court's rational basis test, the Legislature had a legitimate government purpose for enacting the C-Tax with different classifications because it wanted to promote general-purpose governments.

Under the Nevada Constitution, Article 4, the validity of a statute "is determined by ascertaining its effect, and not by the number of counties coming within its scope." *Reid v. Woofter*, 88 Nev. 378, 380, 498 P.2d 361, 362 (1972). For example, in *Reid*, this court rejected the argument that a statute violated Sections 20 and 21 because it only applied to certain townships based on population. *Id.* This court concluded that "a statute is not rendered an unconstitutional local or special law merely because it applies to only one or a few areas due to their population, for if there were others of the same population they too would be included." *Id.* The fact that only two counties fell within the statute did not matter because the statute's "operation and effect is so framed as to apply in the future to all counties coming within its designated class" rendering it neither local nor special legislation under Sections 20 and 21. *Id.*

[Headnote 30]

When a "classification applies prospectively to all counties which might come within its designated class, it is neither local nor special." *Clark Cty. ex rel. Cty. Comm'rs v. City of Las Vegas ex rel. Bd. of City Comm'rs*, 97 Nev. 260, 263, 628 P.2d 1120, 1122 (1981). The legislative classification still "must be rationally related to the subject matter and must not create odious or absurd distinctions." *Id.* at 264, 628 P.2d at 1122 (citing *Anthony v. State*, 94 Nev. 338, 341, 580 P.2d 939, 941 (1978)). Thus, in *Clark County*, this court invalidated subsequent amendments to a tax system that specified, rather than classified, recipients. *Id.* Because the tax system, as amended, specified recipients, prospective counties had no classification into which they could fit. *Id.* Therefore, this court invalidated the amendments, rendering the law as it existed prior to the amendments as controlling. *Id.* at 265, 628 P.2d at 1123.

This case most closely resembles *Reid*, where this court classified legislation as general even though it currently affected a small number of counties. Similarly, here, Fernley is the only city to have incorporated after the enactment of the C-Tax, rendering it the only one with an outdated base distribution. Nevertheless, the way that

the C-Tax system is designed, if another town decided to incorporate today without creating or assuming any public services, it would occupy the same position as Fernley. Further, if Fernley created or assumed public services, it could achieve the same classification as the other cities that Fernley compares itself to, such as Boulder City, Mesquite, and Elko. *See* NRS 360.740; NRS 354.598747; *see also supra* note 3 (State concedes this option remains open to Fernley).

Unlike *Clark County*, where the amendments to the tax system specified counties, rather than classified counties, 97 Nev. at 263-64, 628 P.2d at 1122, here, the C-Tax does not specify recipients. Instead, the C-Tax has different formulas it uses for any entity that falls within that classification. NRS 360.690. The classifications that the Legislature used when enacting the C-Tax are rationally related to achieve that end, as required by this court in *Clark County*, 97 Nev. at 264, 628 P.2d at 1122. The Legislature enacted the C-Tax to encourage general-purpose governments that provide public services, such as police and fire protection. Additionally, the Legislature wanted to avoid new local governments that emerge to take advantage of extra tax funds without providing any benefit to its residents.

In this case, Fernley presents the exact situation the Legislature evidently sought to avoid: Fernley incorporated hoping to collect more tax distributions, but it has not provided any new benefits to its residents, beyond those it provided when it was an unincorporated town, nor has it assumed the fiscal responsibility of Lyon County for providing its services. If Fernley did create or assume public services under one or more of the three different methods provided by NRS 360.600 *et seq.*, it would achieve the legislatively set goals and receive the increased C-Tax distributions; having not done so, its C-Tax base distribution stands. Therefore, the C-Tax classifications are rationally related to achieve its legitimate government interests of promoting general-purpose governments.

III.

The C-Tax system is a general law that applies neutrally to local government entities and is based on classifications that are rationally related to achieving the Legislature's legitimate government objective of promoting general-purpose governments that have public services, such as police and fire protection.

We therefore affirm the district court's grant of summary judgment.

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

SHADOW WOOD HOMEOWNERS ASSOCIATION, INC.; AND GOGO WAY TRUST, APPELLANTS, *v.* NEW YORK COMMUNITY BANCORP, INC., RESPONDENT.

No. 63180

January 28, 2016 366 P.3d 1105

Appeal from a district court order granting summary judgment in a quiet title and declaratory relief action. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

Holder of note and first deed of trust for condominium brought action against homeowners' association and purchaser at association lien foreclosure sale for declaratory relief and to quiet title, and association and purchaser counterclaimed for declaratory relief and to quiet title. The district court granted summary judgment to holder. Association and purchaser appealed. The supreme court, PICKERING, J., held that: (1) courts retain equitable authority to consider quiet title actions when foreclosure deed contains conclusive recitals, (2) genuine issues of material fact as to competing equities precluded summary judgment, and (3) genuine issues of material fact as to whether purchaser was bona fide precluded summary judgment.

Vacated and remanded.

Holland & Hart LLP and *Patrick John Reilly*, Las Vegas; *Alessi & Koenig, LLC*, and *Bradley D. Bace*, Las Vegas; *Tharpe & Howell* and *Ryan M. Kerbow*, Las Vegas, for Appellant Shadow Wood Homeowners Association, Inc.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Las Vegas, for Appellant Gogo Way Trust.

Brooks Hubley LLP and *Gregg A. Hubley*, Las Vegas; *Pite Duncan, LLP*, and *Kenitra A. Cavin*, Las Vegas, for Respondent.

1. JUDGMENT.
   A court will not always grant summary judgment in an action seeking equitable relief simply because there is no dispute as to the facts; if relief seems inappropriate, or the judge desires a fuller development of the circumstances of the case, the judge is free to refuse to grant the motion.
2. APPEAL AND ERROR.
   Even though equitable relief is sought, review of a summary judgment ruling remains de novo.
3. JUDGMENT.
   If genuine issues of fact exist, summary judgment must be denied in a proceeding for equitable relief. NRCP 56.
4. QUIETING TITLE.
   A person who brings a quiet title action may, consistent with statutes regarding actions concerning property and long-standing equitable juris-

prudence, invoke the court's inherent equitable powers to resolve the competing claims to such title. NRS 40.005 *et seq*.

5. Statutes.
The Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute.

6. Statutes.
Statutes in derogation of the common law are strictly construed.

7. Common Interest Communities.
Courts retain the equitable authority to consider quiet title actions when a homeowners' association's foreclosure deed contains statutorily conclusive recitals. NRS 116.31166 (2013).

8. Common Interest Communities.
Demonstrating that a common-interest community association sold a property at its nonjudicial foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression.

9. Judgment.
Genuine issues of material fact as to competing equities precluded summary judgment to holder of note and first deed of trust for condominium on its action to quiet title against homeowners' association and purchaser at association lien foreclosure sale.

10. Common Interest Communities.
Homeowners' association was entitled to more than superpriority lien, which was nine months of assessments not paid by original owner of condominium, that survived first deed of trust foreclosure sale in association's action against holder of note and first deed of trust; holder became owner after foreclosing its first deed of trust, and holder was obligated to pay monthly assessments as they came due after foreclosure. NRS 116.3116(2) (2013).

11. Appeal and Error.
Purchaser of condominium at homeowners' association lien foreclosure sale did not waive for appeal its argument that it was bona fide purchaser in action to quiet title by holder of note and first deed of trust; purchaser was party before the district court claiming right to property, which placed its status as potentially innocent third party that would have been harmed by setting aside foreclosure sale in issue, and the district court's determination that purchaser was not bona fide allowed it to set aside sale without taking into account harm caused to purchaser.

12. Equity.
When sitting in equity, courts must consider the entirety of the circumstances that bear upon the equities, including the status and actions of all parties involved, and including whether an innocent party may be harmed by granting the desired relief.

13. Judgment.
Genuine issues of material fact as to whether purchaser of condominium at homeowners' association lien foreclosure sale was bona fide purchaser precluded summary judgment to holder of note and first deed of trust on its action to quiet title against association and purchaser. NRS 116.31162(1), 116.31164(3)(a).

14. Vendor and Purchaser.
A subsequent purchaser is bona fide under common-law principles if it takes the property for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would

be indicated and from which notice would be imputed to purchaser, if he or she failed to make such inquiry.

15. Mortgages.
When a trustee or homeowners' association forecloses on and sells a property pursuant to a power of sale granted in a deed of trust, it terminates the owner's legal interest in the property. NRS 116.31162(1), 116.31164(3)(a).

16. Common Interest Communities.
If a homeowners' association forecloses on its superpriority lien portion of its delinquent assessment lien, the sale would extinguish other subordinate interests in the property. NRS 116.3116 (2013).

17. Common Interest Communities.
When a homeowners' association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, and without any facts to indicate the contrary, the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser. NRS 116.31162(1), 116.31164(3)(a).

18. Equity.
Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his or her act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

This is an appeal from a district court order setting aside a trustee's deed following a homeowners' association (HOA) assessment lien foreclosure sale. The district court held that NRS 116.3116(2) (2013) limited the HOA lien to nine months of common expense assessments and that the HOA acted unfairly and oppressively in insisting on more than that sum to cancel the sale; that the bid price was grossly inadequate; and that the foreclosure sale buyer did not qualify as a bona fide purchaser for value. The appellants are the HOA and the lien foreclosure sale buyer whose trustee's deed the district court set aside. They argue that NRS 116.31166 (2013), which says that certain recitals in an HOA trustee's sale deed are "conclusive proof of the matters recited," renders such deeds unassailable. We disagree and reaffirm that, in an appropriate case, a court can grant equitable relief from a defective HOA lien foreclosure sale. *E.g.*, *Long v. Towne*, 98 Nev. 11, 639 P.2d 528 (1982). We conclude, though, that the district court erred in limiting the HOA lien amount to nine months of common expense assessments and in resolving on summary judgment the significant issues of fact surrounding the parties' conduct, the HOA lien amount, the foreclo-

sure sale buyer's status, and the competing equities in this case. We therefore vacate and remand.

I.

The parties to this case are the bank that held the note and first deed of trust on the property (respondent New York Community Bank, or NYCB), the HOA (appellant Shadow Wood Homeowners Association, or Shadow Wood), and the buyer at the HOA lien foreclosure sale (appellant Gogo Way Trust). The original homeowner is not a party. She lost the property, a condominium, on May 9, 2011, when NYCB foreclosed on its first deed of trust. At the time NYCB foreclosed, the note securing its first deed of trust had an outstanding balance of $142,000. NYCB acquired the property at foreclosure with a $45,900 credit bid.

The original homeowner also defaulted on the periodic assessments due Shadow Wood ($168.71 per month) for her share of the condominium community's budgeted common expenses. Her defaults led Shadow Wood, in 2008 and 2009, to file a notice of delinquent assessment lien, two notices of default and election to sell, and a notice of sale against her and the property. When NYCB foreclosed, it did not pay off any part of the original homeowner's delinquent assessment lien. As to first deeds of trust like NYCB's, the HOA lien statute, NRS 116.3116 (2013), splits the HOA lien into two pieces: a superpriority piece, which survives foreclosure of the first deed of trust; and a subpriority piece, which does not. *See SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 410 (2014). When NYCB acquired the property via credit bid, it thus took title subject to Shadow Wood's superpriority lien but the subpriority piece of the lien was extinguished.

NYCB not only failed to pay off the superpriority lien, it also did not pay the ongoing HOA monthly assessments as they came due. This led Shadow Wood, on July 7, 2011, to record a new notice of delinquent assessment lien. The new notice listed NYCB as the owner, stated that the lien delinquency was $8,238.87 as of June 29, 2011, and advised that, "[a]dditional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice." Shadow Wood's counsel, Alessi & Koenig, sent a certified letter to NYCB with a copy of the notice of delinquent assessment. The letter advised that "the total amount due may differ from the amount shown on the enclosed lien" and that:

> Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our

> office will assume the debt is valid. If you notify our office in writing within the thirty-day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you.

NYCB did not respond, and on October 13, 2011, Shadow Wood engaged the next step of the HOA lien foreclosure process, recording a notice of default and election to sell (the NOD). Although NYCB had not made any payments to Shadow Wood,[1] the NOD reduced the stated lien delinquency to $6,608.34 as of August 29, 2011. (Mathematics and the record suggest, but do not definitively establish, that Shadow Wood subtracted the original owner's delinquent monthly assessments to the extent they went back further than nine months before the NYCB foreclosure sale.) The NOD advised, "You have the right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses," which "will increase until your account becomes current," and warned that, if not paid, foreclosure sale will follow after 90 days.

After receiving the NOD, NYCB sent Alessi & Koenig (the law firm who acted as Shadow Wood's collection counsel and whom the NOD designated as Shadow Wood's trustee's agent) an email on November 2, 2011, saying, "In order to pay the dues on this property we will need a detailed statement." By December 12, 2011, Alessi & Koenig had not responded to NYCB's November 2, 2011, email or its December 2, 2011, reforwarded follow-up, so NYCB emailed Shadow Wood's management company asking for "a current statement and their W9 so that we can pay the dues." NYCB's title company also sent the management company "a demand which reflects all funds owed by OUR SELLER ONLY and not those funds which might have been owed by the prior owner of the subject property." In response, Alessi & Koenig and Shadow Wood's management firm sent NYCB various, seemingly conflicting documents, which included account history ledgers for the original homeowner and NYCB that listed the monthly assessments and late charges, and summaries that broke down the fees and costs associated with the current and prior lien foreclosure processes, charges not included on the account history ledgers.

By notice of sale (NOS) dated January 18 and recorded January 27, 2012, Shadow Wood scheduled its lien foreclosure sale for February 22, 2012. By then, the stated delinquency had increased

---

[1]At oral argument, NYCB's counsel stated that the bank "typically" would not pay HOA assessments on property acquired by credit bid at foreclosure but, rather, would wait until the bank had a purchaser to buy the property and pay off the HOA assessment lien out of escrow funds.

from $6,608.34 as of the NOD date to $8,539.77 as of the NOS date. As NRS 116.31162(1)(b) (2013) requires, the NOS stated:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, *EVEN IF THE AMOUNT IS IN DISPUTE*.

(Emphasis added.)

On January 31, 2012, NYCB sent Shadow Wood a $6,783.16 check, an amount less than the NOS said was required but which the bank later explained it derived from the account history ledgers. Shadow Wood rejected the check and sent NYCB breakdowns showing $9,017.39 as the current lien amount, consisting of $3,252.39 in unpaid monthly assessments from August 9, 2010, through February 29, 2012, plus fees and charges for publishing and posting of the notice of trustee's sale, recording fees, late fees, title research fees, and the like. Although the breakdowns itemize the charges and provide dates, some going back to 2009 and 2010, before NYCB foreclosed its first deed of trust, they also include parentheticals suggesting the same charges were incurred multiple times, and thus that the charges, or portions of them, were current.

Shadow Wood's lien foreclosure sale proceeded, as scheduled, on February 22, 2012. NYCB did not attend or try to halt the sale, and a third-party buyer, appellant Gogo Way, purchased the property for $11,018.39 in cash. The trustee's deed to Gogo Way recites:

> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.

After the sale, NYCB sued Shadow Wood and Gogo Way, seeking declaratory relief and to quiet title under NRS 40.010. NYCB's first amended complaint alleges that NYCB remained the owner because Shadow Wood did not conduct the sale in good faith and the sale price was commercially unreasonable. Represented jointly by Alessi & Koenig, Shadow Wood and Gogo Way counterclaimed with their own declaratory relief and quiet title claims, in which they alleged that Shadow Wood properly foreclosed based on NYCB's failure to pay assessments and performed all statutory and contractual obligations in conducting the sale, so title vested in Gogo Way.

After discovery, both sides moved for summary judgment. At the district court's suggestion, NYCB supplemented its summary judgment motion to argue that Shadow Wood was only entitled to nine months' worth of HOA assessments, or $1,519.29 (monthly assessments of $168.71 multiplied by 9). The district court granted summary judgment for NYCB and against Shadow Wood and

Gogo Way. It held that, under NRS 116.3116(2) (2013), Shadow Wood could only recover $1,519.29, and found, "based upon the papers and pleadings submitted . . . that Shadow Wood and/or its agents were attempting to profit off of the subject HOA foreclosure by including exorbitant fees and costs that could not be used as the basis for an HOA foreclosure sale in this matter." The district court deemed Shadow Wood's rejection of NYCB's $6,783.16 check "unreasonable and oppressive" and also held that "Gogo Way Trust was not a bona fide purchaser at the subject HOA foreclosure sale." On these bases, the district court set aside Shadow Wood's sale and declared title vested in NYCB. Shadow Wood and Gogo Way appeal.

II.

A.

[Headnotes 1-3]

Summary judgment may be granted for or against a party on motion therefor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). That an action seeks declaratory or equitable relief does not prevent its adjudication on summary judgment. *See* NRCP 56(a), (b) (declaratory judgment claims may be resolved on summary judgment); 10B Charles Alan Wright et al., *Federal Practice & Procedure: Civil* § 2731 (3d ed. 2014) ("if there are no triable fact issues and the court believes equitable relief is warranted, it is fully empowered to grant it on a Rule 56 motion"). This does not mean "that a court always will grant summary judgment in an action seeking equitable relief simply because there is no dispute as to the facts. If relief seems inappropriate, or the judge desires a fuller development of the circumstances of the case, the judge is free to refuse to grant the motion." *Id.* And even though equitable relief is sought, our review remains de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1030 (2005). Finally, "as is true under Rule 56 generally, if genuine issues of fact do exist, summary judgment must be denied in a proceeding for equitable relief." 10B Charles Alan Wright et al., *supra*, § 2731.

B.

Nevada has adopted the 1982 Uniform Common Interest Ownership Act (UCIOA), codifying it as NRS Chapter 116. *See* 1991 Nev. Stat., ch. 245, § 100, at 570. In doing so, the Legislature also enacted unique provisions not contained in the UCIOA setting out the procedures for an HOA's nonjudicial foreclosure of delinquent assessment liens. *See* NRS 116.31162-.31168 (2013), *discussed in SFR*

Invs. Pool 1, 130 Nev. at 745-47, 334 P.3d at 411-12.[2] Among these provisions are NRS 116.31164(3)(a), which mandates that, after an HOA's nonjudicial foreclosure sale, the person who conducted the sale must "[m]ake, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit," and its companion, NRS 116.31166, which states:

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
>
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
>
> (b) The elapsing of the 90 days; and
>
> (c) The giving of notice of sale,
>
> are conclusive proof of the matters recited.
>
> 2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. . . .

NRS 116.31166(1)-(2) (2013).

The Gogo Way trustee's deed contains recitals that NRS 116.31166 deems "conclusive," to wit: "Default" occurred; and, "All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with." Shadow Wood and Gogo Way maintain that, under NRS 116.31166, recitals such as these bar any post-sale challenge regardless of basis, whether it disputes the HOA's compliance with the statutory default, notice, and timing requirements or, as here, seeks to set aside the sale for equity-based reasons. If true, this interpretation would call into question this court's statement in *Long v. Towne*, that a common-interest community association's nonjudicial foreclosure sale may be set aside, just as a power-of-sale foreclosure sale may be set aside, upon a showing of grossly inadequate price plus "fraud, unfairness, or oppression." 98 Nev. at 13, 639 P.2d at 530 (citing *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere inadequacy of price, it may be if the price is grossly inadequate and there is "in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" (internal quotation omitted))).

As a textual matter, the deed recitals to which NRS 116.31166 accords conclusive effect do not relate to the deficiencies NYCB

---

[2]The 2015 Legislature revised Chapter 116 substantially. 2015 Nev. Stat., ch. 266. Except where otherwise indicated, the references in this opinion to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2011 and 2012, when the events giving rise to this litigation occurred.

alleges. The "conclusive" recitals concern default, notice, and publication of the NOS, all statutory prerequisites to a valid HOA lien foreclosure sale as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and give context to NRS 116.31166. *Cf. Bourne Valley Court Tr. v. Wells Fargo Bank, N.A.*, 80 F. Supp. 3d 1131, 1135 (D. Nev. 2015) (holding that under NRS 116.31166, when a foreclosure deed recited that there was a default, the proper notices were given, the appropriate amount of time elapsed between notice of default and sale, and the notice of sale was given, it was "'conclusive proof' that the required statutory notices were provided"). But NYCB does not dispute that it defaulted, at least as to the superpriority piece of the original homeowner's lien, or that Shadow Wood complied with the notice and publication requirements of NRS 116.31162 through NRS 116.31164. NYCB's claim is that Shadow Wood acted unfairly, oppressively, perhaps even fraudulently by overstating its lien delinquency, rejecting a valid tender of the amount due, and selling the property at foreclosure for a grossly inadequate price. And, while it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default justifying foreclosure when, in fact, no default occurred, such a reading would be "breathtakingly broad" and "is probably legislatively unintended." 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:22 (6th ed. 2014). We decline to give the default recital such a broad and unprecedented reading, particularly since Shadow Wood and Gogo Way cite no germane authority in its support. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court will not consider arguments not cogently stated or supported with relevant authority).

History and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166. At common law, courts possessed inherent equitable power to consider quiet title actions, a power that required no statutory authority. *See MacDonald v. Krause*, 77 Nev. 312, 317, 362 P.2d 724, 727 (1961) ("It has always been recognized that equity has inherent original jurisdiction of bills to quiet title to property and to remove a cloud from the title."); *Robinson v. Kind*, 23 Nev. 330, 47 P. 977, 978 (1897) (recognizing the "well-settled rules that an action to quiet title is a suit in equity") (internal quotation omitted). Thus, in *Low v. Staples*, 2 Nev. 209 (1866), this court determined that, notwithstanding the then-existing statutory requirement that a quiet title plaintiff must be in possession of the property, *see* Compiled Laws State of Nev., tit. VIII, ch. 3, § 256, at 372 (1873), a plaintiff not in possession still may seek to quiet title by invoking the court's inherent

equitable jurisdiction to settle title disputes. *Low*, 2 Nev. at 211-13. In so holding, the court explained:

> The plaintiff seeks a remedy which courts of equity have always granted independent of any statute, where a proper case was made out. The relief sought is a decree to compel certain persons to execute deeds of conveyance to the plaintiff, and to remove a cloud from his title. That it requires no statutory provisions to enable a court of equity to award relief in such cases, there can be no doubt.

Id. at 211.

[Headnote 4]

In 1912, the Legislature adopted statutes to govern quiet title actions that largely stand today. *Compare* Revised Laws of Nev., ch. 62, §§ 5514-5526 (1912), *with* NRS 40.010-.130. And in *Clay v. Scheeline Banking & Trust Co.*, the court recognized that the statute authorizing a person to bring a quiet title claim against another who claims adversely, now numbered NRS 40.010, essentially codified the court's existing equity jurisprudence, stating that "there is practically no difference in the nature of the action under our statute and as it exists independent of statute." 40 Nev. 9, 16-17, 159 P. 1081, 1082 (1916). So, a person who brings a quiet title action may, consistent with NRS Chapter 40 and our long-standing equitable jurisprudence, invoke the court's inherent equitable powers to resolve the competing claims to such title.

The Legislature borrowed NRS 116.31166's conclusive recital language from NRS 107.030(8), which it enacted in 1927 to govern power-of-sale foreclosures. A.B. 131, 33d Leg. (Nev. 1927); 1927 Nev. Stat., ch. 173, § 2, at 295; Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg. (Nev., May 23, 1991) & Exhibit C (conversion table matching up each component of the Nevada bill with its UCIOA counterpart providing that the section that became NRS 116.31166 had no UCIOA equivalent, but was explained as: "Deed recitals in assessment lien foreclosure sale. *See* NRS 107.030(8)."). The conclusive recital provisions in NRS 107.030(8) have never been argued to carry the preemptive effect that Shadow Wood and Gogo Way attribute to NRS 116.31166. While not directly addressing the preemption argument Shadow Wood and Gogo Way make as to NRS 116.31166, our post-NRS 107.030(8) cases reaffirm that courts retain the power, in an appropriate case, to set aside a defective foreclosure sale on equitable grounds. *See Golden v. Tomiyasu*, 79 Nev. at 514, 387 P.2d at 995 (adopting the California rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale legally made; there must be in addition proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy

of price" (quoting *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App. 1955))); *McLaughlin v. Mut. Bldg. & Loan Ass'n*, 57 Nev. 181, 191, 60 P.2d 272, 276 (1936) (noting that, in the context of an action to recover possession of a property after a trustee sale, "[h]ad the conduct of the trustee and respondent, in connection with the sale, been accompanied by any actual fraud, deceit, or trickery, a more serious question would be presented"); *see also Nev. Land & Mortg. Co. v. Hidden Wells Ranch, Inc.*, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967) ("In the proper case, the trial court may set aside a trustee's sale upon the grounds of fraud or unfairness."). And, cases elsewhere to have addressed comparable conclusive- or presumptive-effect recital statutes confirm that such recitals do not defeat equitable relief in a proper case; rather, such recitals are "conclusive, *in the absence of grounds for equitable relief*." *Holland v. Pendleton Mortg. Co.*, 143 P.2d 493, 496 (Cal. Ct. App. 1943) (emphasis added); *see Bechtel v. Wilson*, 63 P.2d 1170, 1172 (Cal. Ct. App. 1936) (distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale); *compare* 1 Grant S. Nelson, *Real Estate Finance Law*, *supra*, § 7:23, at 986-87 ("After a defective power of sale foreclosure has been consummated, mortgagors and junior lienholders in virtually every state have an equitable action to set aside the sale.") (footnotes omitted), *with id.* § 7:22, at 980-82 (noting that "[m]any states have attempted to enhance the stability of power of sale foreclosure titles by enacting a variety of *presumptive statutes*"), *and* 6 Baxter Dunaway, *Law of Distressed Real Estate*, § 64:161 (2015) (noting that a trustee's deed recital can be overcome on a showing of actual fraud).

[Headnotes 5-7]

The Legislature is "presumed not to intend to overturn long-established principles of law" when enacting a statute. *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010) (internal quotation omitted). Also, this court strictly construes statutes in derogation of the common law, *Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1180 (1988), and has been instructed to apply "principles of law and equity, including . . . the law of real property," to NRS Chapter 116. NRS 116.1108. The long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action, the fact that the recitals made conclusive by operation of NRS 116.31166 implicate compliance only with the statutory prerequisites to foreclosure, and the foreign precedent cited under which equitable relief may still be available in the face of conclusive recitals, at least in cases involving fraud, lead us to the conclusion that the Legislature, through NRS

116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals. We therefore reject Shadow Wood's and Gogo Way's contention that NRS 116.31166 defeats, as a matter of law, NYCB's action to set aside the trustee's deed and to quiet title in itself.

C.

[Headnote 8]

The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating the burden of proof rests with the party seeking to quiet title in its favor). As discussed above, demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression. *Long*, 98 Nev. at 13, 639 P.2d at 530.

[Headnote 9]

NYCB failed to establish that the foreclosure sale price was grossly inadequate as a matter of law. NYCB compares Gogo Way's purchase price, $11,018.39, to the amount NYCB bought the property for at its foreclosure sale, $45,900.00. Even using NYCB's purchase price as a comparator, and adding to that sum the $1,519.29 NYCB admits remained due on the superpriority lien following NYCB's foreclosure sale, Gogo Way's purchase price reflects 23 percent of that amount and is therefore not obviously inadequate. *See Golden*, 79 Nev. at 511, 387 P.2d at 993 (noting that even where a property was "sold for a smaller proportion of its value than 28.5%," it did not justify setting aside the sale); *see also* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997) (stating that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value[, g]enerally . . . a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount").[3]

[3]Although not argued by NYCB, the record includes an unauthenticated appraisal of the property setting its value at $53,000. The $11,018.39 sale price is slightly more than 20 percent of that estimate, so it does not affect the analysis in the text. *See also* Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (stating that "courts can properly take into account the fact that the value shown on a recent appraisal is not necessarily the same as the property's fair market value on the foreclosure sale date").

[Headnote 10]

Other than the sale price, NYCB focuses on the actions of Shadow Wood and its counsel, Alessi & Koenig, which NYCB submits amounted to fraud, unfairness, or oppression that, combined with the inadequate price, justify setting aside the sale. NYCB focuses on Shadow Wood's alleged overstatement of its lien amount. The district held that Shadow Wood was limited to the superpriority lien that survived its first deed of trust foreclosure sale, which NYCB asserts was capped at $1,519.29, or nine months of $168.71 monthly assessments. NYCB persuaded the district court to find, as a matter of law, that Shadow Wood's actions in trying to collect more than $1,519.29 from NYCB were "unreasonable and oppressive" and justified the district court in setting aside the sale.

NYCB's argument does not account for the fact that, after foreclosing its first deed of trust, NYCB became the owner of the property. Its foreclosure sale extinguished Shadow Wood's subpriority lien, eliminating the original owner's monthly assessment arrearages going back further than the nine months accorded superpriority status by NRS 116.3116(2) (2013). But NYCB's foreclosure did not absolve NYCB of its obligation, as the new owner, to pay the monthly HOA assessments as they came due, which it failed to do. The lien delinquency breakdowns that Shadow Wood sent NYCB charged NYCB with monthly assessments from August 9, 2010, through February 29, 2012. NYCB foreclosed its deed of trust on May 9, 2011, so Shadow Wood went back nine months, to August 9, 2010, to calculate NYCB's superpriority monthly assessment delinquency of $1,519.29. To this sum, though, Shadow Wood properly added the monthly assessments NYCB owed as owner on an ongoing basis, from June 9, 2011, projected through February 2012, when the Shadow Wood foreclosure sale occurred, which effectively doubles the monthly assessment delinquency. In holding that Shadow Wood acted unfairly and oppressively in seeking to collect more than $1,519.29, the district court erred, since it excluded the ongoing monthly assessments due from NYCB as owner.[4]

NYCB's analysis also does not adequately defend its complete exclusion of all fees and costs associated with Shadow Wood's foreclosure of its lien, even fees and costs incurred after NYCB became the owner of the property. The omission is understandable, given the district court's holding that Shadow Wood was limited as a matter of law to $1,519.29. The question of whether and, if so, to what extent

[4]The Shadow Wood breakdown sets out $3,252.39 as the monthly assessment delinquency from August 9, 2010, through February 29, 2012. The record does not explain the math that produced this number. Nineteen months of assessments, assuming the split month is included, works out to $3,205.49.

costs and fees are recoverable in the context of an HOA superpriority lien is open, particularly as to foreclosures that pre-date the 2015 amendments to NRS Chapter 116. But here, because the parties did not develop in district court what the fees and costs represent, when they were incurred, their (un)reasonableness, and the impact, if any, of Shadow Wood's covenants, conditions and restrictions (CC&Rs) on their allowance,[5] we leave this issue to further development in the district court on remand.

The district court erred in simply stopping at its conclusion that Shadow Wood was entitled only to nine months' worth of assessments. None of the parties, most importantly NYCB, whom the district court found carried its burden to show no genuine issues of material fact existed and that it therefore was entitled to judgment as a matter of law, point to uncontroverted evidence in the record to show exactly what Shadow Wood was entitled to post-NYCB's foreclosure sale and up until the association foreclosure sale, leaving that amount surrounded by issues of fact and not a proper basis upon which to enter summary judgment. *Anderson v. Heart Fed. Sav. & Loan Ass'n*, 256 Cal. Rptr. 180, 189 (Ct. App. 1989) (reversing grant of summary judgment where there remained triable issues of fact as to the amount actually owed to the trustee and thus as to whether the tender was sufficient).

As further evidence of the oppression and unfairness, NYCB points to the inconsistent lien amounts provided by Shadow Wood, through Alessi & Koenig, from the time it filed the 2011 notice of delinquent assessment to the time it actually sold the property to Gogo Way.[6] The recorded instruments and communications between the parties indeed demonstrate that Shadow Wood and its counsel provided varying lien amounts to NYCB throughout the foreclosure process, conduct that, if it rose to the level of misrepresentations and nondisclosures that indeed prevented NYCB's ability to cure the default, might support setting aside the sale. *Cf. In re Tome*, 113 B.R. 626, 636 (Bankr. C.D. Cal. 1990) (holding that where the security interest holder had not notified the borrower that it had purchased the interest, it was bound by the previous holder's provision of inaccurate information to the borrower concerning the amount due to halt the foreclosure sale and that such inaccurate information supported setting aside the sale).

---

[5]The record on appeal does not include the complete CC&Rs. Allegedly, section 4.01 of the CC&Rs reads as follows:

> The annual and special assessments, together with interest, costs and reasonable attorney's fees, shall be a charge on the Condominium Unit and shall be a continuing lien upon the Condominium Unit against which such assessment is made.

[6]NYCB does not argue that it invoked NRS 116.3116(8) (2013), so our analysis does not take this statute into consideration.

Against these inconsistencies, however, must be weighed NYCB's (in)actions. The NOS was recorded on January 27, 2012, and the sale did not occur until February 22, 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount, yet it did not attend the sale, request arbitration to determine the amount owed, or seek to enjoin the sale pending judicial determination of the amount owed. The NOS included a warning as required by NRS 116.311635(3)(b):

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, *EVEN IF THE AMOUNT IS IN DISPUTE*. YOU MUST ACT BEFORE THE SALE DATE.

(Emphasis added.) In addition to the required warning, Shadow Wood's NOS listed the lien amount as $8,539.77. For whatever reason, NYCB tendered only $6,783.16.

Taken together, the record demonstrates too many unresolved issues of material fact for the district court to assess the competing equities in this case as between Shadow Wood and NYCB on the summary judgment record assembled.

D.

[Headnote 11]

There also remain issues surrounding Gogo Way's putative status as a bona fide purchaser and its bearing on the equitable relief requested. NYCB argues that Gogo Way waived its presently made bona fide purchaser argument because it relied below on NRS Chapter 645F's bona fide purchaser provisions, rather than the common-law-based argument it makes on appeal. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (stating points not urged in the trial court generally are deemed waived on appeal).

[Headnote 12]

When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities. *See, e.g.*, *In re Petition of Nelson*, 495 N.W.2d 200, 203 (Minn. 1993) (considering whether the totality of the circumstances supported granting equitable relief to set aside a sale when the former owner had failed to act during the redemption period); *see also La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (remanding for reconsideration of a district court's decision granting a permanent injunction because the district court's analysis did not discuss a fact relevant to the weighing of the equities); *Murray v. Cadle Co.*, 257 S.W.3d 291, 301 (Tex. App. 2008) (considering the totality of the circumstances to determine whether to uphold the

lower court's equitable subrogation decision); *Savage v. Walker*, 969 A.2d 121, 125 (Vt. 2009) (noting trial courts should consider the totality of the circumstances to determine if a constructive trust, an equitable remedy, was warranted). This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.[7] *Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *see also In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.").

Here, Gogo Way was a party before the district court in this quiet title action, claiming a right to the property as the foreclosure purchaser to whom the deed had been delivered. So, its status as a potentially innocent third party that would be harmed by setting aside the foreclosure sale and placing title back with NYCB was in issue. In fact, the district court's determination that Gogo Way was not a bona fide purchaser allowed it to set aside the sale and quiet title in NYCB's favor without taking into account the harm that would cause Gogo Way, as the order reflects no further discussion of Gogo Way beyond that summary determination. Therefore, we find the issue of whether Gogo Way was an innocent purchaser who took the property without any knowledge of the pre-sale dispute between NYCB and Shadow Wood was sufficiently in controversy before the district court, and indeed formed the basis of a major aspect of the district court's decision, such that the issue was not waived.

[Headnotes 13, 14]

A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also Moore v. De Bernardi*, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of

[7]Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS 40.060. *Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive."). Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. *Fair v. Howard*, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); *see also Poole v. Watts*, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

As to notice, NYCB submits that "the simple fact that the HOA trustee is attempting to sell the property, and divest the title owner of its interest, is enough to impart constructive notice onto the purchaser that there may be an adverse claim to title." Essentially, then, NYCB would have this court hold that a purchaser at a foreclosure sale can never be bona fide because there is always the possibility that the former owner will challenge the sale post hoc. The law does not support this contention.

[Headnotes 15-17]

When a trustee forecloses on and sells a property pursuant to a power of sale granted in a deed of trust, it terminates the owner's legal interest in the property. *Charmicor, Inc. v. Bradshaw Fin. Co.*, 92 Nev. 310, 313, 550 P.2d 413, 415 (1976). This principle equally applies in the HOA foreclosure context because NRS Chapter 116 grants associations the authority to foreclose on their liens by selling the property and thus divest the owner of title. *See* NRS 116.31162(1) (providing that "the association may foreclose its lien by sale" upon compliance with the statutory notice and timing rules); NRS 116.31164(3)(a) (stating the association's foreclosure sale deed "conveys to the grantee all title of the unit's owner to the unit"). And if the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property. *SFR Invs.*, 334 P.3d at 412-13. So, when an association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary, the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, the basis of which is unknown to that purchaser.

That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title. And NYCB points to no other evidence indicating that Gogo Way had notice before it purchased

the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale, or that Gogo Way knew or should have known that Shadow Wood claimed more in its lien than it actually was owed, especially where the record prevents us from determining whether that is true. *Lennartz v. Quilty*, 60 N.E. 913, 914 (Ill. 1901) (finding a purchaser for value protected under the common law who took the property without record or other notice of an infirmity with the discharge of a previous lien on the property). Because the evidence does not show Gogo Way had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further defeats NYCB's entitlement to judgment as a matter of law.

III.

[Headnote 18]

"Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." *Nussbaumer v. Superior Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971). NYCB did not tender the amount provided in the notice of sale, as statute and the notice itself instructed, and did not meet its burden to show that no genuine issues of material fact existed regarding the proper amount of Shadow Wood's lien or Gogo Way's bona fide status. Though perhaps NYCB could prove its claim at trial by presenting sufficient evidence to demonstrate that the equities swayed so far in its favor as to support setting aside Shadow Wood's foreclosure sale, NYCB did not prove that it was entitled to summary judgment on the matter. *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013).

We therefore vacate the district court's judgment and remand.

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