ISRAEL BAIGUEN, an Individual, Appellant, *v.* HARRAH'S LAS VEGAS, LLC, a Nevada Domestic Limited Liability Corporation, dba HARRAH'S CASINO HOTEL, LAS VEGAS; and CAESARS ENTERTAINMENT CORPORATION, a Nevada Foreign Corporation, dba HARRAH'S CASINO HOTEL, LAS VEGAS, Respondents.

No. 70204

September 13, 2018 426 P.3d 586

Appeal from summary judgment in a tort action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Affirmed.

The Galliher Law Firm and *Jeffrey L. Galliher*, Las Vegas; *Law Offices of Steven M. Burris, LLC*, and *Steven M. Burris* and *Adrian A. Karimi*, Las Vegas, for Appellant.

Fisher & Phillips LLP and *Scott M. Mahoney*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

The Nevada workers' compensation system provides the exclusive remedy an employee has against his or her employer for a work-related injury. This case requires us to decide whether an injury arising from an employer's failure to provide medical assistance to an employee suffering a stroke arose out of and in the course of the employment. We hold that it did. Because an employee's sole remedy for such an injury is workers' compensation, we affirm summary judgment for the employer.

I.

Israel Baiguen was suffering a stroke when he arrived for work as a Harrah's houseperson. Baiguen parked his car in the employee-only parking garage and met with coworkers on the second floor of the garage about 15 minutes before his shift. His coworkers noted that he was drooling and unresponsive to questions. He then went with a coworker to the employee-only clock-in area at the housekeeping office in the basement of Harrah's, where he walked around disoriented, then waited in line to receive his keys and radio for his shift. While Baiguen waited for his keys and radio, his immediate supervisor asked him a question; when Baiguen did not respond, the

coworker said that Baiguen was "not good." Observing that Baiguen was drooling, and that his face was drooping, the supervisor notified a manager that Baiguen was "not fine." The manager told Baiguen that he could not work, and when the coworker volunteered to help Baiguen, the manager allowed the coworker to find Baiguen a ride home.

Baiguen never left the employee-only areas of Harrah's to begin his shift. Two coworkers on the outgoing shift drove Baiguen home, unlocked his front door for him, helped him change clothes, and then left after about 30 minutes. Baiguen remained in the apartment for two days until his girlfriend stopped by, discovered that he was unable to talk and drooling, and drove him to the hospital.

The only FDA-approved treatment for Baiguen's type of stroke at the time was a blood-clot-busting medication called tissue plasminogen activator (t-PA). As a diabetic, Baiguen had an approximately three-hour window after exhibiting stroke symptoms for the t-PA to be administered. When timely administered, t-PA increases by 30 percent the chance that a patient will fully recover from the stroke with minimal or no disability. Even so, t-PA carries a risk of internal bleeding and death; the drug is not a guaranteed fix, but rather a way to help improve a stroke victim's chances of recovery. Baiguen did not receive t-PA following his stroke, because he was not treated within the three-hour window.

Baiguen sued Harrah's in district court for failure to aid him during the "golden window" of diagnostic and treatment opportunity. The district court granted summary judgment to Harrah's, finding that Baiguen's exclusive remedy was workers' compensation, because the injury occurred in the workplace and arose out of his employment with Harrah's. Baiguen appealed and the case was transferred to the court of appeals. The court of appeals reversed. We granted Harrah's petition for review, vacated the decision of the court of appeals, and affirm the district court's summary judgment order.

II.

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the evidence "show[s] 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. "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

The Nevada Industrial Insurance Act (NIIA) provides the exclusive remedy for an employee against his employer when the employee sustains an injury "arising out of and in the course of the

employment." NRS 616A.020(1); *see Wood*, 121 Nev. at 732, 121 P.3d at 1031 ("The NIIA provides the exclusive remedy for employees injured on the job, and an employer is immune from suit by an employee for injuries 'arising out of and in the course of employment.'"). In exchange for the NIIA provisions and protections, covered employees and employers give up their common law remedies and defenses for workplace injuries. NRS 616A.010(3) (workers' compensation is "based on a renunciation of the rights and defenses of employers and employees recognized at common law"); *see also Millersburg Military Inst. v. Puckett*, 260 S.W.3d 339, 341 (Ky. 2008) ("Workers' compensation is a statutory creation under which workers and employers agree to forego common law remedies/liability for workplace injuries . . . ."). Thus, when an employee's injury occurs within the course of the employment and arises out of the employment, the employer is liable under the NIIA, and the employee may not sue the employer in court for negligence.

A.

Baiguen argues that Harrah's failure to respond to his stroke did not occur within the course of his employment, and therefore is not covered by workers' compensation, because he had not clocked in yet and his symptoms prevented him from performing any work duties. "[W]hether an injury occurs within the course of the employment refers merely to the time and place of employment, *i.e.*, whether the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties." *Wood*, 121 Nev. at 733, 121 P.3d at 1032. But there is no requirement that the employee actually be capable of performing job duties or be actively engaged in those job duties at the time of the injury for it to occur in the course of employment. *See, e.g.*, *Dugan v. Am. Express Travel Related Servs. Co.*, 912 P.2d 1322, 1330 (Ariz. Ct. App. 1995) (rejecting employee's argument that she could not be in the course of employment when she was incapacitated due to a brain injury). And even accepting Baiguen's allegation that he did not clock in for work,[1] it remains undisputed that Baiguen was on Harrah's premises at his regularly scheduled time to work and that he was in line to

[1]The parties dispute whether Baiguen clocked in to work. In Harrah's reply to Baiguen's opposition to the motion for summary judgment, Harrah's attached an affidavit from an employee that Baiguen clocked in on the day in dispute. Baiguen refutes this by pointing to evidence not in the record and statements by witnesses who claimed not to know whether Baiguen clocked in. While this may not create a genuine dispute of material fact, *see Wood*, 121 Nev. at 732, 121 P.3d at 1031 (recognizing that the nonmoving party must show more than "that there is some metaphysical doubt" and cannot rely on "gossamer threads of whimsy, speculation, and conjecture"), we need not decide whether it does because the remaining undisputed facts are sufficient to establish that Baiguen's injury occurred in the course of his employment.

receive his radio and keys when Harrah's approved the plan to have two coworkers drive him home.

In *Mirage v. Cotton*, we held that "injuries sustained on the employer's premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred 'in the course of employment.'" 121 Nev. 396, 400, 116 P.3d 56, 58 (2005), *quoting Norpac Foods, Inc. v. Gilmore*, 867 P.2d 1373, 1376 (Or. 1994). There, a woman tripped over a curb and injured her ankle walking from her employer's parking lot to the entrance of the employer's building ten minutes before her shift. *Id.* Here, Baiguen parked in the Harrah's employee lot, walked to an area where employees typically gather before their shift, entered the back area of the building where employees clock in, and got in line to receive his radio and keys as his shift was about to begin. Under *Cotton*, Harrah's alleged failure to aid Baiguen occurred in the course of Baiguen's employment.

B.

Baiguen also argues that his injury did not arise out of his employment. An injury arises out of the employment "when there is a causal connection between the employee's injury and the nature of the work or workplace." *Wood*, 121 Nev. at 733, 121 P.3d at 1032. It is not enough that an employee was at work and suffered an injury. *See Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997) ("merely being at work and suffering an injury" is insufficient to show that the injury arose out of the employment). Rather, "the employee must show that 'the origin of the injury is related to some risk involved within the scope of employment.'" *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 350, 240 P.3d 2, 5 (2010) (quoting *Mitchell v. Clark Cty. Sch. Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005)). If the injury "is not fairly traceable to the nature of the employment or workplace environment, then the injury cannot be said to arise out of the claimant's employment." *Gorsky*, 113 Nev. at 604, 939 P.2d at 1046.

1.

An employee might encounter three types of risks at work: (1) employment; (2) personal; and (3) neutral. *See Phillips*, 126 Nev. at 351, 240 P.3d at 5. Employment risks arise out of the employment. *Id.* They are solely related to the employment and include obvious industrial injuries. *Id.*; *see also* 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 4.01, at 4-2 (rev. ed. 2017) (classic employment risks include "machinery breaking, objects falling, explosives exploding, tractors tipping, fingers getting caught in gears, excavations caving in, and so on" as well as "occupational diseases").

On the other hand, personal risks do not arise out of the employment. *Phillips*, 126 Nev. at 351, 240 P.3d at 6. Personal risks include injuries caused by personal conditions and illnesses, such as falling at work due to "a bad knee, epilepsy, or multiple sclerosis." *Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* Larson, *supra* § 4.02, at 4-2 (examples of personal risks include dying a natural death, the effects of disease or internal weakness, and death by "mortal personal enemy").

Finally, a neutral risk is a risk that is neither an employment risk nor a personal one, such as a fall that is not attributable to premise defects or a personal condition. *Phillips*, 126 Nev. at 351, 240 P.3d at 5; *see also* Larson, *supra* § 4.03, at 4-2 (examples of neutral risks include "hit by a stray bullet out of nowhere, bit by a mad dog, stabbed by a lunatic running amuck," acts of God, and unknown causes). A neutral risk arises out of the employment if the employee was subjected to a greater risk than the general public due to the employment. *See Phillips*, 126 Nev. at 353, 240 P.3d at 7 (adopting the increased-risk test).

Under some circumstances, the risk may be mixed. A mixed risk is "a personal cause and an employment cause combin[ing] to produce the harm." Larson, *supra* § 4.04, at 4-3. A classic example of an injury from a mixed risk is "a person with a weak heart who dies because of strain occasioned by the employment." *Id.* A mixed risk arises out of the employment if the employment risk was a contributing factor in the injury. *Id.*

Both parties agree that Baiguen's employment at Harrah's did not cause his stroke. They disagree, however, about whether Baiguen's alleged injuries in this suit—the lost chance of recovery and the exacerbated effects of his stroke due to delayed medical assistance—constituted a personal risk, a neutral risk, or an employment risk. Baiguen argues that his injuries were a personal risk, and therefore did not arise out of his employment, which would allow him to sue Harrah's in tort and avoid the workers' compensation bar. He alternatively argues that even if it was a neutral risk, the injuries did not arise out of the employment because he faced the same risk that Harrah's would not come to his aid as any other Harrah's guest or visitor. Conversely, Harrah's argues that Baiguen's alleged injury is the lost chance of recovery due to Harrah's alleged failure to properly train employees or obtain medical assistance for Baiguen—an employment risk.

Baiguen urges a neutral risk analysis, but the personal origin of his stroke defies a neutral risk analysis. *See* Larson, *supra* § 7.04(1)(b), at 7-28 ("Whenever personal disease or weakness contributes to the [injury], an entirely new set of rules comes into play, since the risk is no longer neutral but either personal or, perhaps, 'mixed.'"). A neutral risk is a risk that is not related to either a per-

sonal risk or an employment risk; it is not a risk that is a combination of a personal risk and an employment risk. *See id.* § 4.03, at 4-2 (defining neutral risks as "of *neither* distinctly employment *nor* distinctly personal character") (emphasis added). We conclude that Baiguen's alleged injuries are the result of a mixed risk—the personal risk that he could have a stroke, and the employment risk that if he had a stroke at work his employer might fail to render appropriate aid. *See id.* § 4.04, at 4-3.

Baiguen's stroke itself constituted a personal risk. But his claim is not that Harrah's caused his stroke; rather, that its inadequate response to his stroke symptoms cost him his window of treatment opportunity, turning a treatable medical incident into a catastrophic injury. That Harrah's might respond inadequately to Baiguen's stroke in the workplace, due to inadequate workplace policies, procedures, or training, or fail to follow existing policies, procedures, and training, is a risk related to Baiguen's employment. Such inadequate policies, procedures, and training are conditions of the workplace akin to well-recognized physical hazards, like the risk that the injury from a painter's stroke will be worsened by falling off a ladder, or an epileptic cook who suffers a seizure and burns himself on a stove. *See, e.g.*, *Dudley v. Victor Lynn Lines, Inc.*, 161 A.2d 479, 486 (N.J. 1960). Thus, where an injury at work was exacerbated by the absence of (or failure to adhere to) a policy, procedure, or the necessary training to allow other employees to properly respond to such an injury, the workplace contributed to the injury and it arose out of the employment. *Id.* at 487 ("In these situations, the parallel operative facts are (1) a non-work-connected injury, (2) a common-law duty arising in another to take care to procure medical aid, (3) non-procurement of that aid for a reason related to the employment, and (4) resulting [injury].").

For example, in *Dugan*, an employee with a history of heart problems suffered a "heart event" at work. 912 P.2d at 1325. But when her coworkers tried to call 9-1-1 they could not reach the emergency dispatcher, because, unknown to them, the employer had blocked 9-1-1 "in favor of an in-house emergency number." *Id.* Because the coworkers could not summon emergency help, medical assistance was delayed and the employee suffered irreversible brain damage from prolonged oxygen deprivation. *Id.* The court held that "[w]hen an industrial injury aggravates a pre-existing physical condition or combines with the pre-existing condition to produce an additional injurious effect, the employee is entitled to [workers'] compensation for losses attributable to the further harm." *Id.* at 1329. By blocking any calls to 9-1-1, the employer delayed the employee's necessary medical treatment, which aggravated or contributed to the brain injury from the employee's personal heart condition. *Id.*

Similarly, Baiguen alleges that decisions by Harrah's employees exacerbated the effects of his stroke and cost him a 30-percent

chance of recovery by preventing timely administration of the t-PA medicine. Just as the employer's decision in *Dugan* to block 9-1-1 access, Harrah's negligence, if any, was inextricably linked to Harrah's workplace conditions, including its policies, procedures, and training related to recognizing and providing medical assistance for medical events occurring in the workplace.

2.

"In Nevada, as under the common law, strangers are generally under no duty to aid those in peril." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). But "where a special relationship exists between the parties," the law may impose an affirmative duty. *Id.* The relationship between an employer and its employee is one of those special relationships. *Id.* While its exact contours are disputed, the duty, by its very nature, arises out of the employer-employee relationship. *See Handzel v. Kane-Miller Corp.*, 614 N.E.2d 206, 208 (Ill. App. Ct. 1993) (because "there is no duty at common law to provide aid to an injured person . . . [w]hatever duty [the defendants] owed the decedent must necessarily arise out of the employer-employee relationship"). And where the duty is breached, the injury resulting from the breach arises out of the employment. *See Vand. Univ. v. Russell*, 556 S.W.2d 230, 231 (Tenn. 1977) (explaining that an employer's negligent failure to render aid "[w]hen an employee becomes helpless in the course of employment due to illness or other cause not related to his employment" arises out of the employment); *Dudley*, 161 A.2d at 488 ("The breach of the assumed duty was the realization of a risk of the employment in exactly the same way as is a breach of the duty to render or procure emergency medical aid. And, in just the same way, [an injury] resulting from such breach of duty arises out of the employment.").

Baiguen claims that his injury does not arise out of his employment because Harrah's owed him the same duty under our law as any other person on Harrah's premises. *See Lee*, 117 Nev. at 296-97, 22 P.3d at 212 (discussing special relationships that create a duty to render aid to those in peril, such as innkeeper-guest, employer-employee, and restaurateur-patron). Even accepting this assertion as true, it is inapposite given that Baiguen's stroke occurred in an employee-only area and while in the course of his employment. *See Blakeslee v. Platt Bros. & Co.*, 902 A.2d 620, 625 (Conn. 2006) ("Compensability also may not be denied simply because the plaintiff could have been exposed to a similar risk of injury from the administration of aid had he suffered the seizure outside of work."). Baiguen was not a hotel guest or a restaurant patron; he was at Harrah's to work. And when he showed up for work, he remained in areas restricted to employees, where his only opportunity for aid was from his employer, Harrah's, or his coworkers. Under the facts

before us, any duty on Harrah's part to render aid to Baiguen would have arisen out of the employer-employee relationship, not another special relationship such as innkeeper-guest or restaurateur-patron. *See Lee*, 117 Nev. at 296-97, 22 P.3d at 212. Thus, while the NIIA's exclusive remedy provision cannot bar a guest or a patron from suing in court for negligence on facts analogous to these, the NIIA limits an employee's remedy to workers' compensation. *See* NRS 616A.020(1).

Baiguen's injuries occurred in the course of his employment and arose out of his employment such that workers' compensation is his exclusive remedy against Harrah's. We therefore affirm.

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

BANK OF AMERICA, N.A., Successor by Merger to BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOME LOANS SERVICING, LP, Appellant, *v*. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.

No. 70501

September 13, 2018 427 P.3d 113

Appeal from a district court order granting summary judgment to the buyer and denying summary judgment to the first deed of trust holder in a quiet title action following an HOA lien foreclosure sale. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Reversed and remanded.

[Rehearing denied November 13, 2018]

Akerman, LLP, and *Darren T. Brenner, Thera A. Cooper*, and *Vatana Lay*, Las Vegas, for Appellant.

Kim Gilbert Ebron and *Jacqueline A. Gilbert, Howard C. Kim, Zachary Clayton*, and *Jason G. Martinez*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

This is a quiet title dispute between the buyer at an HOA lien foreclosure sale and the holder of the first deed of trust on the prop-

erty. The holder of the first deed of trust tendered the amount needed to satisfy the superpriority portion of the lien to the HOA before the sale but the trustee proceeded with foreclosure anyway. The question presented is whether the buyer took title subject to the first deed of trust. We hold that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust. We therefore reverse the district court's grant of summary judgment for SFR Investments Pool 1, LLC and remand for further proceedings consistent with this opinion.

I.

In 2012, the original owner of 3617 Diamond Spur Avenue (Property) fell behind on his payments to the Sutter Creek Homeowners Association (HOA). The HOA initiated foreclosure proceedings, recording a delinquent assessment lien and a notice of default and election to sell. After receiving notice of the default, Bank of America, the holder of the first deed of trust on the property, contacted the HOA, seeking to clarify the superpriority amount and offering to pay that amount in full. Based on the HOA's representations, Bank of America tendered payment of $720—nine months' worth of assessment fees—to the HOA. The letter included with the tender stated that the HOA's acceptance would be an "express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [Property] have now been 'paid in full.'" The HOA rejected the payment and sold the property at foreclosure to respondent SFR Investments Pool 1, LLC.

After the foreclosure sale, litigation ensued with Bank of America and SFR both claiming title to the Property. On cross-motions for summary judgment, the district court granted summary judgment to SFR and denied summary judgment to Bank of America, from which order Bank of America timely appealed. The case was routed to the court of appeals, which reversed and remanded. SFR then petitioned for review of the decision under NRAP 40B(a), which we granted.

II.

Bank of America argues that its tender was valid and satisfied the superpriority portion of the HOA's lien. SFR responds that the HOA's rejection was in good faith because at the time of the tender it was unsettled as to the amount of the superpriority portion of the lien, and the tender was conditional. SFR also asserts that it is protected as a bona fide purchaser of the property.

The grant or denial of summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other

evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007).

A.

Bank of America asserts that it tendered the correct amount to satisfy the superpriority portion of the HOA lien and that it was not required to do more. A valid tender of payment operates to discharge a lien or cure a default. *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972) ("Common-law and statutory liens continue in existence until they are satisfied or terminated by some manner recognized by law. A lien may be lost by . . . payment or tender of the proper amount of the debt secured by the lien."); *see also* 74 Am. Jur. 2d *Tender* § 41 (2012). Valid tender requires payment in full. Annotation, *Tender as Affected by Insufficiency of Amount Offered*, 5 A.L.R. 1226 (1920). The HOA refused to accept Bank of America's tender, because it did not satisfy both the superpriority and subpriority portions of the lien.

NRS 116.3116 governs liens against units for HOA assessments and details the portion of the lien that has superpriority status. At the time of the tender in 2012, the statute provided that the superpriority portion of an HOA lien was prior to a first security interest on a unit

> to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 [maintenance and nuisance abatement] and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

NRS 116.3116(2) (2012). A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments. We explained as much in *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 748, 334 P.3d 408, 412 (2014), and *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 371, 373 P.3d 66, 72 (2016).[1]

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[1]Citing *Horizons at Seven Hills*, 132 Nev. at 365 n.4, 373 P.3d at 69 n.4, SFR argues for the first time in its petition for review that Bank of America's tender was insufficient because it did not include collection costs and attorney fees. SFR waived this argument, both by failing to raise it timely in district court or on appeal and by failing to cogently distinguish the statutory and regulatory

The record establishes that Bank of America tendered the correct amount to satisfy the superpriority portion of the lien on the property. Pursuant to the HOA's accounting, nine months' worth of assessment fees totaled $720, and the HOA did not indicate that the property had any charges for maintenance or nuisance abatement. Bank of America sent the HOA a check for $720 in June 2012. On the record presented, this was the full superpriority amount.

B.

The district court deemed Bank of America's tender insufficient because it was conditional. It based this finding on the letter Bank of America sent with its payment, which stated,

> This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that [Bank of America]'s financial obligations towards the HOA in regards to the [property] have now been "paid in full."

SFR argues, and the district court found, that this clause imposed an impermissible condition on the tender, as it required the HOA to potentially accept less than the full amount it was due under NRS 116.3116, given that the scope of the superpriority portion of an HOA's lien was not yet clarified at the time of the tender.

In addition to payment in full, valid tender must be unconditional, or with conditions on which the tendering party has a right to insist. 74 Am. Jur. 2d *Tender* § 22 (2012). "The only legal conditions which may be attached to a valid tender are either a receipt for full payment or a surrender of the obligation." *Heath v. L.E. Schwartz & Sons, Inc.*, 416 S.E.2d 113, 114-15 (Ga. Ct. App. 1992); *see also Stockton Theatres, Inc. v. Palermo*, 3 Cal. Rptr. 767, 768 (Ct. App. 1960) (tender of entire judgment with request for satisfaction of judgment was not conditional); *cf. Steward v. Yoder*, 408 N.E.2d 55, 57 (Ill. App. Ct. 1980) (concluding tender with request for accord and satisfaction was conditional, but not unreasonable).

Although Bank of America's tender included a condition, it had a right to insist on the condition. Bank of America's letter stated that acceptance of the tender would satisfy the superiority portion of the lien, preserving Bank of America's interest in the property. Bank of America had a legal right to insist on this. SFR's claim that this

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analysis in *Horizons at Seven Hills*. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (arguments not raised on appeal are deemed waived); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (an appellate court needed not consider claims that are not cogently argued).

made the tender impermissibly conditional because the payment required to satisfy the superpriority portion of an HOA lien was legally unsettled at the time is unpersuasive. As discussed in Section A, a plain reading of NRS 116.3116 indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien. Thus, this issue was not undecided, and Bank of America's tender of the superpriority portion of the lien did not carry an improper condition.

C.

SFR claims that even if Bank of America's tender was valid, the HOA's good-faith rejection because of a belief that Bank of America needed to tender the entire amount of the lien, is a defense to the tender. Bank of America responds that SFR's assertion is speculative because the HOA never gave a reason for its rejection, and thus cannot serve as the basis for summary judgment in SFR's favor.

Bank of America first contacted the HOA for assistance in determining the property's monthly assessment fee so it could pay the superpriority portion of the lien. The HOA responded with a demand that Bank of America pay the entire HOA lien to halt the foreclosure proceedings. Bank of America then tendered nine months of the property's assessment fees, along with a statutory analysis explaining that the amount was sufficient. The HOA returned the check a few weeks later and continued with foreclosure proceedings, giving no explanation for its rejection.

SFR did not present its good-faith rejection argument to the district court. *But see Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that '[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'") (second alteration in original) (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)). The authorities it cites to this court for that proposition do not support it. We therefore reject SFR's claim that the HOA's asserted "good faith" in rejecting Bank of America's tender allowed the HOA to proceed with the sale, thereby extinguishing Bank of America's first deed of trust.

D.

SFR next claims that if Bank of America's tender was valid and cured the default on the superpriority portion of the HOA lien, Bank of America's failure to record its tender or keep the tender good renders it ineffective against SFR.

1.

SFR argues that Bank of America was required to record its tender under either NRS 111.315 or NRS 106.220.[2] Issues of statutory interpretation are questions of law reviewed de novo. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). If a statute is unambiguous, this court does not look beyond its plain language in interpreting it. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). "Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

NRS 111.315 states that "[e]very conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved acknowledged and certified in the manner prescribed in this chapter . . . shall be recorded . . . ." NRS 111.010 defines conveyance as "every instrument in writing, except a last will and testament . . . by which any estate or interest in lands is created, alienated, assigned or surrendered." Thus, when an interest in land is created, alienated, assigned, or surrendered, the instrument documenting the transaction must be recorded.

By its plain text, NRS 111.315 does not apply to Bank of America's tender. Tendering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land. Rather, it *preserves* a pre-existing interest, which does not require recording. *See* Baxter Dunaway, *Interests and Conveyances Outside Acts—Recordable Interests*, 4 L. of Distressed Real Est. § 40:8 (2018) ("[D]ocuments which do not create or transfer interests in land are often held to be nonrecordable; the records, after all, are not a public bulletin board."). SFR's argument that the tender was an instrument affecting real property is unpersuasive. NRS 111.315 pertains to written instruments "setting forth an agreement . . . whereby any real property may be affected . . . *in the manner prescribed in this chapter* . . . ." (Emphasis added.) NRS Chapter 111 governs the creation, alienation, assignment, or surrendering of property interests, and their subsequent recording. Bank of America's tender did not bring about any of these actions, and therefore did not affect the property as prescribed in NRS Chapter 111. Accordingly, NRS 111.315 did not require Bank of America to record its tender.

NRS 106.220 provides that "[a]ny instrument by which any mortgage or deed of trust of, lien upon or interest in real property is

[2]In 2015, the Legislature amended NRS Chapter 116 to add NRS 116.31164(2), which imposes recording requirements on certain superpriority lien satisfactions. This statute is not at issue on this appeal, because the tender and foreclosure sale predated its enactment.

subordinated or waived as to priority, must . . . be recorded . . . ." The statute further states that "[t]he instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded." NRS Chapter 106 does not define instrument as used in NRS 106.220, but *Black's Law Dictionary* defines the term as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." *Instrument*, *Black's Law Dictionary* (10th ed. 2014). Thus, NRS 106.220 applies when a written legal document subordinates or waives the priority of a mortgage, deed of trust, lien, or interest in real property.

The changes in the lien priority caused by Bank of America's tender do not invoke NRS 106.220's recording requirements. Generally, the creation and release of a lien cause priority changes in a property's interests as a result of a written legal document. But Bank of America's tender cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law. *See* NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A statutory lien is created and defined by the legislature. The character, operation and extent of a statutory lien are ascertained solely from the terms of the statute."). NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder. NRS 116.3116(1)-(3); *see also* Unif. Common Interest Ownership Act (UCIOA) § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) ("As a practical matter, secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit."). Thus, under the split-lien scheme, tender of the superpriority portion of an HOA lien satisfies that portion of the lien by operation of law. Because the lien is not discharged by using an instrument, NRS Chapter 106 does not apply.

2.

SFR also argues that Bank of America should have taken further actions to keep its tender good, such as paying the money into court or an escrow account. Bank of America responds that NRS Chapter 116 does not require any further action beyond tender of the superpriority portion of the lien to preserve its interest in the property.

Whether a tendering party must pay the amount into court depends on the nature of the proceeding and the statutory and common law of the jurisdiction. *See* Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921) ("Generally, there is no fixed rule in equity which requires a tender to be kept good in the sense in which that phrase is used at law."); *see also* Restatement

(Third) of Prop.: Mortgages § 6.4 (Am. Law Inst. 1997) ("The tender must be kept good in the sense that the person making the tender must continue at all times to be ready, willing, and able to make the payment."). Where payment into court is not explicitly required, "averment of a readiness and willingness to bring the money into court, and pay the same on the order of the court, is sufficient." Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921). And, "the necessity of keeping a tender good and of paying the money into court has no application to a tender made for the purpose of discharging a mortgage lien." Annotation, *Unaccepted Tender as Affecting Lien of Real Estate Mortgage*, 93 A.L.R. 12 (1934) (explaining that such a tender would either immediately discharge the mortgage lien or the lien would remain unimpaired by the tender).

To satisfy the superpriority portion of an HOA lien, the tendering party is not required to keep a rejected tender good by paying the amount into court. HOA liens created under NRS Chapter 116 are statutory liens and thus enforcement of the lien is governed by statute. *See Phifer v. Gulf Oil Corp.*, 401 S.W.2d 782, 785 (Tenn. 1966) ("A lien created by statute is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute . . . ."). Neither NRS 116.3116, the related statutes in NRS Chapter 116, nor the UCIOA, indicates that a party tendering a superpriority portion of an HOA lien must pay the amount into court to satisfy the lien.

To judicially impose such a rule would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to cure the default on the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the tender is valid and paid into court to avoid loss of its position through foreclosure of the superpriority portion of the lien. With such conditions, a tendering party could only achieve discharge of the superpriority portion of the lien by litigation. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties. UCIOA § 3-116 cmt. (amended 2008), 7 pt. 2 U.L.A. 124 (2009) (recognizing the superpriority lien "strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders"). Accordingly, after tendering the superpriority portion of an HOA lien to preserve its interest as first deed of trust holder, a party is not required to pay the amount into court, and need only be ready and willing to pay to keep the tender good.

E.

SFR claims that even if Bank of America's tender satisfied the superpriority portion of the HOA lien, SFR's status as a bona fide purchaser (BFP) gives it title to the property free and clear of Bank of America's interest, citing *Shadow Wood Homeowners Ass'n v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). Bank of America responds that *Shadow Wood* is inapplicable because it concerned the bank as the owner of the property, not the deed of trust holder, and that SFR has failed to prove its BFP status.

A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void. *See Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. App. 1979) ("[T]he doctrine of good faith purchaser for value without notice does not apply to a purchaser at the void foreclosure sale."); *see also* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("A void deed carries no title on which a bona fide purchaser may rely . . . ."). Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest. *See id.*; *cf. Deep v. Rose*, 364 S.E.2d 228 (Va. 1988) (when defect renders a sale wholly void, "[n]o title, legal or equitable, passes to the purchaser").

A foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default. *See* 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law § 7:21 (6th ed. 2014) ("The most common defect that renders a sale void is that the mortgagee had no right to foreclose . . . ."); *see also Henke*, 586 S.W.2d at 620 (concluding the payment of past-due installments cured loan's default such that subsequent foreclosure on the property was void). It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.

Because Bank of America's valid tender cured the default as to the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion. Accordingly, the HOA could not convey full title to the property, as Bank of America's first deed of trust remained after foreclosure. *See* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("Any mortgages, deeds of trust, or liens which are senior to the deed of trust which is being foreclosed are unaffected by the foreclosure of the junior deed of trust.") As a result, SFR purchased the property subject to Bank of America's deed of trust. *See* UCIOA § 3-116 cmt. 2, illus. 3 (amended 2008), 7 pt. 1B U.L.A. 209 (Supp. 2018) (explaining that when a bank pays the superprior-

ity portion of an HOA lien, the subsequent foreclosure sale "will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien").

For these reasons, we reverse the district court's grant of summary judgment to SFR and remand this matter to the district court for further proceedings consistent with this opinion.

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

In the Matter of the W.N. CONNELL AND MARJORIE T. CONNELL LIVING TRUST, Dated May 18, 1972, an Inter Vivos Irrevocable Trust.

JACQUELINE M. MONTOYA; and KATHRYN A. BOUVIER, Appellants, *v*. ELEANOR CONNELL HARTMAN AHERN, Respondent.

No. 71577

September 13, 2018 426 P.3d 599

Appeal from a district court order declining to enforce a no-contest clause in a trust. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

Rushforth Lee & Kiefer LLP and *Daniel P. Kiefer* and *Joseph J. Powell*, Las Vegas, for Appellants.

Brownstein Hyatt Farber Schreck, LLP, and *Kirk B. Lenhard*, Las Vegas, for Respondent.

Marquis Aurbach Coffing and *Terry A. Coffing, Liane K. Wakayama, Candice E. Renka*, and *Kathleen A. Wilde*, Las Vegas, for Amicus Curiae Marquis Aurbach Coffing.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

In this appeal, we consider a district court's order declining to enforce the no-contest clause of the W.N. Connell Living Trust, Dated May 18, 1972 (the 1972 Trust) against trustee-beneficiary respondent Eleanor Connell Hartman Ahern. The district court found that

Eleanor violated her fiduciary duties as trustee of the 1972 Trust, but the court determined that her acts as trustee did not warrant imposition of the trust's no-contest clause to revoke her beneficiary status. The question before this court is whether a trust beneficiary forfeits interest in the trust's assets pursuant to a no-contest clause penalty by breaching her fiduciary duties while acting in her dual capacity as trustee. We conclude that no-contest clauses do not apply to foreclose beneficiary interests when the beneficiary, acting in a trustee capacity, breaches his or her fiduciary duty, as doing so would conflict with the trustee's powers to administer and distribute the trust, and the most fair and reasonable interpretation of a no-contest clause excludes actions taken in a trustee capacity. We therefore affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

Eleanor was the sole trustee of the 1972 Trust. Eleanor and her daughters, appellants Jacqueline Montoya and Kathryn Bouvier, were its subtrusts' beneficiaries. The 1972 Trust provides for disbursement of its asset income, with Eleanor ultimately receiving a 35-percent share of income, and Jacqueline and Kathryn receiving a 65-percent share. The 1972 Trust contains a no-contest clause, which reads in relevant part:

> The Grantors specifically desire that these trusts created herein be administered and distributed without litigation or dispute of any kind. If any beneficiary of these trusts or any other person, whether stranger, relatives or heir . . . seek or establish to assert any claim to the assets of these trusts . . . or attack, oppose or seek to set aside the administration and distribution of the said trusts, . . . such person . . . shall receive One Dollar ($1.00) and no more in lieu of any interest in the assets of the trusts.

Acting as trustee, Eleanor ceased disbursement of Jacqueline and Kathryn's income share, and they petitioned the district court for a determination construing and interpreting the trust's language, and specifically, a declaration that they are entitled to 65 percent of the trust assets. The district court ordered Eleanor to safeguard and impound the 65-percent interest pending final resolution of the petition.

The parties filed several motions seeking various forms of relief, including cross-motions for summary judgment. The court granted summary judgment in favor of Jacqueline and Kathryn on their claims that they were entitled to the 65-percent income share and that Eleanor breached her fiduciary duty as trustee by unilaterally cutting off their share of the trust income.[1] The district court also

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[1]Eleanor appealed, and this court affirmed the district court's order. *See Matter of W.N. Connell & Marjorie T. Connell Living Tr.*, 133 Nev. 137, 141, 393 P.3d 1090, 1093 (2017).

ordered Eleanor to produce an accounting of the 1972 Trust. Eleanor submitted the trust accounting, and, after a hearing, at which the district court addressed concerns with Eleanor's management of the trust funds, the district court appointed a new temporary trustee for the 1972 Trust and ordered Eleanor to provide the trustee with all relevant information regarding the trust's administration. Upon preliminary review of the accounting information, the new trustee filed an affidavit indicating his concerns with Eleanor's administration, including her failure to maintain the 65-percent interest and withdrawal of over $1 million of trust funds after being removed as trustee.

Jacqueline and Kathryn moved for enforcement of the trust's no-contest clause, as well as damages and a surcharge of Eleanor's interest, arguing that Eleanor inappropriately withheld payment of their 65-percent income share, misreported the total amount due to them, and failed to account for trust income and resolve tax issues, further breaching her fiduciary duty as trustee. Although Jacqueline and Kathryn acknowledged that the court's summary judgment orders afforded some relief by removing Eleanor as trustee and awarding them attorney fees, they maintained that Eleanor's continued refusal to cooperate with the new trustee to recover trust funds she improperly withdrew and to account for income she received while she was trustee continued to have adverse impacts on them. Following a hearing, the district court found that Eleanor violated the district court's orders by failing to protect the 65-percent interest, filing an intentionally inaccurate accounting and summary of the trust's administration, and removing from and returning funds to the trust before turning them over to the successor trustee.

The district court held that Eleanor's actions constituted breaches of Eleanor's fiduciary duties as trustee[2] and granted a surcharge of Eleanor's interest. However, the district court declined to enforce the no-contest clause against Eleanor, reasoning that her "failure to properly apply her duties as a Trustee d[id] not warrant imposition of the harsh remedy of imposition of the no-contest clause, specifically her failure to seek Court approval before ceasing payments to [Jacqueline and Kathryn]."

DISCUSSION

Eleanor's breaches of her fiduciary duty as trustee did not violate the no-contest clause

Jacqueline and Kathryn argue that, under the undisputed findings of fact in this case, the no-contest clause should apply to reduce Eleanor's beneficiary share in the trust to $1 based on breaches of

[2]Although Eleanor withdrew funds after being removed as trustee, the district court found that she had "not [been] discharged from her fiduciary duties" as trustee at that time.

her fiduciary duty as a trustee.[3] They assert that application of the no-contest clause penalty is proper against Eleanor as a beneficiary because Eleanor's inappropriate conduct as trustee "was undertaken solely to benefit herself as a beneficiary," and actions taken in a representative capacity can give rise to forfeiture under a no-contest clause.

Generally, we review a district court's factual determination of whether a beneficiary violated a trust's no-contest clause for clear error. *Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). Where there are no disputed facts, we review a district court's trust interpretation de novo. *See Connell Living Tr.*, 133 Nev. at 139, 393 P.3d at 1092.

We construe trusts in a manner effecting the apparent intent of the settlor. *Hannam*, 114 Nev. at 356, 956 P.2d at 798; *see also* NRS 163.00195(2). To determine the settlor's intent, we employ contract principles, including determining the intentions of the settlor "by considering [the trust] as a whole," *Connell Living Tr.*, 133 Nev. at 140, 393 P.3d at 1092, and favoring the most "fair and reasonable" interpretation of the trust's language, *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

A no-contest clause "express[es] a directive to reduce or eliminate the share allocated to a beneficiary . . . if the beneficiary takes action to frustrate or defeat the settlor's intent as expressed in the trust." NRS 163.00195(6)(a). If triggered, a no-contest clause generally "must be enforced by the court." NRS 163.00195(1). "Whether there has been a 'contest' within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." *Johnson v. Greenelsh*, 217 P.3d 1194, 1198 (Cal. 2009) (internal quotations omitted). No-contest clauses exist to "protect estates from costly and time-consuming litigation and minimize the bickering over the competence and capacity of testators, and the various amounts bequeathed." *Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722, 725-26 (S.C. 2006) (internal quotation marks omitted). Still, "[t]he law abhors a forfeiture." *Organ v. Winnemucca State Bank & Trust Co.*, 55 Nev. 72, 77, 26 P.2d 237,

[3]We conclude that neither the law-of-the-case doctrine nor claim preclusion bars our consideration of the district court's decision regarding the no-contest provision, as (1) no appellate court has made a determination in this regard, and (2) the new claim of breach of fiduciary duty is based on separate facts and wrongful conduct that could not have been brought in the first proceeding. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (providing that "[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress" (alteration in original) (internal quotation marks omitted)); *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014) (stating that claim preclusion applies when the subsequent action is "based on the same claims or any part of them that were or could have been brought in the first case" (internal quotation marks omitted)).

238 (1933). Therefore, "[a]lthough no contest clauses are enforceable and favored by the public policies of discouraging litigation and preserving the transferor's intent, they are nevertheless strictly construed and may not be extended beyond their plainly intended function." *Johnson*, 217 P.3d at 1198; *see also Ivanovich v. Meier*, 595 P.2d 24, 30 (Ariz. 1979); *Saier v. Saier*, 115 N.W.2d 279, 281 (Mich. 1962).

Here, Jacqueline and Kathryn first claim that Eleanor cannot be shielded from the no-contest clause through her trustee status because her actions were undertaken solely to benefit herself as a beneficiary. Reviewing the disputed order, however, the district court made no findings as to Eleanor's motives as a beneficiary. Rather, the district court merely determined that Eleanor's actions were in her fiduciary capacity. Therefore, while there may be instances wherein a no-contest clause applies to trustee-beneficiaries who abuse their trustee status "as a means of presenting personal views" as a beneficiary, *see* Restatement (Third) of Prop.: Wills & Donative Transfers § 8.5 cmt. f (2003); *Johnson*, 217 P.3d at 1202, we conclude that Jacqueline and Kathryn fail to establish that Eleanor's breaches of fiduciary duty here were motivated by her own interest.[4]

Jacqueline and Kathryn further argue that the broad language of the no-contest clause demonstrates the settlors' intent to prohibit all interference with the trust's administration and distribution, including a trustee's breach of fiduciary duty. A "contest" under the 1972 Trust's no-contest clause occurs when any person "attack[s], oppose[s] or seek[s] to set aside the administration and distribution" of the 1972 Trust. At first blush, the no-contest clause appears broad enough to support Jacqueline and Kathryn's interpretation. *See Merriam-Webster's Collegiate Dictionary* 74, 816, 1071 (10th ed. 1996) (defining "attack" as "set upon or work against," "oppose" as "offer resistance to," and "set aside" as "to put to one side"). However, unlike beneficiaries generally, the 1972 Trust vests trustees with the power to "manage, control, . . . sell, . . . convey, exchange, . . . divide, [and] improve . . . trust property." Interpreting the no-contest clause as applying to any actions taken by a trustee-beneficiary in her trustee capacity—even if those actions are later deemed to be in breach of the trustee's fiduciary duties—would conflict with the latitude afforded to trustees in order to effectively manage and control the trust in the normal course of their duties. Therefore, in the absence of specific language to the contrary, we conclude that the trust

[4]To demonstrate that Eleanor's actions were undertaken in her capacity as beneficiary, Jacqueline and Kathryn cite to this court's prior determination that Eleanor breached her fiduciary duties of impartiality and to avoid conflicts of interest "when she advocated as trustee for a trust interpretation favoring herself as beneficiary." *See Connell Living Tr.*, 133 Nev. at 141, 393 P.3d at 1094. However, Jacqueline and Kathryn concede that the challenged actions here are "unrelated to the claims laid out" in that previous case.

as a whole indicates that the settlors did not intend for the no-contest clause to apply to actions taken by a beneficiary acting in her dual capacity as trustee, regardless of whether those acts benefitted or were intended to benefit the trustee in her beneficiary capacity.

To the extent that the settlor's intent is unclear in this regard, our interpretation of the no-contest clause produces the most fair and reasonable result. Imposing a no-contest clause on a trustee-beneficiary for actions taken in a fiduciary capacity would not disincentivize litigation or minimize disputes among beneficiaries. Rather, it would seem to incentivize challenges by the beneficiaries to the trustee-beneficiaries' administration of the trusts in order to eliminate a trustee-beneficiary and increase the challenger's share. Imposing a no-contest clause against trustee-beneficiaries for their breach of fiduciary duty ignores the variety of remedies available for the breach of a trustee's fiduciary duties, including surcharging their interest (as was ordered in this case), damages, and recovery of attorney fees. Therefore, we conclude that the district court did not err in refusing to apply the no-contest clause against Eleanor.[5]

CONCLUSION

The language of the 1972 Trust's no-contest clause does not indicate that the trust's settlors intended the clause to apply to foreclose a beneficiary's interests when the beneficiary, acting in her dual capacity as trustee, breaches her fiduciary duty, as doing so would conflict with the trustee's powers to administer and distribute the trust. Other legal remedies exist to address such conduct. We, therefore, affirm the court's order declining to enforce the no-contest clause against Eleanor.

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

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[5]Because we find that the 1972 Trust's no-contest clause did not apply to Eleanor's actions taken in a fiduciary capacity, we need not consider Jacqueline and Kathryn's arguments regarding the applicability of NRS 163.00195 or any exceptions to the application of the no-contest clause.

WELLS FARGO BANK, N.A., as Trustee on Behalf of the Holders of the Harborview Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-12, Appellant, *v*. TIM RADECKI, Respondent.

No. 71405

September 13, 2018 426 P.3d 593

Appeal from a judgment, following a bench trial, in an action to quiet title. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed.

Ballard Spahr LLP and *Sylvia O. Semper* and *Abran E. Vigil*, Las Vegas; *Ballard Spahr LLP* and *Anthony C. Kaye*, Salt Lake City, Utah, for Appellant.

The Wright Law Group and *John Henry Wright*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

This appeal requires us to consider the competing interests of the purchaser of a property at a homeowners' association foreclosure sale and the beneficiary of a deed of trust on that property at the time of the sale. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A. (SFR I)*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that valid foreclosure of an HOA superpriority lien extinguishes a first deed of trust).

After a bench trial, the district court determined that appellant Wells Fargo Bank, N.A.'s deed of trust was extinguished by a valid foreclosure sale. On appeal, Wells Fargo argues that the foreclosure sale should have been invalidated on equitable grounds, the foreclosure sale constituted a fraudulent transfer under the Uniform Fraudulent Transfer Act (UFTA), and that the foreclosure deed failed to transfer ownership of the property.

We disagree on all three points. We agree with the district court's conclusion that there was no "unfairness or irregularity" in the foreclosure process, s*ee Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963), so the district court correctly rejected Wells Fargo's equitable argument. UFTA does not apply because regularly conducted, noncollusive foreclosure sales are exempt from that statute. Lastly, we agree with the district court's conclusion that an

irregularity in the foreclosure deed upon sale does not invalidate the foreclosure as a whole. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

This case concerns competing rights to 2102 Logston Drive, North Las Vegas (the Property). In 2006, in exchange for a $196,000 loan, a homeowner encumbered the Property with a Deed of Trust (DOT). That DOT was eventually assigned to appellant Wells Fargo.

The Property is located within the Cambridge Heights planned community (the HOA) and is subject to the HOA's Covenants, Conditions, and Restrictions (CC&Rs). Those CC&Rs obligated the Property owner to pay monthly assessments and authorized the HOA to impose a lien upon the Property in the event of nonpayment.

By 2012, the homeowner had defaulted on both the loan and the HOA payments. The HOA recorded a Notice of Delinquent Assessment and a Notice of Default. Then, before the HOA recorded a Notice of Foreclosure sale, Wells Fargo sued for judicial foreclosure on the property. Wells Fargo secured a default judgment against both the homeowner and the HOA. The written judgment declared that Wells Fargo's DOT "is superior to all right, title, interest, lien, equity or estate of the Defendants with the exception of any super priority lien rights held by any Defendant pursuant to NRS 116.3116."

The HOA then conducted a foreclosure sale pursuant to NRS 116.3116. The winning bidder at that sale was respondent Tim Radecki, who purchased the property for $4,000. The declaration of value associated with the sale indicated that the tax value of the property was $56,197.

Radecki moved to intervene in Wells Fargo's foreclosure suit. The district court granted that motion and held a bench trial to determine whether Radecki or Wells Fargo had superior title to the Property. In its judgment following trial, the district court rejected Wells Fargo's arguments as to why the foreclosure sale should be invalidated and held that Wells Fargo's DOT was extinguished pursuant to *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014). Thus, the district court quieted title in favor of Radecki.

Wells Fargo appeals.

DISCUSSION

Wells Fargo raises numerous issues, some of which this court has conclusively decided in our HOA foreclosure jurisprudence.[1] Three

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[1]That is, Wells Fargo attacks NRS Chapter 116 as unconstitutional. We rejected this claim in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. 28, 28, 388 P.3d 970, 971 (2017), and we see no new arguments in Wells Fargo's briefing that would lead us to revisit this constitutional issue. Wells Fargo also argues that the foreclosure should be invalidated due to the grossly inadequate price alone. This claim has no merit in

of Wells Fargo's arguments are novel: (1) Wells Fargo argues that the actions of the HOA and the intent of the purchaser at the foreclosure indicate "unfairness or irregularity" in the foreclosure process, rendering the foreclosure invalid; (2) Wells Fargo argues that the foreclosure constituted a "fraudulent transfer" under the Uniform Fraudulent Transfer Act; and (3) Wells Fargo argues that the foreclosure deed failed to convey the property to Radecki.

After a bench trial, this court reviews the district court's legal conclusions de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). The district court's factual findings will be left undisturbed unless they are clearly erroneous or not supported by substantial evidence. *Id*.

There was not unfairness or irregularity in the foreclosure process

Wells Fargo argues that the foreclosure sale should be invalidated due to the low purchase price coupled with "evidence of unfairness or irregularity" in the foreclosure process. *See Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963). Wells Fargo first argues that the HOA "intentionally evaded the judicial process and went forward with the HOA sale despite defaulting" in Wells Fargo's judicial foreclosure proceeding. The HOA's actions, Wells Fargo contends, "suggest[ ] a race to complete a [foreclosure] sale before the [district] Court could issue a foreclosure judgment." This argument ignores the fact that Wells Fargo's default judgment explicitly stated that Wells Fargo's DOT was superior to all other interests "*with the exception of any super priority lien* rights held by any Defendant pursuant to NRS 116.3116." (Emphasis added.) NRS 116.31162 authorized the HOA to nonjudicially foreclose on that superpriority lien. To the extent the HOA "race[d]" to foreclose on that lien, it was entitled to do so.

Wells Fargo additionally argues that Radecki was not a bona fide purchaser (BFP) because he "admittedly had knowledge of Wells Fargo's competing interest" and "he was aware of the legal and title issues surrounding HOA foreclosure sales." Radecki cannot possibly be a BFP, Wells Fargo argues, because Radecki himself did not believe he was acquiring title to the property. Thus, Wells Fargo concludes, it is unfair to award unencumbered title to Radecki.

We agree with the district court that Radecki had no obligation to establish BFP status. The BFP doctrine provides an equitable remedy to protect innocent purchasers from an otherwise *defective* sale; it does not provide an equitable basis to invalidate an otherwise *valid* sale. *See 25 Corp. v. Eisenman Chem. Co.*, 101 Nev. 664, 675, 709

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light of this court's decision in *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, in which we clarified that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a [foreclosure] sale." 133 Nev. 740, 741, 405 P.3d 641, 643 (2017) (alteration in original; quotation marks omitted).

P.2d 164, 172 (1985) ("The bona fide doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance."). "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." *Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 66, 366 P.3d 1105, 1116 (2016) (quotation marks omitted). Given that the foreclosure sale was valid, Radecki's subjective beliefs as to the effect of the foreclosure sale are irrelevant.

In sum, Wells Fargo has failed to show "evidence of unfairness or irregularity" in the foreclosure process that would invalidate the foreclosure sale on equitable grounds. *See Golden*, 79 Nev. at 515, 387 P.2d at 995.

A properly conducted NRS Chapter 116 foreclosure sale is not a "fraudulent transfer"

Wells Fargo argues that the foreclosure sale violated NRS Chapter 112, the Uniform Fraudulent Transfer Act (UFTA). "The UFTA is designed to prevent a debtor from defrauding creditors by placing the subject property beyond the creditors' reach." *Herup v. First Boston Fin., LLC*, 123 Nev. 228, 232, 162 P.3d 870, 872 (2007). While a "[f]raudulent conveyance under NRS Chapter 112 does not require proof of intent to defraud," the creditor bears the burden of proof to establish that a fraudulent transfer occurred. *Sportsco Enters. v. Morris*, 112 Nev. 625, 631, 917 P.2d 934, 937 (1996).

Wells Fargo argues that the conveyance was fraudulent under NRS 112.180(1)(b)(1), NRS 112.180(1)(b)(2), and NRS 112.190(1). NRS 112.180(1)(b)(1) does not apply, because there was no evidence that the homeowner "[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small." Nor is NRS 112.180(1)(b)(2) applicable, because there was no evidence that the homeowner "[i]ntended to incur, or believed or reasonably should have believed that [she] would incur, debts beyond . . . her ability to pay as they became due." Wells Fargo's strongest argument is that the sale violated NRS 112.190(1), which provides in full:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

As relevant here, to succeed under its NRS 112.190(1) UFTA claim, Wells Fargo must show the following: (1) A transfer of an asset occurred, (2) Wells Fargo's claim preexisted the transfer, (3) the transfer was not for "reasonably equivalent value," and (4) the homeowner was insolvent at the time of the transfer. *Id*.

Some of these elements are clearly met. As to the second element, Wells Fargo's DOT constitutes a prior claim on the Property that was transferred via the foreclosure sale. The fourth element is likewise met because the homeowner was not paying her debts at the time of the transfer, and "[a] debtor who is generally not paying . . . her debts as they become due is presumed to be insolvent." NRS 112.160(2).

We hold that the third element of an NRS 112.190(1) claim is not met.[2] At first glance, Wells Fargo persuasively argues that the $4,000 purchase price was not "reasonably equivalent" to the Property's value, which was assessed to have a tax value of $56,197. However, Wells Fargo ignores NRS 112.170(2), which provides in pertinent part:

> a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

The effect of this safe harbor provision is to exempt certain transfers from UFTA by treating them as being for "reasonably equivalent value" regardless of the price. A "regularly conducted, noncollusive foreclosure sale" is one such type of exempted transfer. NRS 112.170(2).

The question is whether this provision covers HOA foreclosure sales. One argument against such sales being included is that NRS 112.170(2) specifically refers to "default under a mortgage, deed of trust or security agreement." In referring to those three types of encumbrances, the Legislature arguably intended to exclude other types of encumbrances, such as HOA assessment liens. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'Expressio Unius Est Exclusio Alterius,' the expression of

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[2]Given this holding, we need not consider whether the Property constitutes an "asset" within the meaning of UFTA. *Compare Guild Mortg. Co. v. Prestwick Court Tr.*, 293 F. Supp. 3d 1228, 1241 (D. Nev. 2018) (holding that property in any way encumbered is exempted from UFTA's definition of "asset"), *appeal docketed*, No. 18-15293 (9th Cir. Feb. 22, 2018), *with Or. Account Sys., Inc. v. Greer*, 996 P.2d 1025, 1029 (Or. Ct. App. 2000) (holding that encumbered property constitutes an asset as long as the property's value exceeds "the amount of the encumbering lien(s)").

one thing is the exclusion of another, has been repeatedly confirmed in this State."). However, we interpret "default under a mortgage, deed of trust or security agreement" to limit only "execution of a power of sale," as opposed to "noncollusive foreclosure sale." That is, we interpret NRS 112.170(2) to cover *any* "regularly conducted, noncollusive foreclosure sale" and *certain* types of executions of power of sale—namely, those that occur "upon default under a mortgage, deed of trust or security agreement." This interpretation is consistent with both the statute's plain meaning and UFTA's primary purpose of "prevent[ing] a debtor from defrauding creditors by placing the subject property beyond the creditors' reach." *See Herup*, 123 Nev. at 232, 162 P.3d at 872. Wells Fargo's DOT was extinguished not by fraud, but by the consequences of NRS 116.3116 and *SFR 1*, 130 Nev. at 743, 334 P.3d at 409.

The district court concluded that the foreclosure sale was valid because it complied with the relevant provisions of NRS Chapter 116. As we analyzed in the prior section of this opinion, the district court's finding was supported by substantial evidence. A foreclosure sale that complies with the relevant statutory requirements is necessarily one that is "regularly conducted" and "noncollusive." *See BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 545 (1994) (holding that " 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with"). Thus, the foreclosure sale was necessarily for "reasonably equivalent value," NRS 112.170(2), so Wells Fargo's UFTA claim fails.

Alleged inaccuracies in a foreclosure deed do not invalidate the foreclosure sale

Lastly, Wells Fargo argues that reversal is warranted because the foreclosure deed did not say that it transferred ownership of the property to Radecki. The district court rejected this argument, holding that "[i]f the Foreclosure Deed contains irregular language, this irregularity can be remedied" without invalidating the foreclosure sale. The district court was again correct. Invalidation of the foreclosure sale is not the way to remedy alleged inaccuracies within the Foreclosure Deed. As the district court found, the foreclosure sale fully complied with NRS Chapter 116, so that sale "vest[ed] in the purchaser the title of the unit's owner." NRS 116.31166(3) (1993).

CONCLUSION

We affirm the district court's conclusion that the foreclosure sale should not be invalidated on equitable grounds. We hold that a "regularly conducted, noncollusive" NRS Chapter 116 foreclosure sale is exempt from UFTA pursuant to NRS 112.170(2). Lastly, we hold that an alleged inaccuracy in a foreclosure deed does not invalidate

an otherwise valid foreclosure sale. Accordingly, we affirm the district court's decision to award title to Radecki.

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

ANGELA DeCHAMBEAU; and JEAN-PAUL DeCHAMBEAU, Both Individually and as Special Administrators of the ESTATE OF NEIL DeCHAMBEAU, Appellants, *v.* STEPHEN C. BALKENBUSH, ESQ.; and THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, a Nevada Professional Corporation, Respondents.

No. 72879-COA

September 27, 2018 431 P.3d 359

Appeal from a judgment on jury verdict, an amended judgment, and an order denying a motion for new trial in a legal malpractice action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Affirmed.

[Rehearing denied December 26, 2018]

Kozak & Associates, LLC, and *Charles R. Kozak*, Reno, for Appellants.

Molof & Vohl and *Robert C. Vohl*, Reno; *Pollara Law Group* and *Dominique A. Pollara*, Sacramento, California, for Respondents.

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

OPINION

By the Court, Tao, J.:

In their joint case conference report, the parties to this civil lawsuit stipulated to a discovery schedule that expressly waived the usual requirement, otherwise contained in Rule 16.1(a)(2)(B) of the Nevada Rules of Civil Procedure (NRCP), that written reports be produced and exchanged summarizing the anticipated testimony of all expert witnesses designated to appear at trial. Much later in the case, the district court (sua sponte but without objection by either party) entered a scheduling order that extended the deadline for identifying expert witnesses. The order said nothing one way or the other about whether the stipulation to waive expert reports continued in effect or not.

The question raised in this appeal is whether, in the face of that silence, the original stipulation continued in effect or rather must be deemed to have been entirely superseded by the new order. We conclude that the intent of the parties ultimately controls the duration and scope of the stipulation and, in the absence of any evidence of an intention to the contrary, the stipulation should be read to continue in effect until and unless expressly vacated either by the court or by a subsequent agreement between the parties.

FACTUAL SUMMARY

This case originated as an action in medical malpractice that eventually degraded into a legal malpractice suit. The plaintiffs-appellants, members of the DeChambeau family (the DeChambeaus), allege that they retained the respondents, attorneys licensed to practice law in Nevada (hereafter collectively referred to as Balkenbush), to handle a medical malpractice action on behalf of a deceased relative, but that Balkenbush handled the case negligently and that negligence led to entry of a final judgment adverse to the DeChambeaus. The family then sued Balkenbush for legal malpractice. This appeal arises from the legal malpractice action.

After the filing of the complaint and answer, the parties filed a joint case conference report in which they mutually stipulated to waive the requirement, otherwise contained in NRCP 16.1(a)(2)(B), that the parties must exchange written reports summarizing the anticipated testimony of any expert witnesses retained by either party. The joint case conference report also contained an agreed-upon discovery cut-off date. Before the close of discovery, Balkenbush retained and designated an expert witness named Dr. Fred Morady. Pursuant to the stipulation, no expert report was prepared.

Shortly before trial, the district court entered summary judgment in favor of Balkenbush, finding that the DeChambeaus' claim failed for lack of causation (an issue unrelated to the question before us in this appeal). The DeChambeaus appealed to the Nevada Supreme Court and, in an unpublished order, the supreme court reversed the grant of summary judgment and remanded the matter back to the district court.

By the time the supreme court issued its order of reversal and remand, all of the deadlines set in the joint case conference report, including all discovery deadlines and the expected trial date, had long expired. Two months after the supreme court's order of reversal and remand, the district court conducted a status hearing with the parties and, apparently sua sponte but without objection by either party, issued a scheduling order which, among other things, extended the deadlines for disclosing both initial expert witnesses and rebuttal experts. The district court's revised scheduling order did not speci-

fy whether the requirement to prepare and exchange expert reports would once again be waived.

Balkenbush subsequently retained a new expert witness, Dr. Hugh Calkins, who had not been previously designated. Adhering to the original stipulation filed before the supreme court appeal, Balkenbush did not provide a written report outlining Dr. Calkins' testimony. The DeChambeaus objected to the designation of Dr. Calkins based on Balkenbush's failure to supply an expert report describing his testimony, filing both a motion to strike and a motion in limine seeking to prevent him from testifying at trial. Both were denied. The case proceeded to trial with Dr. Calkins testifying to the jury that, in his expert opinion, Balkenbush had not violated the applicable standard of care. The jury returned a verdict in favor of Balkenbush. The DeChambeaus filed a motion for a new trial arguing that admission of Dr. Calkins' testimony constituted error, which the district court denied. The DeChambeaus now appeal both from the verdict and from the denial of their motion for new trial, presenting the same arguments for both.

ANALYSIS

Of the various issues raised by the DeChambeaus, the one that has been properly preserved for our review and merits extensive discussion is whether the trial court abused its discretion by allowing Dr. Calkins to testify at trial when Balkenbush never produced an expert report pursuant to NRCP 16.1(a)(2)(B).

The starting point for our analysis is, as always, the text of the governing rule. Expert reports are governed by NRCP 16.1(a)(2)(B), which provides, in part:

> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. . . .

The purpose of discovery rules "is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (internal quotation marks omitted). Normally, we review district court decisions relating to the adequacy of expert reports and the admission of expert testimony under NRCP 16.1(a)(2)(B) for an abuse of discretion. *See Khoury v. Seastrand*, 132 Nev. 520, 533, 377 P.3d 81,

90 (2016) ("This court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion."). Permitting an expert witness to testify in violation of the requirement to provide a written report can, in certain circumstances, constitute an abuse of that discretion. *See generally id*.

But the question in this case is whether the parties voluntarily waived the application of that rule. NRCP 16.1(a)(2)(B) expressly provides that the expert report requirement controls "[e]xcept as otherwise stipulated or directed by the court" and the court "upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case." Thus, the rule itself provides that its requirements are not mandatory and do not necessarily apply to every case, but may be waived either by the court or by stipulation of the parties.

Here, the parties unquestionably stipulated to waive the requirement, at least initially in their original joint case conference report. "A written stipulation is a species of contract." *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011). Stipulations should therefore generally be read according to their plain words unless those words are ambiguous, in which case the task becomes to identify and effectuate the objective intention of the parties. *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309-10, 301 P.3d 364, 366 (2013). When examining the supposed "intent" behind contractual words, what matters is not the subjective intention of the parties (i.e., what the parties may have thought in their minds), but rather the more objective inquiry into the meaning conveyed by the words they selected to define the scope of the agreement. *See Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981) ("[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing." (alteration in original, internal quotation marks omitted)). Thus, the inquiry is not into what the attorneys may have intended in their minds to convey but rather the most reasonable meaning to be given to the words they utilized in the stipulation itself. *See Oakland-Alameda Cty. Coliseum, Inc. v. Oakland Raiders, Ltd.*, 243 Cal. Rptr. 300, 304 (Ct. App. 1988) (providing that contractual intention, whenever possible, must be "ascertained from the writing alone"). *See generally* Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899) (stating that when determining contractual intent, "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used").

Here, the stipulation contains no express deadline or time limit. The question thus becomes what the parties intended this silence to

mean about how long the stipulation should last. The DeChambeaus argue that once the district court subsequently entered a superseding order following the remand containing new deadlines, the situation reverted by default back to the expectations of NRCP 16.1(a)(2)(B). They note that the parties never agreed to re-enter their prior stipulation and the district court's superseding order never extended it. Thus, they argue that the prior stipulation terminated when the joint case conference report in which it was contained was supplanted by the new scheduling order. In contrast, Balkenbush argues that the district court's silence implies that it did not intend to alter the parties' original agreement to waive expert reports, that the parties themselves never agreed to alter it, and it therefore remained in effect throughout the litigation.

In the absence of ambiguity or other factual complexity, interpreting the meaning of contractual terms presents a question of law that we review de novo. *Galardi*, 129 Nev. at 309, 301 P.3d at 366. On balance, Balkenbush's position is by far the more reasonable and the most consistent with the plain language of the stipulation. The purpose of the original stipulation is self-evident: to simplify the discovery process by relieving the parties of the obligation to do something that the rules would otherwise require but the parties thought unnecessary. Moreover, the preparation of expert reports often comprises the single most expensive (and sometimes time-consuming) part of the discovery process, so a second obvious goal of the stipulation was to save both parties time and money.

Consequently, there are two flaws inherent in the way the DeChambeaus would have us read the stipulation. They argue in effect that the stipulation was designed to be only temporary and to automatically disappear whenever subsequent scheduling orders were entered, even when those subsequent orders said nothing about expert reports. But reading it that way would result in complicating, not simplifying, the course of discovery by requiring expert reports to be submitted some of the time (i.e., after new scheduling orders were entered), but not at other times (i.e., so long as the original scheduling order remained in effect). It would be more than a little odd to read the stipulation as designed to create such inconsistency and uncertainty at different times during the course of the case and effectively make the litigation more complex than if the parties had never entered into it in the first place and just followed the existing rules of procedure instead.

The second flaw in their argument is that it reads the words of the stipulation in a way that is both unnatural and inconsistent with the way that lawyers and judges ordinarily do things. Normally, any order issued by the court on any matter is deemed to remain in effect until expressly superseded by another order on the same question. *See, e.g.*, NRCP 16(e) ("[Pre-trial orders] shall control the

subsequent course of the action unless modified by a subsequent order."); *Douglas v. Burley*, 134 So. 3d 692, 697 (Miss. 2012) (holding that "upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court"); *see also Greenawalt v. Sun City W. Fire Dist.*, 250 F. Supp. 2d 1200, 1203, 1206-07 (D. Ariz. 2003) (original scheduling order deadline for filing dispositive motions remained in effect when post-remand scheduling order did not set a new deadline); *Cell Therapeutics, Inc. v. Lash Grp., Inc.*, No. C07-0310JLR, 2010 WL 11530557, at *5 n.7 (W.D. Wash. Apr. 30, 2010) ("Unless the court modifies it, the scheduling order entered in January 2008 remains in effect."). The stipulation here contains no language suggesting that the parties intended to depart from the typical way that other stipulations and orders are ordinarily handled between lawyers and by courts.

Accordingly, in the absence of any indication that the parties intended their agreement to mean something else, the most reasonable way to understand a stipulation like the one before us is that the parties drafted it to govern throughout the course of the litigation until and unless subsequently voided either by the court or by the parties themselves.[1] Once the parties agreed to the stipulation, it remained in effect until modified or superseded by any other agreement between the parties or a contrary order of the court.[2]

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[1]The concurrence proposes an alternative line of reasoning. First, it proposes that Nevada should follow a decision from another jurisdiction even when the underlying rules of civil procedure are not the same in both states. Second, it suggests that the district court's revised scheduling order was ambiguous, but that the DeChambeaus waived the right to challenge this ambiguity on appeal because they failed to timely object to the entry of the revised scheduling order—a conclusion with which we agree, which is why the validity of the revised scheduling order is not at issue in this appeal—and also failed to first ask the district court to "clarify" the scope of the revised scheduling order—a conclusion with which we disagree, for the following reasons. The DeChambeaus would have had little reason to seek any such clarification until Balkenbush disclosed the new expert without an expert report, because only then would it have become apparent that any disagreement existed over the meaning of the revised scheduling order. After the expert was disclosed, the DeChambeaus filed both a motion to strike the expert and a motion in limine to prevent the expert from testifying at trial. The concurrence apparently believes that these two motions were not enough to preserve the matter for appeal unless the DeChambeaus also asked for "clarification" as well. But there is no precedent or authority cited for this proposition, and we disagree with it.

[2]The DeChambeaus allege a number of other errors relating in some way to Dr. Calkins' trial testimony that can be disposed of without extensive discussion. First, as to their arguments that the district court erred in entering a new scheduling order, that Dr. Calkins was not qualified to testify, and that his testimony exceeded the scope of appropriate expert testimony under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), they did not object to these alleged errors below, and consequently the matters have not been properly preserved for appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983

CONCLUSION

In this case, the parties expressly stipulated to waive the requirement to produce expert reports under NRCP 16.1(a)(2)(B). There is no evidence that the parties intended it to expire at any particular point in the litigation, and the terms of the stipulation itself contained no such condition or limitation. The district court did not overrule the prior stipulation, and the parties never agreed to modify it. In the absence of any indication that the district court and the parties did not intend for the stipulation to continue, we conclude that it remained in effect and Balkenbush was not required to submit an expert report in connection with Dr. Calkins. Consequently, the district court did not abuse its discretion by allowing Dr. Calkins to testify at trial even though no expert report was provided. We therefore affirm the judgment of the district court and the denial of the motion for a new trial.

Gibbons, J., concurs.

Silver, C.J., concurring:

I concur in the result only. I do believe, however, that the basis of this opinion should have focused on the issue of whether—on remand by the Nevada Supreme Court with discovery closed—the district court erred by sua sponte issuing a *new* scheduling order extending the time for expert disclosures. Nevada law is silent in this situation, but the Mississippi case of *Douglas v. Burley*, 134 So. 3d 692 (Miss. 2012) is illustrative here.

In *Burley*, the lower court entered an initial scheduling order providing discovery deadlines. *Id.* at 694. After discovery closed, but prior to trial, the defendants moved to dismiss and the lower

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(1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). As to the argument that the district court erred in precluding them from calling a rebuttal expert, they failed to provide a transcript of the trial for our review, so we have no record that this happened in the way the DeChambeaus describe, what reasons the district court might have given for doing it, or whether a timely objection was made below. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that the appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). Furthermore, without a transcript, we have no basis for determining what the proposed rebuttal evidence would have been and cannot evaluate whether the rebuttal testimony might have affected the outcome of the trial. *See Carr v. Paredes*, Docket Nos. 60318, 61301 (Order of Affirmance, Jan. 13, 2017) ("To preserve excluded testimony for appeal, the party must make a specific offer of proof to the trial court on the record." (citing *Van Valkenberg v. State*, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979))); *Khoury*, 132 Nev. at 539, 377 P.3d at 94 (stating that to be reversible, a party must show that, "but for the alleged error, a different result might reasonably have been reached" (internal quotation marks omitted)).

court granted the defendants' motion. *Id.* at 695. The Mississippi Supreme Court reversed, and upon remand the plaintiff noticed a new expert. *Id.* The defendants moved to strike plaintiff's newly designated expert on remand, arguing that the notice was filed years after the close of discovery. *Id.* The plaintiff argued that the prior scheduling order had no effect on remand. *Id.* at 696. The trial court sua sponte reopened discovery in response and refused to strike the newly designated expert. *Id.* The defendant then filed an interlocutory appeal challenging the district court's order reopening discovery. *Id.* The Mississippi Supreme Court reversed, holding that "upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court." *Id.* at 697.

Here, similar to *Burley*, the district court granted summary judgment after discovery had closed, and upon remand from the Nevada Supreme Court, the district court inexplicably, sua sponte, entered a new scheduling order extending the time for expert disclosures at a status check prior to resetting the trial. Coincidently, like *Burley*, respondents noticed a new expert for the new trial setting. Prior to trial, appellants moved to strike the expert and filed a motion in limine to preclude the new expert's testimony.

I believe that this court should have followed *Burley* and held that prior discovery orders remain in place absent either a party's motion to extend deadlines or absent a subsequent district court order to the contrary. Nevertheless, distinguishable from *Burley*, appellants here conceded at oral argument that they never objected to the district court's sua sponte scheduling order on remand. As a result, I believe that appellants are now precluded on appeal from challenging the district court's order claiming abuse of discretion. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Contrary to the majority's analysis, in my view the question of whether the district court's sua sponte discovery order required the parties under NRCP 16.1 to prepare expert reports or whether the parties' initial stipulation waiving the expert report requirement governed was ambiguous and not clear. The parties' initial stipulation contained no express deadline or time limit. On the other hand, the district court's sua sponte new scheduling order was also silent as to whether the parties' prior stipulation continued in light of the court's re-opening of discovery.

I believe that the majority opinion unfairly attacks the parties' arguments because both are reasonable interpretations of how the prior discovery stipulation affected the district court's later order. However, dispositive in my view is also the fact that appellants

never timely requested that the district court *clarify* its order as to whether expert reports were subsequently required or whether the parties' prior discovery stipulation waiving expert reports governed going forward into the second trial setting.

Much to appellants' chagrin, prior to the second trial setting, respondents designated a *brand new expert*—an expert not previously designated before the first trial setting after discovery had closed. But, instead of corresponding with opposing counsel, or filing an order shortening time requesting the district court immediately clarify its discovery order as to whether the parties' prior stipulation was in effect, or perhaps noticing the newly designated expert for deposition, appellants appear to have strategically waited. Appellants' strategy—waiting until *after discovery closed* to then file a motion to strike expert and a motion in limine to preclude that new expert from testifying for failing to produce an expert report—just did not pay off under these circumstances. Nevertheless, I do not agree with the majority's analysis of the issues raised in this appeal, and, therefore, I respectfully concur in result only.