of Kim, supporting Kim's malpractice claim against Dickinson Wright. Finally, we hold that Nevada's litigation malpractice tolling rule applies to Kim's malpractice claim against Dickinson Wright and, therefore, the district court erred in concluding that Kim's claim was time-barred by NRS 11.207(1). Accordingly, we reverse the district court's order of dismissal and remand for further proceedings on Kim's claim consistent with this opinion.

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

WASTE MANAGEMENT OF NEVADA, INC., Appellant, *v.* WEST TAYLOR STREET, LLC, a Limited Liability Company, Respondent.

No. 74876

June 27, 2019 443 P.3d 1115

Appeal from a final judgment in a declaratory relief action. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Reversed and remanded.

Simons Law, PC, and *Mark G. Simons*, Reno, for Appellant.

C. Nicholas Pereos, Ltd., and *C. Nicholas Pereos*, Reno, for Respondent.

Peterson Baker, PLLC, and *Tamara Beatty Peterson* and *Nikki L. Baker*, Las Vegas, for Amicus Curiae.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, C.J.:

In 2005, the Nevada Legislature enacted the garbage lien statute to give waste collection companies a method for collecting delinquent payments for their services. *See* NRS 444.520. For the first time, we are asked to interpret this statute and the procedures required to perfect and foreclose on a garbage lien. This dispute focuses on whether NRS 444.520(3)'s reference to the mechanics' lien statute incorporates only the mechanics' lien statute's procedural requirements for foreclosure, as set forth in NRS 108.239. Or, rath-

er, if that reference to the mechanics' lien statute also incorporates the requirements for perfecting a lien, as set forth in NRS 108.226. Additionally, we are asked to determine if the perpetual nature of the garbage lien means that the foreclosure of a garbage lien is not subject to a statute of limitations. We hold that the reference to the mechanics' lien statute in NRS 444.520(3) incorporates only the mechanics' lien statute's procedural requirements for foreclosure. We also hold that no limitations period applies to the foreclosure of a garbage lien.

FACTS AND PROCEDURAL HISTORY

Respondent West Taylor Street, LLC, is the owner of a duplex in Reno. This duplex has two addresses, and each address has a waste service account with appellant Waste Management of Nevada, Inc. At some point, both of these waste services accounts became delinquent. As a result, Waste Management filed three notices of liens against the property. West Taylor filed a complaint with the district court asking, among other things, for declaratory relief. West Taylor alleged that Waste Management did not properly follow the lien perfection requirements under NRS 108.226, which West Taylor argued the Legislature incorporated by reference into the garbage lien statute. West Taylor filed a motion for partial summary judgment as to this issue. The district court granted West Taylor's motion for summary judgment, holding that the lien perfection requirements outlined in NRS 108.226 applied to the garbage lien statute. Therefore, the district court held that Waste Management did not properly record the lien because it failed to record it within 90 days of the completion of the work. The district court also held, in the alternative, that Waste Management could no longer foreclose on its liens because a two-year limitations period applied to the foreclosing on garbage liens. As a result of this ruling, Waste Management voluntarily released all three of its liens against the property. The parties proceeded to litigate other claims, until West Taylor voluntarily dismissed those claims. Waste Management now challenges the grant of summary judgment in West Taylor's favor as to the recordation of the liens.

DISCUSSION

This case is not moot

As an initial matter, we address West Taylor's argument that this matter is moot because Waste Management released the three liens. As a general rule, this court will decline to hear any case in which there is no actual controversy. *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) ("[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and

not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." (internal quotation marks omitted)). Therefore, if a case comes before this court when there is no actual controversy, even if the case had a live controversy at the outset, then we will dismiss the case as moot. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that a case has to have an actual controversy during "all stages of the proceeding" or it would be dismissed as moot). Because the district court's order granting summary judgment prevents Waste Management from refiling its garbage liens against West Taylor, we conclude that there is still a live controversy, and the case is not moot.

The plain language of NRS 444.520(3) incorporates only the foreclosure procedures from the mechanics' lien statutes

We review questions of statutory construction de novo. *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 799, 358 P.3d 234, 240 (2015). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (internal quotation marks omitted) (alterations in original). When a statute is clear on its face, this court gives the statute's plain language its "ordinary meaning." *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local 1107*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008). If a statute is ambiguous, meaning that it is susceptible to multiple "natural or honest interpretation[s]," then this court will look beyond that statute to determine its meaning. *Tam*, 131 Nev. at 799, 358 P.3d at 240.

The plain meaning of NRS 444.520(3) is clear on its face. NRS 444.520(3) states:

> Until paid, any fee or charge levied pursuant to subsection 1 constitutes a perpetual lien against the property served, superior to all liens, claims and titles other than liens for general taxes and special assessments. The lien is not extinguished by the sale of any property on account of nonpayment of any other lien, claim or title, except liens for general taxes and special assessments. The lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens.

Based on the definition of foreclosure, the statute's meaning is clear on its face as to which provision of the mechanics' lien statutes is incorporated into the garbage lien statute. "Foreclosure" is defined as "*[a] legal proceeding* to terminate a mortgagor's interest in a property instituted . . . either to gain title or to force a sale to satisfy the unpaid debt secured by the property." *Foreclosure*, *Black's Law*

Dictionary (8th ed. 2004) (emphasis added). Under this definition, the ordinary meaning of the word "foreclosure" involves the actual legal proceeding itself and not the prerequisites of establishing the garbage lien and perfecting it. Therefore, to foreclose on a garbage lien, the lien holder must follow the foreclosure procedure established in the mechanics' lien statutes, which is outlined in NRS 108.239. Based on the statute's plain meaning, the only provision of the mechanics' lien statutes incorporated into NRS 444.520 is NRS 108.239.

Therefore, the district court erred in incorporating into NRS 444.520 the perfection requirements under the mechanics' lien statute as outlined in NRS 108.226, which is separate from NRS 108.239's foreclosure procedures. NRS 444.520(3) references mechanics' liens in the foreclosure context, not in the context of recording or perfecting a garbage lien. Further, NRS 444.520(4) already provides a method of perfecting a garbage lien. Thus, under the plain language of the garbage lien statute, the perfection requirements of the mechanics' lien statute, or any other requirements that do not involve the foreclosure of a mechanics' lien, are not incorporated. The district court erred when it incorporated anything beyond NRS 108.239 into the garbage lien statute. Accordingly, we hold that the district court erred in concluding that Waste Management needed to record its lien within 90 days of completing the work in accordance with NRS 108.226, and we reverse the district court's order on this ground.

The district court erred by concluding that there is a two-year statute of limitations to foreclose on garbage liens

Next, we address whether a statute of limitations applies to garbage liens, as the district court concluded that even if Waste Management had properly perfected its liens, it would be required to foreclose on those liens within two years. To determine whether there is an applicable limitations period for the foreclosure of a garbage lien, we again turn to the text of the statute.

NRS 444.520(3) provides that "[u]ntil paid, any fee or charge levied pursuant to subsection 1 constitutes a *perpetual* lien against the property served, superior to all liens, claims and titles other than liens for general taxes and special assessments." (Emphasis added.) "Perpetual" is defined as "lasting for eternity: never ending." *Perpetual*, *Webster's II New College Dictionary* (2011). Under a plain reading of the statute, the lien against the property should last until the debt is paid. Perpetual liens, while unusual, are not uncommon in the context of tax or assessment law. *See* 85 C.J.S. Taxation § 970 ("The duration of a tax lien is generally governed by statute and, ordinarily, a tax lien continues until the tax is paid or the property is sold for the tax."). States that have enacted perpetual liens have

generally held that the liens last forever, and the ability to foreclose upon these liens is not limited by a general statute of limitations. *See, e.g.*, *James v. Strange*, 407 U.S. 128, 132 (1972) ("Florida's recoupment law has no statute of limitations and the State is deemed to have a perpetual lien against the defendant's real and personal property and estate."); *Forman Realty Corp. v. Brenza*, 144 N.E.2d 623, 628 (Ill. 1957) ("The purpose of this statute is to make taxes a lien superior to all other liens without regard to priority in point of time and to continue such liens without limitation of time until taxes are paid. . . ."); *Swingley v. Riechoff*, 112 P.2d 1075, 1079 (Mont. 1941) ("The government's lien for taxes is based upon express statutory provision, and is a perpetual lien against which no statute of limitations can successfully be interposed.").

While the district court agreed that the garbage lien was perpetual, and that therefore the six-month statute of limitations in the mechanics' lien statute did not apply, it went on to conclude that the two-year statute of limitations under NRS 11.190(4)(b) applied.[1] To support this proposition, the district court relied on an early case from this court, *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220 (1879). In that case, this court held that a tax lien could be perpetual, but the remedy of foreclosure was subject to a statute of limitations. *Id.* at 232.

However, the reasoning underlying this conclusion in *Yellow Jacket* is outdated, and therefore we decline to apply it here. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 178 (2016) ("[P]recedents become obsolete if the conditions or facts that existed when they were rendered are different or no longer exist, or if the underlying rationale is no longer sound."). In *Yellow Jacket*, this court, following California law, reasoned that the remedy of foreclosure could expire under the statute of limitations, but the obligation of the debt could remain. *See id.* at 232. ("A mortgage debt is not destroyed or extinguished by the statute of limitations. The remedy only is taken away." (*citing McCormick v. Brown*, 36 Cal. 180, 185 (1868))). However, separating the foreclosure remedy from its underlying debt is paradoxical, and as such, many states have rejected the notion that the debt may be separated from the foreclosure remedy. Nancy Saint-Paul, *Distinction Between Mortgage Lien and Mortgage Debt*, Clearing Land Titles § 6:2 (3d ed. 2018); *see also* Cal. Civ. Code § 2911(1) (eliminating the separation of the underlying debt from the foreclosure remedy). Nevada, like other states, has moved toward eliminating this separation under the "one action rule," which states that "[t]here may be but one action for the recovery of any debt, or for the enforcement of any right se-

[1]NRS 11.190(4)(b) provides two years for bringing actions "upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation."

cured by a mortgage or other lien upon real estate." NRS 40.430(1); *see also McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 751 (2005). Therefore, given that the underlying rationale for separating the remedy from the lien is outdated, we decline to follow the rule outlined in *Yellow Jacket.*

The plain language of NRS 444.520(3) indicates that the lien is perpetual, and therefore the remedy of foreclosure must also be perpetual. As another court has held regarding perpetual liens, "it is impossible to believe that the legislature meant to subject this lien, and the right to enforce it, to any limitation law; for then we would witness the anomalous condition, presented by a perpetual lien . . . without any power in the public to make such lien available." *Wells Cty. v. McHenry*, 74 N.W. 241, 248 (N.D. 1898). As that court aptly observed, "[a] lien that cannot be enforced is no lien at all." *Id.*

Accordingly, we hold that the district court properly concluded that garbage liens are perpetual but erred in applying both the lien perfection requirements set forth in NRS 108.226 and the two-year statute of limitations set forth in NRS 11.190(4)(b) to the foreclosure of those liens under NRS 444.520. Since a garbage lien is perpetual, it is not subject to a statute of limitations. Therefore, a municipal waste management company may foreclose upon such a lien at any time so long as it properly perfects the lien under NRS 444.520(4). Therefore, we reverse the judgment of the district court and remand this case to the district court for further consideration consistent with this opinion.

Pickering, Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

PARDEE HOMES OF NEVADA, Appellant, *v.* JAMES WOLFRAM, an Individual; ANGELA L. LIMBOCKER-WILKES, as Trustee of the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, a Nevada Trust; and WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, a Nevada Trust, Respondents.

No. 72371

July 3, 2019 444 P.3d 423

Appeal from a district court judgment in a breach of contract action and post-judgment orders regarding attorney fees and costs. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied September 27, 2019]

McDonald Carano LLP and *Pat Lundvall* and *Rory T. Kay*, Las Vegas, for Appellant.

The Jimmerson Law Firm, P.C., and *James M. Jimmerson* and *James J. Jimmerson*, Las Vegas, for Respondents.

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

OPINION

By the Court, Stiglich, J.:

Nevada adheres to the American Rule of attorney fees—attorney fees may not be awarded unless there is a statute, rule, or contract providing for such an award. This court, however, has recognized a narrow and limited exception for attorney fees as special damages. We have outlined certain requirements for pleading and proving attorney fees as special damages, and we have recognized scenarios that may warrant such fees. We take this opportunity to clarify that attorney fees incurred by a plaintiff in bringing a two-party breach-of-contract claim against a defendant do not constitute special damages under the narrow and limited exceptions recognized by this court. Because the attorney fees at issue here do not fall into any of the narrow and limited exceptions that permit attorney fees as special damages, we reverse the portion of the district court's judgment awarding attorney fees as special damages. We affirm the portion of the district court's award of attorney fees that was based on the parties' contractual prevailing party provision and remand the matter because the prevailing parties may be entitled to additional attorney fees in light of this opinion.

BACKGROUND

In the 1990s, Coyote Springs Investment, LLC (CSI), began planning a development project called "Coyote Springs," to be located over thousands of acres of undeveloped land in Lincoln and Clark Counties of Nevada. Real estate brokers James Wolfram and Walter Wilkes[1] introduced appellant Pardee Homes of Nevada (Pardee) to CSI to initiate Pardee's purchase of portions of Coyote Springs. Pardee and CSI subsequently entered into an agreement (Option Agreement) wherein Pardee agreed to purchase from CSI certain lands designated for the development of single-family residences. Pardee's purchase was to be paid in installments. Additionally, the

[1]Walter Wilkes passed away in April 2014. Wilkes' rights under the contract at issue were assigned to respondent The Walter D. Wilkes and Angela L. Limbocker-Wilkes Living Trust, with respondent Angela L. Limbocker-Wilkes acting as trustee.

agreement gave Pardee a 40-year option to purchase other designated property.

To compensate Wolfram and Wilkes for procuring Pardee's purchase of real property from CSI, Pardee agreed to pay the brokers specified commissions for purchases made pursuant to Pardee and CSI's Option Agreement (Commission Agreement). Additionally, Pardee agreed to keep the brokers reasonably apprised of all matters related to their commission payments and to provide the brokers with documentation corresponding to Pardee's purchases under the Option Agreement. Wolfram and Wilkes received commissions from March 2005 through March 2009 totaling $2,632,000.

Pardee and CSI amended the Option Agreement several times after its inception. Wolfram and Wilkes received the first two amendments to the Option Agreement as well as the Amended and Restated Option Agreement (AROA), but they did not receive any further amendments to the AROA before they filed the underlying lawsuit.[2] When Wolfram and Wilkes requested information to verify the types of property Pardee was purchasing from CSI and to confirm that its commission payments were accurate, Pardee provided some information concerning its acquisition of property for single-family residences but not all of the requested information. Wolfram and Wilkes continued to ask Pardee for additional information regarding land acquisitions and designations, requested the same from the title companies processing the payments, and attempted to obtain it themselves by searching public records. Wolfram and Wilkes also retained an attorney to seek the requested information.

Because Wolfram and Wilkes were unable to obtain the sought-after information, they filed suit against Pardee. In the complaint, they alleged three causes of action pertaining to Pardee's obligations under the Commission Agreement: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) an accounting. Subsequently the district court, despite Pardee's opposition, granted leave for Wolfram and Wilkes to file an amended complaint to plead attorney fees as special damages. Pardee raised a counterclaim of breach of the implied covenant of good faith and fair dealing against Wolfram and Wilkes.

After a bench trial, the district court found in favor of Wolfram and Wilkes on their causes of action and against Pardee on its counterclaim. Specifically, the district court held Pardee breached the Commission Agreement and the implied covenant of good faith and fair dealing by failing to keep Wolfram and Wilkes reasonably informed per the terms of the contract and by refusing to provide Wolfram and Wilkes with the requested documentation. The district

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[2]Wolfram and Wilkes never received these amendments directly from Pardee; rather, they filed the underlying lawsuit against Pardee, subpoenaed the title company handling their commission payments, and obtained the amendments.

court concluded there was a special relationship between Pardee and the brokers insofar as the respondents had to rely upon Pardee to keep them reasonably informed of any developments at Coyote Springs that could impact their commission payments.

The district court ordered an accounting, demanding that Pardee provide Wolfram and Wilkes—and their successors or assigns—all future amendments made to the AROA and to continue to keep the respondents reasonably informed under the Commission Agreement. Additionally, the district court awarded Wolfram and Wilkes attorney fees on two grounds: (1) $135,500 as special damages, concluding that Wolfram and Wilkes were forced to file suit against Pardee in order to get the information to which they were entitled pursuant to the Commission Agreement; and (2) $428,462.75 because Wolfram and Wilkes were the prevailing parties pursuant to the Commission Agreement.

DISCUSSION

Pardee claims the district court erred in two ways: (1) in awarding Wolfram and Wilkes attorney fees as special damages, and (2) in determining Wolfram and Wilkes were the prevailing parties entitled to attorney fees pursuant to the Commission Agreement.

Attorney fees as special damages

First, Pardee claims the district court erred in awarding attorney fees as special damages to Wolfram and Wilkes pursuant to *Sandy Valley Associates v. Sky Ranch Estates Owners Association*, 117 Nev. 948, 960, 35 P.3d 964, 971 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), and *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 321 P.3d 875 (2014). Pardee argues Wolfram and Wilkes are not entitled to special damages here because a two-party breach-of-contract action does not fit into one of the illustrations discussed in *Sandy Valley*. Wolfram and Wilkes counter *Sandy Valley* and its progeny do not stand for the proposition that only three limited exceptions exist to the American Rule of attorney fees; rather, according to Wolfram and Wilkes, those cases permit attorney fees as special damages where the fees are incurred as a "natural and proximate consequence" of another party's wrongful conduct. *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 969.

"Generally, we review decisions awarding or denying attorney fees for a manifest abuse of discretion. But when the attorney fees matter implicates questions of law, the proper review is de novo." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (internal citations omitted). Because the issue of attorney fees as special damages involves a question of law, we review this issue de novo. *Id.*

Nevada adheres to the American Rule that attorney fees may only be awarded when authorized by statute, rule, or agreement. *Id.* This court has recognized exceptions to this general rule; one such exception is for attorney fees as special damages. *See Sandy Valley*, 117 Nev. at 960, 35 P.3d at 971 (emphasizing that attorney fees as special damages, as with any other element of damages, must be pleaded under NCRP 9(g) and then proven at trial by competent evidence).

In *Sandy Valley*, this court considered an award of attorney fees as special damages in an action involving title to real property where those fees were not requested until after trial. *Id.* at 958-60, 35 P.3d at 970-71. We concluded the district court erred in considering attorney fees as special damages because the issue was neither pleaded nor proven by competent evidence at trial. We stressed that future litigants could not obtain attorney fees as special damages without complying with NRCP 9(g). *See id.* at 959-60, 35 P.3d at 971. *Sandy Valley*'s comment that attorney fees as special damages are "foreseeable damages arising from tortious conduct or a breach of contract," and a "natural and proximate consequence of . . . injurious conduct" did not expand the scope of the scenarios that warrant attorney fees as special damages. *See id*. at 956-57, 35 P.3d at 969. *Sandy Valley*'s holding embraced the general concept that attorney fees as special damages, as with any other item of damages, must be pleaded and proven by competent evidence. Therefore, to the extent *Sandy Valley* has been read to broadly allow attorney fees as special damages whenever the fees were a reasonably foreseeable consequence of injurious conduct, we disavow such a reading.

Based on *Sandy Valley*, *Horgan*, and *Liu*, the district court erroneously concluded Wolfram and Wilkes were entitled to attorney fees as special damages under Wolfram and Wilkes' two-party breach-of-contract action. *Sandy Valley* discussed three scenarios in which attorney fees as special damages may be appropriate.[3] *Id.* at 957-58,

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[3]First, "cases when a plaintiff becomes involved in a third-party legal dispute as a result of a breach of contract or tortious conduct by the defendant." *Id.* at 957, 35 P.3d at 970. Second, "cases in which a party incurred the fees in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property." *Id.*, *partially abrogated by Horgan*, 123 Nev. at 586, 170 P.3d at 988 (clarifying that "attorney fees [in actions to clear a clouded title] are now only available as special damages in slander of title actions"). Third, injunctive or declaratory relief actions compelled "by the opposing party's bad faith conduct." *Id.* at 958, 35 P.3d at 970. These narrow exceptions in which attorney fees as special damages may be warranted are well established in Nevada's jurisprudence. *See, e.g.*, *Michelsen v. Harvey*, 110 Nev. 27, 29, 866 P.2d 1141, 1142 (1994) ("As an exception to the general rule, it is well-settled in Nevada that attorney's fees are considered an element of damages in slander of title actions."), *receded from in Horgan*, 123 Nev. 577, 170 P.3d 982; *Lowden Inv. Co. v. Gen. Elec. Credit Co.*, 103 Nev. 374, 380, 741 P.2d 806, 809 (1987) (providing that "attorney's fees attributable to plaintiff's litigation with other parties may be recovered as

35 P.3d at 970. *Sandy Valley*, however, does not support an award of attorney fees as special damages where a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-contract action against a breaching defendant. *Liu*, 130 Nev. at 155 n.2, 321 P.3d at 880 n.2 (observing *Sandy Valley* did not permit a plaintiff to recover attorney fees as special damages in a suit for breach of contract). Under Wolfram and Wilkes' theory, any breach-of-contract suit would warrant attorney fees as special damages because it would be foreseeable that an aggrieved party would retain the services of an attorney to remedy a breach. This conflicts with our caselaw. Rather, we reiterate that attorney fees as special damages are an exception to the American rule that each party assumes their own attorney fees. Accordingly, we determine the district court erred in awarding Wolfram and Wilkes attorney fees as special damages.[4]

Attorney fees pursuant to prevailing party provision

Next, Pardee contends the district court abused its discretion by finding Wolfram and Wilkes were the prevailing parties pursuant to the parties' Commission Agreement. Pardee acknowledges Wolfram and Wilkes prevailed on all three of their causes of action, as well as against Pardee's counterclaim. However, Pardee posits Wolfram and Wilkes unsuccessfully sought substantial unpaid commission payments, which the district court found were not due because Pardee had paid all commission payments owed, and thus, Pardee was the prevailing party.

Whether a contract authorizes attorney fees is a question of law reviewed de novo. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). "Parties are free to provide for attorney fees by express contractual provisions." *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012). "[T]he initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.*

The Commission Agreement unambiguously provides, "[i]n the event either party brings an action to enforce its rights under this

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damages when defendant's conduct caused the litigation"); *Von Ehrensmann v. Lee*, 98 Nev. 335, 337-38, 647 P.2d 377, 378-79 (1982) ("Where equitable relief is sought, an award of attorneys' fees is proper if awarded as an item of damages.").

[4]Alternatively, Wolfram and Wilkes contend they are entitled to attorney fees as special damages because the district court ordered injunctive relief as a result of Pardee's wrongful withholding of information that respondents were entitled to under their contract. *See Sandy Valley*, 117 Nev. at 958, 35 P.3d at 970. We reject this argument insofar as Wolfram and Wilkes did not address how the district court's order on their accounting at law claim amounted to injunctive or equitable relief. They did not challenge the district court's classification of their accounting claim as an accounting at law claim and did not discuss this classification with respect to equitable accounting.

Agreement, the prevailing party shall be awarded reasonable attorney fees and costs." Thus, the district court did not err in finding attorney fees were authorized under the parties' contract. *See Lehrer*, 124 Nev. at 1115, 197 P.3d at 1041. "A party prevails 'if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit.'" *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (emphasis in original).

Pardee's assertion the respondents filed the underlying suit because they claimed they were owed unpaid compensation—a claim the district court found was without merit—is not compelling. Wolfram and Wilkes prevailed on each cause of action they brought as well as on Pardee's counterclaim. Further, the complaint and the evidence presented at trial demonstrate Wolfram and Wilkes sought information through an accounting, which was eventually granted by the district court. It is inconsequential to the prevailing party determination that the brokers artfully framed their complaint in a limited way. The complaint requests information; the district court granted this request. It is beyond the scope of prevailing party determination to consider if Wolfram and Wilkes' underlying motivation was to discover they were owed unpaid commissions because that was not one of their claims. Accordingly, the district court did not abuse its discretion in concluding that Wolfram and Wilkes were the prevailing parties under the Commission Agreement as this holding is neither clearly erroneous nor unsupported by the evidence. *See Davis*, 128 Nev. at 314, 278 P.3d at 510.

In sum, we conclude the district court erred in awarding Wolfram and Wilkes attorney fees in the amount of $135,500 as special damages for Wolfram and Wilkes' two-party breach-of-contract action. We conclude, however, the district court did not abuse its discretion in awarding $428,462.75 in attorney fees to Wolfram and Wilkes as the prevailing parties on the contract action because Wolfram and Wilkes succeeded on all three causes of action brought against Pardee in addition to Pardee's counterclaim against them. Finally, because Wolfram and Wilkes may be entitled to additional attorney fees as prevailing parties in light of this court's reversal of the attorney fee special damages award, we remand to the district court to consider these fees under a prevailing party analysis. Accordingly, we affirm the portion of the district court's judgment awarding attorney fees to the prevailing parties, we reverse the portion of the judgment awarding attorney fees as damages, and we remand for further proceedings consistent with this opinion.

Hardesty and Silver, JJ., concur.

SATICOY BAY LLC SERIES 9050 W WARM SPRINGS 2079, Appellant, *v.* NEVADA ASSOCIATION SERVICES; JAMES P. MARKEY; and DITECH FINANCIAL LLC, Respondents.

No. 74153

July 3, 2019 444 P.3d 428

Appeal from a final judgment in an action to quiet title to real property. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

[Rehearing denied September 27, 2019]

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Henderson, for Appellant.

Law Office of John W. Thomson and *John W. Thomson*, Henderson; *Messner Reeves LLP* and *Brigette E. Foley*, Las Vegas, for Respondent James P. Markey.

Wolfe & Wyman LLP and *Colt B. Dodrill*, Las Vegas, for Respondent Ditech Financial LLC.

Christopher V. Yergensen, Las Vegas, for Respondent Nevada Association Services.

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

OPINION

By the Court, Stiglich, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this court held that NRS 116.3116(2) (2013) provided a homeowners' association (HOA) with a "superpriority" lien that, when properly foreclosed, extinguished a first deed of trust and vested title in the foreclosure sale purchaser "without equity or right of redemption," NRS 116.31166(3) (1993). In the wake of *SFR Investments*, Nevada's Legislature enacted substantial amendments to NRS Chapter 116's HOA foreclosure sale statutes, in part, by creating a statutory right for homeowners, holders of a recorded security interest, and successors in interest to redeem property within a 60-day time frame after such a sale. We are asked to consider for the first time the application of this amendment. Because we conclude that the homeowner in this matter complied with the redemption statute at issue, we affirm the district court's grant of summary judgment in favor of the homeowner.

FACTS AND PROCEDURAL HISTORY

Appellant Saticoy Bay LLC Series 9050 W Warm Springs 2079 purchased property owned by respondent James Markey for $48,600 at an HOA foreclosure sale in November 2015. After the foreclosure sale, Nevada Association Services (NAS), the entity that conducted the sale, distributed $4,564.23 of sale proceeds to pay off the HOA lien and satisfy costs associated with the sale. It then held the remaining proceeds of the sale in its trust account. Within 60 days of the foreclosure sale, Markey notified NAS that he intended to redeem the property pursuant to Nevada's newly enacted HOA foreclosure sale redemption statute, NRS 116.31166(3) (2015).[1] NAS in turn notified Saticoy Bay of Markey's intent to redeem, but neither NAS nor Markey provided Saticoy Bay with a certified copy of the deed on the property.

NAS provided Markey with the figures that encompassed the redemption amount. Pursuant to NRS 116.31166(3), the redemption amount is calculated as the sum of (1) the purchase price of the property at the foreclosure sale, (2) the HOA lien and costs,[2] (3) reimbursement for reasonable maintenance costs, and (4) statutory interest accumulated from the date of the HOA foreclosure sale to the date of redemption. NAS informed Markey that it would direct the remaining proceeds of the sale it held in trust toward the full redemption amount and instructed Markey to supply the remainder. Further, NAS informed Markey that as soon as he sent the remainder of the redemption amount, NAS would return to Saticoy Bay the proceeds of the sale held in trust along with the remainder of the redemption amount from Markey (together, the full redemption amount).

Markey sent the remainder of the redemption amount to NAS, and NAS sent a check to Saticoy Bay for the full redemption amount. Saticoy Bay, however, refused the check because it believed that the money had to come directly from Markey, not NAS, and because Markey could not use proceeds from the sale to redeem the property. NAS sent another check, this time in Markey's name, to Saticoy Bay on the last day of the redemption period, but Saticoy Bay again rejected it. Respondent Ditech Financial LLC—the bank servicing the mortgage on Markey's property—also expressed interest in redeeming the property prior to Markey's notice. However, when Ditech learned of Markey's intent to redeem, it abandoned

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[1]All ensuing references to the statutes in NRS Chapter 116 are to the 2015 versions of those statutes.

[2]Meaning, "[t]he amount of any assessment, taxes or payments toward liens which were created before the purchase and which the purchaser may have paid thereon after the purchase, and interest on such amount." NRS 116.31166(3)(a)(1).

those efforts. Ditech later memorialized that position when it notified NAS that to the extent Ditech had any interest in the proceeds of the sale NAS held in its trust account, Ditech authorized Markey to use those funds to redeem the property. When Saticoy Bay sought a foreclosure deed[3] for the property, NAS refused, arguing that Markey's redemption was successful and that the foreclosure sale was terminated.

Saticoy Bay filed a complaint in the district court seeking quiet title to the property, declaratory relief, and specific performance. Ditech moved for summary judgment, which Markey joined, arguing that the plain language of NRS 116.31166(3) and (4) did not prevent unit owners from using the proceeds of an HOA foreclosure sale to exercise their redemption rights, and that it was "immaterial" that Markey did not provide a certified copy of his deed when he sought redemption. Saticoy Bay opposed and countermoved for summary judgment, arguing that Markey failed to comply with NRS 116.31166(3) because the checks came from NAS and not Markey directly, that NAS and Markey failed to comply with NRS 116.31164(7)(b), and that NRS 116.31166(4) mandated strict compliance. The district court concluded that NAS's "tender to Saticoy Bay of the full redemption amount of $50,052.16 via cashier's check on behalf of Markey immediately extinguished Saticoy Bay's interest in the property." It also found that "the amount, time, and manner of the tender was sufficient" to satisfy the redemption statute. Consequently, the district court granted summary judgment to Ditech and Markey, terminated the foreclosure sale, and quieted title in favor of Markey subject to Ditech's first deed of trust.

Saticoy Bay appeals from the order granting summary judgment and raises two primary arguments: (1) Markey did not comply with the HOA foreclosure sale redemption statute when he directed NAS to put the proceeds of the foreclosure sale toward redemption of the property, and (2) Markey did not comply with the notice provision of the redemption statute when he failed to produce a certified copy of the deed with his notice to redeem. Saticoy Bay argues that this failure to comply with the statutory requirements renders the redemption invalid, and therefore, the district court erred in granting summary judgment to Ditech and Markey.

DISCUSSION

Generally, "[t]his court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026,

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[3]Pursuant to the redemption statute, Saticoy Bay was entitled to receive a certificate of sale after the sale took place, but it was not entitled to receive the foreclosure deed until the redemption period expired without the property being redeemed. *Compare* NRS 116.31166(2), *with* NRS 116.31166(7).

1029 (2005). Pursuant to NRCP 56(c), summary judgment is proper when no genuine issue of material fact remains and the movant "is entitled to a judgment as a matter of law." *Id.* (internal quotation omitted). And this court views the evidence in a light most favorable to the nonmoving party. *Id.* Further, issues of statutory construction are reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "Similarly, whether a statute's procedural requirements must be complied with strictly or only substantially is a question of law subject to [this court's] plenary review." *Id.*

Markey complied with the HOA foreclosure redemption provision

In 2015, NRS Chapter 116 was amended to include NRS 116.31166(3) in order to afford property owners, holders of a recorded security interest, and successors in interest a right to redeem the properties after delinquent HOA payments result in an HOA foreclosure sale.[4] Legislative Counsel Bureau Research Division, *Policy and Program Report: Housing* 3-4 (Apr. 2016). In relevant part, the statute provides that a unit owner, holder of a recorded security interest in the unit, or successor in interest of those persons may redeem the property within 60 days after the HOA foreclosure sale "by paying: (a) [t]he purchaser the amount of his or her purchase price, with interest at the rate of 1 percent per month thereon in addition, to the time of the redemption, plus" additional fees, taxes, assessments, and liens that vary depending on the circumstances. NRS 116.31166(3).

Saticoy Bay argues that Markey did not comply with NRS 116.31166(3) because he was not permitted to use the funds held in trust by NAS—funds provided by Saticoy Bay to NAS for the foreclosure sale price—to "pay . . . [t]he purchaser the amount of his or her purchase price" to redeem the property. NRS 116.31166(3). In furtherance of this argument, Saticoy Bay looks to NRS 116.31164(7), which states:

> 7. *After the sale*, the person conducting the sale *shall*:
> (a) Comply with the provisions of subsection 2 of NRS 116.31166; and
> (b) Apply the proceeds of the sale for the following purposes *in the following order*:
> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to

[4]The redemption statute is effective only as to foreclosure sales that occurred after October 1, 2015. *See* 2015 Nev. Stat., ch. 266, §§ 6, 9, at 1342, 1349. The HOA foreclosure sale here occurred on November 20, 2015.

the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

NRS 116.31164(7) (emphases added). Saticoy Bay argues that after the foreclosure sale, NAS was obligated to distribute the proceeds of the sale immediately according to the distribution order in NRS 116.31164(7). Given the distribution order and that a deed of trust encumbered the property, Saticoy Bay argues the proceeds should have been distributed immediately to Ditech, the servicer for the deed of trust beneficiary. *See* NRS 116.31164(7)(b)(4)-(5). Because, on behalf of Markey, NAS directed the remaining proceeds of the sale back to Saticoy Bay to satisfy the redemption and not toward the order of distribution, Saticoy Bay claims NAS and Markey improperly bypassed NRS 116.31164(7)(b)(4).

Reviewing Saticoy Bay's argument de novo as it presents issues of statutory interpretation, *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014), we first look to the statute's plain language to decipher legislative intent. *See Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). If the statute's language is clear and unambiguous, we do not look beyond it. *Id.*

As an initial matter, NRS 116.31164(7) contains more than an order of distribution provision. Indeed, subsection (7)(a) directs the person conducting the sale, here NAS, to also comply with NRS 116.31166(2) "[a]fter the sale." NRS 116.31164(7)(a). NRS 116.31166(2) in turn directs NAS to provide the purchaser, here Saticoy Bay, with a certificate of sale and, among other things, "[a] statement that the unit is subject to redemption." NRS 116.31166(2)(a)(4). Receipt of such certificate of sale in exchange for the purchase price provides purchasers with a recorded interest in the property until the redemption period expires. *See* NRS 116.31166(2)(b); NRS 116.31166(7). "After the sale," the person conducting the sale must also comply with NRS 116.31164(7)(b) and distribute the proceeds of the sale in a particular order. This distribution begins with the "reasonable expenses of [the] sale," expenses associated with preparing the unit for sale, and satisfaction of the HOA's lien, and concludes with satisfying claims of record on the unit and remitting any excess to the prior unit owner. *See* NRS 116.31164(7)(b).

We conclude that NAS complied with the plain language of these provisions, whether or not it explicitly invoked the statute.[5] After

[5]Saticoy Bay does not argue on appeal that a certificate of sale was not delivered pursuant to NRS 116.31166(2), and the record contains a certificate of foreclosure sale subject to redemption that was recorded on November 23, 2015.

Saticoy Bay tendered the $48,600 purchase price at the HOA foreclosure sale, NAS distributed $4,564.23 pursuant to NRS 116.31164(7)(b)(1)-(3) to pay off the HOA lien and costs associated with the sale. It was for this reason that NAS only held $44,035.77 in trust—it had not yet distributed the remainder of the proceeds of the sale pursuant to NRS 116.31164(7)(b)(4)-(5).

This court agrees with Saticoy Bay that the statute required NAS to distribute the proceeds of the sale to Ditech immediately following the sale, however, Ditech's receipt or non-receipt of the proceeds is not for Saticoy Bay to dispute. Critically, the relevant provisions are silent in terms of granting an HOA foreclosure sale purchaser authority to direct how the proceeds are distributed. And Saticoy Bay has not identified any language in the statute that gives it such authority. Rather, the statute explicitly places responsibility on *the person conducting the sale* (here, NAS) to distribute the proceeds of the sale pursuant to NRS 116.31164(7)(b). Absent any such authorization to the purchaser, common sense dictates that Saticoy Bay does not have such authority. In this, Saticoy Bay errs by continuing to characterize the purchase price funds as "its" money. Indeed, once Saticoy Bay received the certificate of sale, it received all it was entitled to at that time under the redemption statute—an interest in the property. Therefore, whether the proceeds of the sale must be distributed toward a subordinate claim of record pursuant to subsection 4, such as that of Ditech here, or to Markey as remittance of any excess proceeds pursuant to subsection 5, is not for Saticoy Bay to assert because those funds no longer belong to Saticoy Bay.[6] *See Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012) ("[A] party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court."); *see also Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) ("[E]ach party must plead and prove his or her own claim to the property in question." (internal quotation omitted)). Rather, that argument is for Ditech to make.

Here, however, the record demonstrates that Ditech authorized NAS to use any sale proceeds Ditech may have had a superior interest in under NRS 116.31164(7)(b)(4) for the benefit of Markey to redeem. Simply put, Ditech waived the very argument Saticoy Bay attempts to assert, and under the unique circumstances of this

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[6]Similarly, Saticoy Bay lacks standing to assert its alternative argument that NAS was required to release the proceeds of the sale to Markey after the sale regardless of NRS 116.31164(7)(b)'s distribution order and only then would Markey be free to submit the redemption payment personally to Saticoy Bay using the funds. *See Beazer Homes Holding Corp.*, 128 Nev. at 731, 291 P.3d at 133. In any event, Saticoy Bay rejected a check coming "from" Markey when NAS sent the second check in his name. *Forderer v. Schmidt*, 154 F. 475, 477 (9th Cir. 1907) (explaining that tender made by a third party at a debtor's request is sufficient tender).

case, Markey was entitled to use the excess proceeds of the sale to redeem the property.[7] Specifically, after receiving the fees from Markey, NAS tendered a check for a total of $50,052.16 to Saticoy Bay before the redemption period expired. That sum included the return of the $48,600 purchase price (less the $4,564.23 HOA lien and costs associated with the sale), as well as $6,016.39 tendered by Markey for the above-mentioned lien and costs and expenses.[8] Therefore, Saticoy Bay received what NRS 116.31166(3) requires if the homeowner chooses to redeem.

In sum, we conclude that in light of Ditech having allowed Markey to use sale proceeds to which Ditech was otherwise entitled, Markey complied with the redemption provision when he tendered the statutorily mandated fees and costs described above[9] and Saticoy Bay received all to which it was entitled pursuant to the redemption statute.[10]

Markey substantially complied with the HOA foreclosure sale notice of redemption provision

The redemption statute also includes a notice requirement. Under NRS 116.31166(4), a unit owner is obligated to provide notice of re-

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[7]Saticoy Bay argues that Ditech was not the servicer of the loan at the time of the redemption period because the assignment of the deed of trust from Quicken Loans (the original owner of the loan) to Ditech was not recorded until April 2016. It argues that because Ditech was not the servicer when Ditech authorized Markey to use any funds, Ditech did not have the authority to make such authorization. However, Saticoy Bay waived the right to argue this issue because Saticoy Bay failed to raise it below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

[8]Saticoy Bay does not reasonably challenge that the checks were sent or received. Rather, Saticoy Bay merely argues that the checks are not included in the record on appeal. However, the record does contain emails from Saticoy Bay's counsel to NAS's counsel dated January 15, 2016, where Saticoy Bay references the January 15 check that was delivered by NAS. Further, in a January 20 email from NAS's counsel to Saticoy Bay's counsel, NAS's counsel explained that the January 19 check had been returned by Saticoy Bay's office that evening.

[9]We further conclude that NAS was permitted to tender the redemption amount on Markey's behalf. It is well-settled that tender "need not be made by [a debtor] personally. If made by a third person at his request it is sufficient . . . ." *Forderer v. Schmidt*, 154 F. 475, 477 (9th Cir. 1907) (quoting 2 Parsons on Contract 639 (9th ed.)); *see also* NRS 116.1108 (stating that supplemental general principles of law are applicable to NRS Chapter 116); Restatement (Third) of Prop.: Mortgages § 6.4(a), (e) & cmt. a (Am. Law Inst. 1997) (explaining that the full payment of a mortgage by a nonassuming grantee nevertheless extinguishes the mortgage).

[10]Saticoy Bay also argues that if Markey and Ditech claim that excess proceeds of the sale could be used to redeem the property, they would therefore be estopped from attacking the validity of the sale. However, we need not reach this issue, as Markey's redemption does not attack the validity of the sale.

demption to the person who conducted the HOA foreclosure sale—here, NAS—as well as the person who purchased the property at the sale—here, Saticoy Bay. NRS 116.31166(4). Where, as here, the unit owner is redeeming the unit, the notice of redemption "must" be accompanied by "a certified copy of the deed to the unit . . . ." NRS 116.31166(4)(a). Markey did not provide a certified copy of his deed in conjunction with his redemption notice.

Saticoy Bay argues that because the redemption statute's notice provision includes the word "must," strict compliance with the statute is required and Markey failed to comply when he did not provide a certified copy of the deed, which rendered the redemption invalid. *See* NRS 116.31166(4). It also argues that NRS 116.31166(4) mandates strict compliance in order to give "each sentence, phrase, and word" of the subsection independent meaning. *Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nev., Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). Further, Saticoy Bay argues that because this court previously held that a statute requiring the provision of a certified copy of a deed of trust warrants strict compliance in the foreclosure *mediation* context, the same should be required in the HOA foreclosure *redemption* context.

"To determine whether a statute and rule require strict compliance or substantial compliance, this court looks at the language used and policy and equity considerations." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 475-76, 255 P.3d 1275, 1278 (2011). "In so doing, [this court] examine[s] whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Id.* at 476, 255 P.3d at 1278. This court has recognized as a "general tenet that 'time and manner' requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements." *Leven*, 123 Nev. at 408, 168 P.3d at 718. Moreover, "[s]ubstantial compliance may be sufficient to avoid harsh, unfair[,] or absurd consequences." *Leyva*, 127 Nev. at 475, 255 P.3d at 1278 (internal quotation omitted). Substantial compliance requires that a party (1) have actual knowledge, and (2) not suffer prejudice. *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010). In the context of NRS 116.31166(4), actual knowledge entails knowledge of the unit owner's intent to redeem and knowledge of the unit owner's authority to redeem.

To be sure, in the foreclosure mediation context, we have held that the statutory requirement to produce a certified copy of a deed of trust mandates strict compliance (analyzing the requirements of NRS 107.086(5)-(6)); *Leyva*, 127 Nev. at 476, 255 P.3d at 1279; *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 465-67, 255 P.3d 1281, 1284-85 (2011). The *Leyva* court reasoned that strict compliance was required because NRS 107.086(5) states that the beneficiary of the deed of trust (i.e., lender) "shall" bring the deed of trust to the

mediation. *Leyva*, 127 Nev. at 476, 255 P.3d at 1279; *see also* FMR 13.7(a). Also, that "[t]he legislative intent behind requiring a party to produce the assignments of the deed of trust . . . is to ensure that whoever is foreclosing actually owns the note." *Leyva*, 127 Nev. at 476, 255 P.3d at 1279 (internal quotations omitted). Indeed, in *Leyva*, the bank attempting to participate in the mediation was not the original named beneficiary on the deed of trust and did not provide a written assignment but was nonetheless attempting to foreclose on the property. *Id.* Evidence of the identity of the deed of trust beneficiary was therefore crucial to ensuring that the bank was authorized to foreclose on the property, so much so that in the foreclosure mediation context, a foreclosing party's failure to strictly comply with the statute and "bring the required documents to the mediation is a *sanctionable offense* under NRS 107.086 and the [Foreclosure Mediation Rules]." *Id.* at 480, 255 P.3d at 1281 (emphasis added).

Conversely, no equivalent ramification is evident in NRS Chapter 116 when a certified copy of a deed is not provided during redemption. Rather, the remedies suggest strict compliance is not necessary in that "[t]he remedies provided by [NRS Chapter 116] must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." NRS 116.1114. In this sense, NRS 107.086 and the applicable Foreclosure Mediation Rules are construed against the lenders (i.e., beneficiaries of the deed of trust) attempting to foreclose on a home, *see Leyva*, 127 Nev. at 476, 255 P.3d at 1279 (concluding that "NRS 107.086 and the FMRs necessitate strict compliance" to adequately serve the purpose of the statute and rules), while NRS Chapter 116's redemption statute is construed in favor of the unit owner attempting to redeem his or her property. *See* Hearing on S.B. 306 Before the Senate Judiciary Comm., 78th Leg. (Nev., Apr. 7, 2015) (statement of Senator Aaron D. Ford); *see also* Hearing on S.B. 306 Before the Assembly Judiciary Comm., 78th Leg. (Nev., Apr. 28, 2015) (statement of Jonathan Gedde, Chairman, Board of Governors, Nevada Mortgage Lenders Association) ("Nevada homeowners benefit by the changes made in this bill as well. Taking away someone's property that is worth hundreds of thousands of dollars is not a matter that should be taken lightly and there are quite a few consumer protections in this bill."). Further, if a unit owner substantially complies with the redemption statute's notice provision, the purchaser is "put in as good a position as if the other party had fully performed," NRS 116.1114, because a successful redemption results in the purchaser receiving repayment of the purchase price, reimbursement for other costs and assessments, and also payment of monthly interest on the purchase price. NRS 116.31166(3). We conclude that substantial compliance with NRS Chapter 116's redemption statute's notice re-

quirement is sufficient because "the purpose of [NRS 116.31166(4)] can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Leyva*, 127 Nev. at 476, 255 P.3d at 1278.

Turning to the case before us, Saticoy Bay had actual knowledge of Markey's intent to redeem the property when NAS emailed Saticoy Bay of Markey's intent. Further, Saticoy Bay does not argue on appeal that Markey is not the unit owner of the property; rather Saticoy Bay merely argues that Markey did not strictly comply with NRS 116.31166(4) by providing a certified copy of the deed. Saticoy Bay also has not demonstrated that it was prejudiced by Markey's failure to provide a certified copy of the deed. First, the only time Saticoy Bay communicated any objection to Markey's notice of redemption and the lack of a certified copy of the deed was the day after the 60-day redemption period expired, despite the fact that Saticoy Bay had been communicating with NAS about Markey's intent to redeem for almost a month. Second, Saticoy Bay failed to articulate how the lack of a certified copy of the deed caused it harm, except that it was unable to frustrate Markey's redemption on the ground that he did not strictly comply with the statute. This objection too is unavailing, as successful redemption by Markey resulted in Saticoy Bay receiving all of the benefits of redemption pursuant to NRS 116.31166, namely the payment of its purchase price and interest at the rate of one percent per month. Accordingly, we conclude that Markey substantially complied with NRS 116.31166(4) and that his substantial compliance was sufficient to satisfy the statute's requirements. *Hardy Cos.*, 126 Nev. at 536, 245 P.3d at 1155.

Based on the above, we find no error in the district court's ruling below, and we affirm the district court's summary judgment.

Hardesty and Silver, JJ., concur.

GERARDO PEREZ, Appellant, *v.*
BRIAN WILLIAMS, Warden, Respondent.

No. 75001

July 3, 2019 444 P.3d 1033

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Affirmed.

Justice Law Center and *Bret O. Whipple*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, and *Jessica Perlick*, Senior Deputy Attorney General, Carson City, for Respondent.

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

OPINION[1]

Per Curiam:

Appellant Gerardo Perez is serving a sentence for using a deadly weapon in the commission of a second-degree murder in 2003. In a postconviction petition for a writ of habeas corpus, Perez challenged the computation of time he has served. He claimed, in relevant part, that the credits he earns under NRS 209.4465 must be applied to the minimum term of his enhancement sentence. The district court rejected that argument, concluding that the applicable sentencing statute specified a minimum term that Perez had to serve before becoming eligible for parole and therefore NRS 209.4465(7)(b) precluded respondent from applying the statutory credits to the minimum term of Perez's enhancement sentence. Perez argues that the district court erred because the sentencing statute is silent as to parole eligibility.[2] We disagree because the statute that specified the sentence for the primary offense (second-degree murder) also specified the sentence for the weapon enhancement and that statute specified a minimum term that Perez had to serve before becoming eligible for parole.

DISCUSSION

NRS 209.4465(7)(b) provides that statutory credits may be applied to the minimum term of an offender's sentence "*unless* the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole."[3] (Emphasis added.) Pointing to NRS 193.165 as the statute under which he was sentenced for the weapon enhancement, Perez argues that it says nothing about parole eligibility and that the parole-eligibility requirement in the sentencing statute for the primary offense should not be read into NRS 193.165 because this court has said that the sentence for the primary offense and the sen-

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[1]We previously decided this matter in an unpublished order but then granted respondent's motion to publish the decision as an opinion.

[2]Perez has not raised any issues related to the other computation claims in his petition.

[3]The exceptions to NRS 209.4465(7) that are set forth in NRS 209.4465(8) do not apply here because the offense at issue was committed before the effective date of NRS 209.4465(8). *See Williams v. State, Dep't of Corr.*, 133 Nev. 594, 595 n.1, 402 P.3d 1260, 1261 n.1 (2017).

tence for a weapon enhancement "are separate and distinct," *State, Dep't of Prisons v. Bowen*, 103 Nev. 477, 481, 745 P.2d 697, 699 (1987).

When interpreting a statute, we focus on its plain language. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). At the time of the offense, NRS 193.165(1) expressly relied on the sentencing statute for the primary offense to set the sentence for the weapon enhancement. 1995 Nev. Stat., ch. 455, § 1, at 1431; *see also State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 188 P.3d 1079 (2008) (holding that the 2007 amendments to NRS 193.165 do not apply to offenses committed before the amendments' effective date). In particular, it required that the enhancement sentence be "equal to . . . the term of imprisonment prescribed by statute for the crime" during which the weapon was used. 1995 Nev. Stat., ch. 455, § 1(1), at 1431. We conclude that NRS 193.165(1)'s plain language incorporated the sentence prescribed by statute for the primary offense. *Bowen* does not undermine that interpretation. The holding in *Bowen* that the primary-offense sentence and enhancement sentence are "separate and distinct" does not mean that those sentences are prescribed by separate and distinct statutes. Take a simple example: consecutive sentences for multiple counts of robbery are "separate and distinct" sentences, yet they are prescribed by the same statute. Considering the plain language of NRS 193.165(1) before the 2007 amendments, we conclude that the relevant sentencing statute for purposes of NRS 209.4465(7)(b) is the one that prescribed the sentence for the primary offense.[4]

Here, NRS 200.030(5) prescribed the sentence for the primary offense of second-degree murder: either life with the possibility of parole or a definite term of 25 years, both "*with eligibility for parole beginning when a minimum of 10 years has been served*." NRS 200.030(5)(a), (b) (emphasis added). Perez therefore was sentenced for the weapon enhancement pursuant to a statute that specified a minimum sentence—10 years—that he had to serve before becoming eligible for parole on the enhancement sentence. *See Williams*, 133 Nev. at 597-98, 402 P.3d at 1262-63 (explaining the difference between parole-eligibility statutes, which "delineate a [maximum sentence], with eligibility for parole beginning when a minimum of [x] years has been served," and minimum-maximum sentencing statutes, which are silent as to parole eligibility (alteration in original) (internal quotation marks omitted)). As such, NRS 209.4465(7)(b) precludes respondent from applying Perez's statutory credits to the

[4]The analysis is different under NRS 193.165(1) as amended in 2007 because those amendments eliminated the "equal" sentence language and replaced it with minimum-maximum penalties that do not mention parole eligibility. Those amendments do not apply here. *Pullin*, 124 Nev. at 572, 188 P.3d at 1084.

minimum term of his weapon enhancement sentence.[5] The district court did not err in so holding and thus denying the postconviction habeas petition. We therefore affirm the judgment of the district court.

JAMES A. BOESIGER, AN INDIVIDUAL; AND MARIA S. BOESIGER, AN INDIVIDUAL, APPELLANTS, *v.* DESERT APPRAISALS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND TRAVIS T. GLIKO, AN INDIVIDUAL, RESPONDENTS.

No. 75198

July 3, 2019 444 P.3d 436

Appeal from a district court order granting summary judgment in a professional negligence action involving a real property appraisal. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed.

David J. Winterton & Associates, Ltd., and *David J. Winterton* and *Meghan H. Shigemitsu*, Las Vegas, for Appellants.

Lipson Neilson P.C. and *Joseph Garin* and *Eric N. Tran*, Las Vegas, for Respondents.

Before the Supreme Court, PICKERING, PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to review a district court order granting summary judgment in favor of respondents, a real estate appraisal company and a professional real estate appraiser. After purchasing a home, appellants alleged respondents negligently relied on inaccurate information to calculate the home's size and market value, resulting in a misleading appraisal report and an inflated pur-

[5]Perez's reliance on our unpublished decision in *Garcia v. Baca*, Docket No. 70874 (Order Vacating and Remanding, Oct. 30, 2017), is misplaced. That case involved a weapon enhancement sentence where the statute that prescribed the sentence for the primary offense did not specify a term that the offender had to serve before becoming eligible for parole. But notably, we looked to the statute that prescribed the sentence for the primary offense to determine whether NRS 209.4465(7)(b) allowed the offender's statutory credits to be applied to the minimum term of the enhancement sentence—the same as we do here.

chase price, and preventing appellants from thereafter refinancing their home loan.

As set forth herein, we affirm the district court's order granting summary judgment for respondents. We also take this opportunity to emphasize the important role of summary judgment in promoting sound judicial economy. Courts should not hesitate to discourage meritless litigation in instances where, as here, claims are deficient of evidentiary support and are based on little more than the complainants' conclusory allegations and accusations.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, appellants James and Maria Boesiger purchased a home in Las Vegas for $337,000, financing most of the purchase price through a mortgage on the property. The mortgage company contracted with respondent Desert Appraisals, LLC, to perform an appraisal on the property, which the appraiser, respondent Travis Gliko, valued at $340,000, with 3,002 square feet of gross living area. The appraisal report explicitly noted a discrepancy between the square footage reported by the county assessor's office, which apparently estimated 3,553 square feet, and the square footage as estimated by the appraiser, explaining that the added footage appeared to be based on outdated information from when the garage was used as a model home office. After unsuccessfully attempting to refinance their home loan approximately one year later, appellants purportedly became aware of the discrepancy in square footage. Appellants thereafter filed suit against respondents, asserting claims for professional negligence, negligent misrepresentation, breach of the statutory duty to disclose a material fact, and breach of contract as third-party beneficiaries. Specifically, appellants alleged respondents negligently relied on the incorrect assessor's data for the property, which resulted in an overvalued appraisal and caused appellants to purchase the home at an inflated purchase price.

Appellants filed their complaint in October 2015. After initially designating an expert appraiser to testify, appellants withdrew the expert witness after failing to comply with NRCP 16.1(a)(2)'s requirements for designating an expert witness. More than two years after appellants filed their complaint, respondents moved for summary judgment, noting appellants' failure to designate an expert witness to establish the professional standard of care for real estate appraisers, and arguing that this failure was fatal to appellants' complaint. Other than the depositions of Maria Boesiger and Gliko, the record does not indicate appellants proffered any evidence supporting their claim. Although appellants identified various individuals who might testify in support of their challenge to the property appraisal, as well as potentially discoverable documents, by December 2017, no such testimony or evidence had been provided, other than

the two depositions, the 2013 purchase agreement, and the disputed property appraisal itself.

The district court granted summary judgment for respondents. In rejecting appellants' professional negligence claim, the court concluded appellants failed to establish the appropriate professional standard of care by failing to designate an expert witness to testify as to industry standards governing professional appraisers. The district court also concluded that appellants' claims for negligent misrepresentation and breach of duty to disclose failed in that they were derivative of appellants' deficient professional negligence claim. Finally, the district court determined that appellants failed to show that they were clearly intended third-party beneficiaries of the appraisal contract between respondents and the mortgage company, which had ordered the appraisal.

DISCUSSION

Summary judgment is an important procedural tool by which "factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex Corp. v Catrett*, 477 U.S. 317, 327 (1986). We review a district court order granting summary judgment de novo, viewing all evidence in a light most favorable to the nonmoving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Pursuant to NRCP 56, a party may properly move for summary judgment where the party establishes "that there is no genuine dispute as to any material fact" and the party is entitled to judgment as a matter of law. It is well settled that summary judgment should only be granted "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits . . . that are properly before the court demonstrate that no genuine issue of material fact exists." *Wood*, 121 Nev. at 731, 121 P.3d at 1031. However, to survive summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the operative facts," relying upon more than general allegations and conclusions set forth in the pleadings, and must present specific facts demonstrating the existence of a genuine issue. *Id.* at 732, 121 P.3d at 1031 (internal quotation marks omitted).

Professional negligence-based claims

The district court rejected appellants' claim for professional negligence, granting summary judgment for respondents based on appellants' failure to establish the standard of care governing the performance of an appraisal. To assert a claim for professional negligence, a party must show "(1) [a] duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) . . . proximate causal

connection between the negligent conduct and resulting injury; and (4) actual loss or damage resulting from the professional's negligence." *Morgano v. Smith*, 110 Nev. 1025, 1028 n.2, 879 P.2d 735, 737 n.2 (1994). Generally, where an alleged harm involves conduct that is not "within the common knowledge of laypersons," the applicable standard of care "must be determined by expert testimony." *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982).

As made clear in their pleadings below, appellants complained that respondents failed to exercise the particular level of professional care established by the appraisal industry. The appraisal report specifies that the performance of the appraisal was subject to the Uniform Standards of Professional Appraisal Practice and indicates that the sales comparison approach to property valuation was used to calculate the home's value. While a layperson may be generally familiar with the concept of a home appraisal prior to purchase, there can be little question that the specific standards governing the performance of a real estate appraiser, and the various approaches used within the profession to calculate property values, are not within the common knowledge of the average layperson. Hence, expert testimony is typically required to establish the standard of care governing the performance of a real estate appraisal. *See Crawford v. Signet Bank*, 179 F.3d 926, 929 (D.C. Cir. 1999); *Brown v. Interbay Funding, LLC*, 417 F. Supp. 2d 573, 579 (D. Del. 2006); *see also State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1411-12, 148 P.3d 717, 722-23 (2006) (discussing the complexities of the sales comparison approach to property valuation, noting "valuation of property is an illusory matter upon which experts hold differences of opinion" (internal quotation marks omitted)).

Appellants initially designated a professional appraiser as an expert witness, but the expert was later withdrawn and was not subsequently replaced. Despite initially designating an expert witness, appellants now argue that expert testimony is unnecessary to establish the professional standard of care governing real estate appraisals. Appellants, however, have offered no authority to support this proposition and base their argument on an incorrect interpretation of caselaw.[1] We are not persuaded that the professional standards governing the appraisal industry are within the common knowledge of the average layperson. Accordingly, we hold the district court correctly concluded that appellants failed to provide evidence nec-

[1]To support their proposition that expert testimony is unnecessary to establish the standard of care in a professional negligence action, appellants misapply our decision in *Egan v. Chambers*, 129 Nev. 239, 240-41, 299 P.3d 364, 365 (2013). Our holding in *Egan* addressed a specific question concerning NRS 41A.071's affidavit-of-merit pleading requirements in medical malpractice actions and is inapposite to this appeal.

essary to establish the first element of their claim for professional negligence.

Even if appellants had succeeded on the first element of their professional negligence claim, they utterly failed to provide any evidence that respondents breached a duty of care. The record includes no evidence to indicate the appraiser misrepresented the property's value or condition. The only documentary evidence in the record to support appellants' claim regarding a discrepancy between the appraisal report and the county assessor's data is the report itself, which, in fact, undermines appellants' claim in that it clearly documented the appraiser's rejection of the assessor's information. The report expressly notes the assessor's estimate of 3,553 square feet, confirms the appraiser's rejection of that estimate, and states the property was appraised at 3,002 square feet. To the extent appellants aver respondents relied on an incorrect home model or sales of homes that were not comparable to the property they purchased, appellants have failed entirely to substantiate these claims as well, relying exclusively on Maria Boesiger's deposition testimony and her unsubstantiated opinions therein.

Simply put, the evidence in the record before us is insufficient to demonstrate that any "*genuine* issue" of fact exists, such that "a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993) (emphasis added). Having reviewed Maria Boesiger's deposition, we note that the factual circumstances surrounding the home purchase render appellants' claims particularly disingenuous. Maria testified that she became a licensed real estate salesperson in Nevada shortly before she and her husband purchased the property, and that she came to be interested in the home because it was listed for sale by the real estate company for which she was working after obtaining her license. Maria also testified she personally participated in efforts to sell the very home appellants now contend was negligently appraised, and that she co-hosted an open house with her supervisor, who would ultimately serve as appellants' agent in the transaction. Yet, in spite of Maria's admitted training and licensure as a Nevada real estate professional, and her firsthand knowledge of and direct participation in efforts to sell the property, appellants maintain that they were misled by a faulty appraisal report and were somehow in the dark as to the property's actual square footage or market value when they purchased the home. We are not persuaded that a reasonable jury could conclude, based on this limited evidence, that a licensed real estate salesperson could participate in efforts to market and sell a home, later decide to purchase it, and, at the time of purchase, be unaware of the property's actual size and value.

Further, reviewing the minimal evidence in the record before us, we think it no stretch at all to characterize appellants' claims as im-

plausible, at best, given the utter lack of any evidence in the record to support their allegation that respondent was negligent in completing the property appraisal. Appellants failed to provide an expert that could corroborate the allegation that the appraisal was deficient, and the report itself clearly explained that the assessor's data was inaccurate and was not used in the appraisal's valuation, despite appellants' claims otherwise. Indeed, appellants failed to even provide documentation of a discrepancy between the property's actual square footage and data purportedly listed by the county assessor. Were it not for the challenged report itself, in which Gliko identified, explained, and rejected the assessor's data, the record would be entirely devoid of any evidence of such a discrepancy. Simply put, appellants failed in the most basic respects to substantiate their claims, opting instead to proffer little more than their own speculation and conjecture. In light of the parties' lackluster attempt to support their complaint with sufficient evidence, we think it warranted here to observe that trial courts should not be reluctant in dispensing with such claims, as they are instructive of the type of litigation that summary judgment is meant to obviate.

Breach of contract claim

The district court also correctly concluded appellants lacked standing to enforce the appraisal contract as third-party beneficiaries. To assert standing as a third-party beneficiary to a contract, a plaintiff must show (1) a clear intent to benefit the third party, and (2) the third party's foreseeable reliance on the agreement. *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977). Here, the appraisal report, by its express terms, explicitly identified the lender as the sole intended beneficiary of the appraisal and provided that no other beneficiary was intended. While the report also acknowledged that appellants were entitled to rely thereupon as part of the purchase transaction, this provision alone does not indicate clear intent sufficient to confer third-party beneficiary rights. The same clause entitling appellants to rely on the report also identified "mortgage insurers, government sponsored enterprises, and other secondary market participants" as parties entitled to rely on the appraisal. We cannot conclude that such generic terms indicate a clear intent to confer third-party contract rights to such a broad class of unnamed entities. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) ("Whether an individual is an intended third-party beneficiary . . . depends on the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered." (internal quotation marks omitted)). Even assuming, arguendo, that appellants had succeeded in establishing their status as third-party beneficiaries, they

proffered no evidence sufficient to show that respondents breached any duty owed to them as such.[2]

Two years after filing their complaint, appellants failed to provide a shred of evidence to meaningfully substantiate their claims, just repeated allegations of negligent performance and misrepresentations on the part of the appraiser. Appellants' only serious attempt to substantiate their allegations appears to be the abandoned designation of a professional appraiser as an expert witness. Aside from the challenged appraisal report itself, appellants ultimately relied exclusively on deposition testimony, alleging respondents engaged in negligent conduct and made misrepresentations based on inaccurate data. We conclude such bare and unsubstantiated allegations, without more, are wholly insufficient to sustain appellants' claims. We also emphasize that in instances such as this, where an action is brought with practically no evidentiary basis to support it, summary judgment can be a valuable tool to discourage protracted and meritless litigation of factually insufficient claims. In dispensing with frivolous actions through summary judgment, courts promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims.

In light of the foregoing, we affirm the district court order granting summary judgment.

Pickering and Cadish, JJ., concur.

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[2]In their opening brief, appellants also challenge the district court's post-judgment award of attorney fees. Because appellants did not appeal from any such post-judgment order, we do not address appellants' argument as to the alleged award of attorney fees. *See Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 525, 134 P.3d 726, 731 (2006) ("Like an appeal from a final judgment, an appeal from an order awarding attorney fees and costs must be filed no more than 30 days from the date that notice of the order's entry is served."); *see also* NRAP 4(a)(1), 3(c)(1)(B).