OXBOW CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ALLAN R. EARL, DISTRICT JUDGE, RESPONDENTS, AND THE REGENT AT TOWN CENTRE HOMEOWNERS' ASSOCIATION, A NEVADA NONPROFIT CORPORATION, REAL PARTY IN INTEREST.

No. 61558

THE REGENT AT TOWN CENTRE HOMEOWNERS' ASSOCIATION, A NEVADA NONPROFIT CORPORATION, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ALLAN R. EARL, RESPONDENTS, AND OXBOW CONSTRUCTION, LLC, A NEVADA LIMITED LIABILITY COMPANY, REAL PARTY IN INTEREST.

No. 61941

October 16, 2014 335 P.3d 1234

Consolidated original writ petitions seeking relief from two district court orders in a construction-defect matter.

General contractor brought action against homeowners' association seeking declaration that statutory remedies for construction defects applicable to new residences were not available to mixed-use community containing 274 residential condominium units. Association counterclaimed for construction defects. The district court granted association's motion in part. General contractor and association petitioned for writs of mandamus. The supreme court, DOUGLAS, J., held that: (1) the supreme court would exercise its discretion to consider consolidated petitions presenting important issues of law; (2) association had standing to bring representative action on behalf of unit-owners; (3) units were "residences" within meaning of statute governing construction defects; (4) units that were occupied before their original sale were not "new" within meaning of statute; (5) the district court's order permitting statutory remedies applied to limited common elements assigned to multiple units in a common building containing at least one previously unoccupied residence; (6) as a matter of first impression, an appurtenance was not required to be "new" to qualify for statutory remedies; and (7) association needed only to establish that building contained at least one unit that was a "new residence" to pursue statutory remedies.

Petitions denied.

Koeller Nebeker Carlson & Haluck, LLP, and *Robert C. Carlson, Jr.*, and *Megan K. Dorsey*, Las Vegas, for Oxbow Construction, LLC.

Feinberg Grant Mayfield Kaneda & Litt, LLP, and *Bruce Mayfield* and *Daniel H. Clifford*, Las Vegas, for The Regent at Town Centre Homeowners' Association.

1. MANDAMUS.

   A writ of mandamus is available to, among other things, control an arbitrary or capricious exercise of discretion. NRS 34.170.

2. MANDAMUS.

   When seeking extraordinary relief in the form of a writ of mandamus, the petitioners bear the burden of demonstrating that an exercise of the supreme court's discretion to that end is warranted. NRS 34.170.

3. MANDAMUS.

   Because an appeal from a final judgment or order is ordinarily an adequate remedy, the supreme court in most cases declines to exercise its discretion to consider writ of mandamus petitions challenging interlocutory district court orders; nevertheless, the supreme court will exercise its discretion to consider such petitions when an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition. NRS 34.170.

4. MANDAMUS.

   The supreme court would exercise its discretion to consider consolidated writ of mandamus petitions addressing whether the court should broaden its definition of "new residence" under statutes governing construction defects of new residences and whether the court should extend statutory remedies for such defects to limited common elements assigned to multiple units in a building containing at least one "new residence"; issues were important questions of law, the resolution of which could have cabined underlying litigation and potentially affected other similarly situated persons living in common-interest communities throughout the state. NRS 34.170, 40.615.

5. COMMON INTEREST COMMUNITIES.

   Homeowners' association had standing to bring representative construction-defect action against general contractor on behalf of unit-owners under statute governing powers of unit-owners' association, even though the district court did not conduct analysis under rule governing class actions; the district court was not required to conduct analysis at that point in the litigation since nothing in the record indicated that association sought to proceed as a class action. NRS 116.3102(1)(d); NRCP 23.

6. ANTITRUST AND TRADE REGULATION; COMMON INTEREST COMMUNITIES; NEGLIGENCE.

   Condominium units of mixed-use community were "residences" within meaning of statute governing construction defects of new residences, even though units had been leased as apartments; unit purchaser's recording of covenants, conditions, and restrictions converted community from an apartment complex to a common-interest community, and developer's transfer of all individual unit titles to purchaser transformed units into residences. NRS 40.630, 116.2101.

7. ANTITRUST AND TRADE REGULATION; NEGLIGENCE.

   A residence is "new" within meaning of statute governing construction defects of new residences if it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its original sale. NRS 40.615.

8. Antitrust and Trade Regulation; Common Interest Communities; Negligence.

   Condominium units that were occupied before their original sale were not "new" within meaning of statute governing construction defects of new residences, and therefore, statutory remedies for construction defects did not apply to units; imposition of a definition of "new" grounded in chronological terms, whether based on age of construction or duration of any occupancy, is a task more appropriate for Legislature. NRS 40.615.

9. Appeal and Error.

   When a district court's order is unclear, its interpretation is a question of law that the supreme court reviews de novo.

10. Antitrust and Trade Regulation.

    The district court's order stating that homeowners' association could pursue statutory remedies against general contractor for construction defects in common elements of buildings containing at least one previously unoccupied condominium unit applied to limited common elements assigned to multiple units in a common building containing at least one previously unoccupied residence; only limited common elements assigned to units in a particular building would be impacted by whether a unit in that building was a new residence, and the district court impliedly focused on defects associated with units as opposed to pure common elements. NRS 116.059.

11. Appeal and Error.

    The supreme court reviews questions of statutory interpretation de novo.

12. Statutes.

    Where a statute is unambiguous, the supreme court applies its plain meaning.

13. Antitrust and Trade Regulation; Negligence.

    An appurtenance is not required to be "new" to qualify for statutory remedies for construction defects applicable to a new residence. NRS 40.605, 40.615, 116.059.

14. Antitrust and Trade Regulation; Common Interest Communities; Negligence.

    To pursue statutory remedies for construction defects in limited common elements assigned to multiple condominium units in a common building, a plaintiff needs only to establish that the building in question contains at least one unit that is a "new residence" within meaning of statute governing construction defects. NRS 40.605, 116.017(1)(a), 116.059, 116.2102.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this opinion, we consider several issues raised by consolidated writ petitions arising out of a construction-defect action. Specifically, we address whether the district court acted arbitrarily or capriciously by failing to perform an NRCP 23 class-action analysis, determining that previously occupied units in a common-interest

community do not qualify for NRS Chapter 40 remedies,[1] and allowing claims seeking NRS Chapter 40 remedies to proceed for alleged construction defects in limited common elements assigned to multiple units in a building containing at least one "new residence." We conclude that the district court's order was not arbitrary or capricious, and therefore, we deny both petitions.

FACTS AND PROCEDURAL HISTORY

These consolidated writ petitions arise from a construction-defect action initiated by The Regent at Town Centre Homeowners' Association against Oxbow Construction, LLC. El Capitan Associates, the original developer of The Regent at Town Centre mixed-use community (Town Centre), hired Oxbow as its general contractor. Town Centre includes 20 buildings containing 274 residential units and 10 commercial units, as well as an office and recreation building. After each building's completion, El Capitan obtained a certificate of occupancy from the Department of Building and Safety so that the building's units could be leased out as apartments.

After Town Centre's completion, El Capitan submitted a condominium plan for the complex, which the City of Las Vegas approved. After this approval, El Capitan entered into an agreement to sell Town Centre to Regent Group II, LLC (Regent II), which recorded Covenants, Conditions and Restrictions (CC&Rs) for Town Centre. As relevant here, section 5.1 of the CC&Rs, entitled "Assigned Limited Common Elements," defines certain elements as limited common elements assigned to a particular unit or units.

Adhering to their agreement, El Capitan transferred titles to Town Centre's units to Regent II in groups over a period of four months. When Regent II received the final group of titles, lessees occupied between 212 and 246 units in the complex,[2] and multiple buildings contained at least one unoccupied unit. Over a period of nine months, Regent II sold all of its condominiums to individual purchasers. The average lease to sale occupancy of the community's units was 7.7 months, and the average unit age was 11.4 months.

Pursuant to NRS 40.645, the Association, on behalf of itself and the condominium unit-owners, served Oxbow with an NRS Chapter 40 notice, alleging construction defects in exterior walls and openings, entry decks/exterior stairs, interior walls and ceilings, and sloped roofs, among other things. After receiving the notice, Oxbow filed a complaint for declaratory relief in district court seeking a determination that NRS Chapter 40 does not apply to Oxbow because the Town Centre units did not qualify as residences after being rent-

[1]When using NRS Chapter 40 in this opinion, we refer exclusively to the construction-defect provisions. We also note that while the relevant statutes use the term "constructional defect," we use "construction defect" in this opinion to refer to those statutes.

[2]This number is disputed by the parties.

ed as apartments. In response, under NRS 116.3102(1)(d), the Association, on behalf of itself and the unit-owners, filed an answer and counterclaims for, inter alia, construction defects. Oxbow then filed a motion to dismiss the Association's counterclaims for construction defects. The district court denied Oxbow's motion, ordering limited discovery to determine which units were occupied before the title transfers from El Capitan to Regent II.

The Association filed its own motion requesting that all units, irrespective of prior occupancy, be declared "new residence[s]" under NRS 40.615 based on their chronological age and the duration of their occupancy. The district court also denied this motion. The Association then filed a second motion, this time seeking a determination that NRS Chapter 40 remedies are available for all common elements, including those contained within "building envelopes."[3] In its opposition to that motion, Oxbow argued that the Association was precluded from bringing a representative action for construction defects in common elements, and that the district court was required to conduct an NRCP 23 class-action analysis to determine whether the Association had standing to bring claims for defects in limited common elements. The district court granted the Association's motion, in part, determining that the Association could seek, on behalf of itself or two or more unit-owners, NRS Chapter 40 remedies for construction defects in the common elements of buildings containing a "new residence."

After that ruling, Oxbow filed a writ petition requesting that this court vacate the district court's order because the district court abused its discretion by failing to conduct an NRCP 23 analysis. The Association filed its own writ petition, asking this court to direct the district court to amend its order denying the Association's initial motion to state that NRS Chapter 40 remedies are available for all 274 condominiums at Town Centre.

DISCUSSION

Writ relief

[Headnotes 1, 2]

A writ of mandamus is available to, among other things, "control an arbitrary or capricious exercise of discretion."[4] *Int'l Game Tech.,*

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[3]"Building envelope" is a term of art in construction and "encompasses the entire exterior surface of a building, including walls, doors, and windows, which enclose, or envelop, the interior spaces." Barbara Nadel, FAIA, *21st Century Building Envelope Systems: Merging Innovation with Technology, Sustainability, and Function*, AIA/Architectural Record, Continuing Education Series, August 2006, at 146.

[4]Because prohibition is not a proper vehicle to challenge the orders at issue here, we deny each petitioner's alternative requests for writs of prohibition. *See* NRS 34.320 (noting that prohibition relief is available to address proceedings in excess of a tribunal's jurisdiction).

Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). When seeking such extraordinary relief, the petitioners bear the burden of demonstrating that an exercise of this court's discretion to that end is warranted. *See Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 356, 167 P.3d 421, 426 (2007); *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnote 3]

Generally, writ relief is available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *Westpark*, 123 Nev. at 356, 167 P.3d at 426. Because an appeal from a final judgment or order is ordinarily an adequate remedy, *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *Westpark*, 123 Nev. at 356, 167 P.3d at 426, in most cases, we decline to exercise our discretion to consider writ petitions challenging interlocutory district court orders. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). Nevertheless, we will exercise our discretion to consider such writ petitions when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559.

[Headnote 4]

NRS 40.615 limits NRS Chapter 40 construction-defect remedies for residences to defects in "new residence[s]" or in alterations or additions to existing residences. We have construed "new residence" to mean "a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its *original sale*." *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 872, 192 P.3d 738, 745 (2008); *Westpark*, 123 Nev. at 360, 167 P.3d at 429. The consolidated writ petitions address whether we should broaden our definition of "new residence" under NRS 40.615 and whether we should extend NRS Chapter 40 remedies for construction defects to limited common elements assigned to multiple units in a building containing at least one "new residence." These issues are important questions of law, the resolution of which could cabin the underlying litigation and potentially affect other similarly situated persons living in common-interest communities throughout Nevada. We therefore conclude that sound judicial economy and administration favor our consideration of these important legal issues, and we exercise our discretion to address the consolidated writ petitions. Our review of the questions of law raised by these writ petitions is de novo. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559.

NRCP 23 analysis

As a threshold matter, Oxbow argues that the district court abused its discretion by allowing the Association to bring a representative construction-defect action on behalf of unit-owners without conducting an NRCP 23 analysis as required by *D.R. Horton, Inc. v. Eighth Judicial District Court (First Light II)*, 125 Nev. 449, 215 P.3d 697 (2009). That argument, however, conflicts with our decision in *Beazer Homes Holding Corp. v. Eighth Judicial District Court*, 128 Nev. 723, 291 P.3d 128 (2012),[5] where we clarified that when a homeowners' association litigates construction-defect claims on behalf of its members under NRS 116.3102(1)(d), a "[f]ailure to meet any additional procedural requirements, including NRCP 23's class action requirements, cannot strip a common-interest community association of its standing to proceed on behalf of its members . . . ." *Id.* at 731, 291 P.3d at 134. In clarifying *First Light II*, we explained that when a homeowners' association seeks to proceed in a class-action format, the district court must, upon either party's request, analyze NRCP 23's factors to determine how the action should proceed. *Id.* at 735, 291 P.3d at 136.

[Headnote 5]

Here, the Association has standing to bring its construction-defect claims on behalf of itself and unit-owners pursuant to NRS Chapter 116, under *Beazer Homes*. *Id.* And, although Oxbow requested an NRCP 23 analysis, the district court was not required to conduct that analysis at this point in the litigation because nothing in the record indicates that the Association sought to proceed as a class action. Accordingly, the district court's refusal to engage in an NRCP 23 analysis was neither arbitrary nor capricious.

"New residence"

[Headnote 6]

Next, Oxbow contends that Town Centre's units, having been leased as apartments, are neither residences per NRS 40.630 nor

[5]We note that *Beazer* was published on December 27, 2012, after the district court had issued the two orders being challenged here. However, because *Beazer* clarified our law, as opposed to changing it, there are no retroactivity concerns here. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96-97 (1993) (stating that after a U.S. Supreme Court ruling concerning federal law is applied to the parties in that case, the Court's ruling must be given full retroactive effect in other cases); *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."); *Nunez-Reyes v. Holder*, 646 F.3d 684, 691-92 (9th Cir. 2011) (explaining that an exception to the general rule of giving court rulings retroactive effect includes decisions establishing a new principle of law unrelated to jurisdiction).

"new" under NRS 40.615, and therefore do not qualify for NRS Chapter 40 remedies. In contrast, the Association claims that the units are residences and that, for purposes of determining whether a residence is new under NRS 40.615, courts should apply a sliding-scale approach that considers factors such as a residence's chronological age and the duration of any occupancy. Before addressing the Association's sliding-scale argument, we must determine whether Town Centre's units are "residence[s]."

In *Westpark*, we concluded that rental apartment units are not "[r]esidence[s]" under NRS 40.630 because "the event conferring 'residence' status on a dwelling is the transfer of title to a home purchaser." 123 Nev. at 358, 167 P.3d at 427-28. In this case, Regent II's filing of CC&Rs converted Town Centre from an apartment complex to a common-interest community, *see* NRS 116.2101, and El Capitan's transfer of all individual Town Centre unit titles to Regent II transformed those units into residences. Thus, Town Centre's condominium units are residences for purposes of NRS Chapter 40.

[Headnote 7]

Having determined that the condominium units are residences under NRS 40.630, we now revisit what "new" means under NRS 40.615. As stated above, "a residence is new for constructional defect purposes if it is a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of its *original sale*." *ANSE*, 124 Nev. at 872, 192 P.3d at 745; *Westpark*, 123 Nev. at 360, 167 P.3d at 429. When we originally interpreted "new" in *Westpark*, we stated that one of NRS Chapter 40's primary purposes is "to protect the rights of homebuyers by providing a process to hold contractors liable for defective original construction or alterations." 123 Nev. at 359, 167 P.3d at 428. We recognized that this purpose would be defeated if contractors were able to "circumvent liability by using units as 'model homes' or leasing units to 'strawmen' for a period of time before offering them for sale."[6] *Id.* at 359-60, 167 P.3d at 428. Acknowledging that it was "nearly impossible to define in strict chronological terms," we defined "new" in terms of original construction, lack of occupancy, and the point of original sale. *Id.* at 359-60, 167 P.3d at 428-29. Taking this approach, we balanced NRS Chapter 40's remedial purpose with the need for certainty.

[Headnote 8]

With our rationale from *Westpark* in mind, it should come as no surprise that we are unwilling to replace our current definition of

[6]Based on the average duration of occupation and age of the units at issue, the Association suggests that the persons who leased units at Town Centre before Regent II sold those units were "strawmen." As the Association states in its brief, however, it is not raising that issue before this court; therefore, we will not address it at this time.

"new," which provides certainty for all parties, with the amorphous, sliding-scale test advocated by the Association. Imposing a definition of "new" grounded in chronological terms, whether a construction's age or the duration of any occupancy, is a task more appropriate for the Legislature. *See Renown Health, Inc. v. Vanderford*, 126 Nev. 221, 225, 235 P.3d 614, 616 (2010) ("This court may refuse to decide an issue if it involves policy questions better left to the Legislature."). Accordingly, we reaffirm our definition of "new" as stated in *ANSE* and *Westpark*. Relying on this definition, we conclude that the district court correctly determined that Town Centre units occupied before their original sale cannot be classified as "new" and therefore do not independently qualify for NRS Chapter 40 remedies.

NRS Chapter 40 remedies for limited common elements assigned to multiple units in a common building containing at least one "new residence"

[Headnote 9]

The parties next dispute whether the Association may seek construction-defect remedies for limited common elements assigned to multiple units in a common building containing at least one "new residence." Before reaching this issue, however, we find it necessary to clarify the district court's July 5, 2012, order granting the Association's motion to that extent. When a district court's order is unclear, its interpretation is a question of law that we review de novo. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570, 170 P.3d 989, 992-93 (2007).

[Headnote 10]

In its order, the district court stated that the Association could pursue NRS Chapter 40 remedies for construction defects in the "common elements" of buildings containing at least one previously unoccupied unit; *i.e.*, a "new residence." In this context, it is unclear whether the district court is referring to pure common elements or limited common elements. Although limited common elements are a subset of common elements, *see* NRS 116.059, only the limited common elements assigned to the units in a particular building would be impacted by whether a unit in that building was a "new residence."

By requiring a building to contain a "new residence," the district court impliedly focused on construction defects associated with units as opposed to pure common elements. That the district court adopted a new rule despite its previous order affirming *Westpark*'s definition of "new" also suggests that it was not addressing defects in or assigned solely to an individual unit. Thus, we conclude that the district court actually meant limited common elements assigned to multiple units in a common building containing at least one previously unoccupied residence.

With this interpretation in mind, we turn to Oxbow's argument that the district court erred by permitting the Association to seek NRS Chapter 40 remedies for construction defects in limited common elements assigned to multiple units in a common building in which at least one unit is a "new residence." Oxbow contends that a construction-defect action cannot be maintained because the assigned limited common elements at issue are appurtenances and must be "new" under NRS 40.615. The Association asserts that NRS 40.615 does not require appurtenances[7] to be "new," but also maintains that it is entitled to pursue NRS Chapter 40 remedies for construction defects in these elements regardless of whether the building in which they are located contains a "new residence" because the limited common elements should be classified as pure common elements and not as part of the units to which they are assigned.

[Headnotes 11-13]

We review questions of statutory interpretation de novo. *Westpark*, 123 Nev. at 357, 167 P.3d at 426-27. Where a statute is unambiguous, we apply its plain meaning. *Id.* at 357, 167 P.3d at 427. As explained above, a residence must be "new" to qualify for construction-defect remedies. *Id.* at 360, 167 P.3d at 429. However, we have never directly considered whether, as Oxbow argues, an appurtenance must also be "new." NRS 40.615 defines "constructional defect[s]" and provides:

> "Constructional defect" means a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance . . . .

Thus, in NRS 40.615, "new" only precedes "residence," raising the question of whether it modifies any other elements in the phrase. "The typical way in which syntax would suggest no carryover modification is that a determiner (*a*, *the*, *some*, etc.) will be repeated before the second element . . . ." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 148 (2012). Applying this syntactic rule to NRS 40.615, the determiner "a/an" is repeated before each subsequent element; *i.e.*, "a new res-

[7]While the Association refers to "building envelopes" in its arguments, we decline to incorporate this term into our analysis. We find that it creates unnecessary confusion and has no legal underpinning in NRS Chapters 40 or 116. Additionally, we note that the term is not used in Town Centre's CC&Rs. Accordingly, we clarify the Association's arguments based on the issue presented by our interpretation of the district court's order.

idence, . . . an alteration of or addition to . . . , or . . . an appurtenance." Accordingly, while "new" modifies "residence," it does not modify "alteration," "addition," or "appurtenance." *See Beazer*, 128 Nev. at 732, 291 P.3d at 134 (noting that homeowners' associations may pursue construction-defect claims for common elements, which are included in the definition of "appurtenance" in NRS 40.605, without reference to the common elements being "new"); *Pankopf v. Peterson*, 124 Nev. 43, 47, 175 P.3d 910, 912-13 (2008) (addressing a construction-defect action for an appurtenance without referring to any newness requirement). We therefore conclude that an appurtenance is not required to be "new" under NRS 40.615 to qualify for NRS Chapter 40 remedies. With this conclusion in mind, we must determine whether the assigned limited common elements referred to in the district court's order are a part of the residence, requiring newness, or are appurtenances with no such requirement.

NRS 40.605 states that an appurtenance is "a structure, installation, facility, amenity or other improvement that is appurtenant to or benefits one or more residences, but is not part of the dwelling unit" and "includes . . . common elements and limited common elements other than those described in NRS 116.2102. . . ." Common elements include "all portions of the common-interest community other than the units . . . ."[8] NRS 116.017(1)(a). " 'Limited common element' means a portion of the common elements allocated by the declaration or by operation of subsection 2 or 4 of NRS 116.2102 for the exclusive use of one or more but fewer than all of the units." NRS 116.059. While limited common elements include elements found in NRS 116.2102, NRS 40.605 expressly excludes these elements from being appurtenances. Therefore, limited common elements not contained in NRS 116.2102 are appurtenances not required to be "new," while those found in NRS 116.2102 are not appurtenances and may or may not be required to be "new."

Generally, NRS 116.2102 assigns certain housing components to an individual unit and others to common elements. Despite these assignments, CC&Rs can assign these components differently. *See generally* NRS 116.2102. Town Centre's CC&Rs adopt NRS 116.2102's provisions, in part. Diverging from NRS 116.2102, parts of section 5.1 of the CC&Rs provide that identified housing components serving more than one unit are not common elements but limited common elements assigned to the units which they serve.[9]

While only indirectly before us, we find it necessary to explain that NRS Chapter 40 remedies for construction defects in limited

[8]A "[u]nit" is "a physical portion of the common-interest community designated for separate ownership . . . ." NRS 116.093.

[9]Limited common elements assigned to the units which they serve include, among other things, stairs, stoops, entrances to buildings, exterior surfaces, trim, siding, and doors.

common elements that are assigned solely to an individual unit and that fall within NRS 116.2102's purview would only be available when the individual unit qualifies as a "new residence." This is because these elements, whether by NRS 116.2102's or the CC&Rs' assignments, are exclusively allocated to the individual residence that they benefit.

[Headnote 14]

However, this is not the case for limited common elements that are assigned to and benefit multiple units in a common building. We now conclude that to pursue NRS Chapter 40 remedies for construction defects in limited common elements assigned to multiple units in a common building, a plaintiff needs only to establish that the building in question contains at least one unit that is a "new residence."[10]

We believe that requiring this minimal nexus to newness in these circumstances is logical, given the apportionment of these assigned limited common elements, and harmonious with NRS Chapter 40's remedial purpose. Allowing the existence of one occupied unit to preclude other "new residence[s]" in the same building from recovering for construction defects assigned to that building would undermine NRS Chapter 40's purpose to "protect the rights of homebuyers by providing a process to hold contractors liable for defective original construction or alterations." *Westpark*, 123 Nev. at 359, 167 P.3d at 428.

Our interpretation of the district court's order permits the Association to pursue NRS Chapter 40 remedies for construction defects in the limited common elements of buildings containing at least one "new residence." This comports with our holding here.

Accordingly, we conclude that the district court's decision was not an arbitrary or capricious exercise of its discretion, and we therefore deny both writ petitions.

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

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[10]We note that section 1.14 of the CC&Rs defines "common elements" to include several components identical to those listed as limited common elements assigned to multiple units under section 5.1 of the CC&Rs. Unlike NRS 116.2102, which allows CC&Rs to alter the categorization of components contained in its provisions, NRS 116.017 does not expressly permit CC&Rs to deviate from its definition of common elements. On remand, the district court must take this into consideration when determining what limited common elements the CC&Rs assign to multiple units in a common building containing at least one previously unoccupied residence.

ZURI-KINSHASA MARIA TERRY, INDIVIDUALLY; MARLENE NUNO, INDIVIDUALLY; MICHELE COSPER, INDIVIDUALLY; SELENA DENISE PELAEZ, INDIVIDUALLY; JESSICA ANNE MORGAN, INDIVIDUALLY; AND TINA CHAREST, INDIVIDUALLY, AND ALL ON BEHALF OF CLASS OF SIMILARLY SITUATED INDIVIDUALS, APPELLANTS, *v.* SAPPHIRE/SAPPHIRE GENTLEMEN'S CLUB, A BUSINESS ORGANIZATION FORM UNKNOWN; AND SHAC, LLC, AN ACTIVE NEVADA DOMESTIC LIMITED LIABILITY COMPANY DBA SAPPHIRE/SAPPHIRE GENTLEMEN'S CLUB, RESPONDENTS.

No. 59214

October 30, 2014 336 P.3d 951

Appeal from a district court summary judgment holding that appellants were independent contractors and not employees within the meaning of NRS Chapter 608. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Performers at gentlemen's club brought action, claiming that they were employees and, thus, guaranteed a minimum wage. The district court entered summary judgment for club, and performers appealed. The supreme court, PICKERING, J., held that: (1) economic realities test that federal courts use under the federal Fair Labor Standards Act is used to determine employment in the minimum wage context; and (2) under economic realities test, gentlemen's club qualified as an employer, and the performers therefore qualified as employees in the minimum wage context.

Reversed and remanded with instructions.

[Rehearing denied January 22, 2015]

Christensen Law Offices, LLC, and *Thomas Christensen*, Las Vegas; *Rusing & Lopez* and *Michael J. Rusing* and *Sean E. Brearcliffe*, Tucson, Arizona; *The Law Offices of Robert L. Starr* and *Robert L. Starr*, Woodland Hills, California, for Appellants.

Greenberg Traurig, LLP, and *Mark E. Ferrario* and *Tami D. Cowden*, Las Vegas, for Respondents.

1. LABOR AND EMPLOYMENT.
   Where remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship for purposes of the minimum wage law.
2. LABOR AND EMPLOYMENT.
   Gentlemen's Club's protestations that its performers never intended to be employees and agreed to be independent contractors were beside the point when determining if performers were employees who were entitled

to a minimum wage; putative employer's self-interested disclaimers of any intent to hire could not control the realities of an employment relationship. NRS 608.010, 608.011.

3. Labor and Employment.

In the minimum wage context, employer includes every person having control or custody of any employment, place of employment, or any employee; one has control where one has the power to govern the management and policies of a person or entity, and custody is the care and control of a thing or person for preservation or security. NRS 608.011.

4. Labor and Employment.

Economic realities test that federal courts use under the federal Fair Labor Standards Act is used to determine employment in the minimum wage context; economic realities test examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. Fair Labor Standards Act of 1938, § 1 *et seq.*, 29 U.S.C. § 201 *et seq.*; NRS 608.011.

5. Statutes.

When a statute that requires the supreme court's interpretation implicates broad questions of public policy, the divergent acts of foreign jurisdictions dealing with similar subject matter may properly inform that interpretation.

6. Labor and Employment.

There are some factors that courts consider relevant and that make up a working relationship's economic reality under the economic realities test, which is used to determine employment in the minimum wage context: (1) degree of the alleged employer's right to control the manner in which the work is to be performed, (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill, (3) alleged employee's investment in equipment or materials required for his task or his employment of helpers, (4) whether the service rendered requires a special skill, (5) degree of permanence of the working relationship, and (6) whether the service rendered is an integral part of the alleged employer's business. NRS 608.011.

7. Labor and Employment.

Under economic realities test, Gentlemen's Club qualified as an employer, and the performers therefore qualified as employees in the minimum wage context; Club was able to heavily monitor the performers, including dictating their appearance, interactions with customers, work schedules, and minute to minute movements when working; Club provided all the risk capital, funds advertising, and covered facility expenses; performers were more closely akin to wage earners toiling for a living than to independent entrepreneurs seeking a return on their risky capital investments; and performers strip-dancing at Club were useful and indeed necessary to its operation. NRS 608.010, 608.011.

8. Labor and Employment.

All work requires some skill, so under the economic realities test for determining employment in the minimum wage context, courts look specifically for workers' special skills; namely, whether their work requires the initiative demonstrated by one in business for himself or herself.

Before the Court En Banc.

OPINION

By the Court, PICKERING, J.:

This case presents the question of whether appellants, performers at Sapphire Gentlemen's Club, are Sapphire employees within the meaning of NRS 608.010 and thus entitled to the minimum wages guaranteed by NRS Chapter 608. Because NRS 608.010's definition of employee hinges on NRS 608.011's definition of employer, we must decide the larger issue of when an entity is an employer under NRS 608.011, and in particular whether Sapphire is the performers' employer under that section. Given that the Legislature has long used federal minimum wage laws as a platform for this state's minimum wage scheme, that the statutes in question do not signal any intent to deviate from that course, and that for practical reasons the two schemes should be harmonious in terms of which workers are entitled to protection, we herein adopt the Fair Labor Standards Act's "economic realities" test for employment in the minimum wage context. 29 U.S.C. §§ 201-219 (2012). Under that test, the performers are Sapphire's employees within the meaning of NRS 608.010. We therefore reverse and remand.

I.

Sapphire Gentlemen's Club contracts for semi-nude entertainment with approximately 6,600 performers. Under these contracts, the performers may determine their own schedules (but agree to work a minimum shift length of six hours any day they decide to work unless they advise a Sapphire employee of their early clock-out); set prices for their private performances (provided that they comply with the club's established minimum charge); control the "artistic aspects" of their performances (though the club D.J. chooses the music they dance to, and they must obey club rules as to body positioning and physical contact with customers); and perform at other venues should they wish to. The performers also agree to abide by certain "house rules," including a minimum standard of coverage by their costumes and a minimum heel height; payment of a "house fee," which ranges in amount, any night they work; and performing two dances per shift on the club stage unless they pay an "off-stage" fee.

Sapphire pays no wages to the performers; their income is dependent upon tips and dancing fees paid by Sapphire patrons. In the district court, the performers challenged this practice, claiming that they were "employees" within the meaning of NRS 608.010 and thus guaranteed a minimum wage. The district court applied a

five-factor test formerly used to determine employment status under the Nevada Industrial Insurance Act, now codified at NRS Chapters 616A-616D, *see Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 528, 815 P.2d 151, 159 (1991), *overruled by Tucker v. Action Equip. & Scaffold Co., Inc.*, 113 Nev. 1349, 951 P.2d 1027 (1997), *overruled by Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 148 P.3d 684 (2006), and found that the performers were not "employees" within the meaning of NRS Chapter 608. The district court then granted a motion for summary judgment brought by Sapphire. The performers appeal.

II.

[Headnotes 1, 2]

Only an "employee" is entitled to minimum wages under NRS Chapter 608. NRS 608.250, *superseded in part by constitutional amendment as recognized in Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014). NRS 608.010 defines employees as "persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." Sapphire argues that the performers had no "contract of hire" and alternatively that the performers were not "in the service of" Sapphire. But these arguments lack merit. First, the signed entertainment agreement, which describes in detail the terms under which Sapphire permits the performers to dance at its facility, is an express contract of hire, despite that therein the parties state that they "intend that the relationship created [by the agreement] will be only that of Sapphire and Entertainer and not any other legal relationship." Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968). Thus, Sapphire's protestations that the performers "never intended to be employees," and agreed to be independent contractors are beside the point.

Second, ordinarily one is "in the service of" another where one is "of use" to that person. *See Merriam-Webster's Collegiate Dictionary* 1137 (11th ed. 2007) (defining "serve" and "service"). And given that Sapphire concedes that the performers "are an important part of the business of a gentlemen's club, and moreover, that it is . . . the dancers that patrons come to see," the performers undeniably are "of use" to Sapphire, Sapphire's claims that the performers only "provided services to their own customers at Sapphire's facility" notwithstanding. Thus, whether the performers are "employees" under NRS 608.010 turns on whether Sapphire is their "employer."

[Headnote 3]

As relevant to this appeal, an employer "includes every person having control or custody of any employment, place of employment or any employee." NRS 608.011. One has control where one has the "power to govern the management and policies of a person or entity." *Black's Law Dictionary* 378 (9th ed. 2009); *see also Merriam-Webster's Collegiate Dictionary* 272 (11th ed. 2007) (defining "control" as "power or authority to guide or manage"). Custody is "[t]he care and control of a thing or person for . . . preservation, or security." *Black's*, *supra*, at 441; *see also Merriam-Webster's*, *supra*, at 308 (defining "custody" as the "guarding" or "safekeeping" by one with authority). In the abstract, these definitions may sufficiently describe an employment relationship as one where a person has the power to direct the management of or the policies governing a worker, or is to some extent responsible for that worker's preservation and security. But this court is faced with a practical problem; namely, identifying which workers, and specifically whether *these* workers, are entitled to minimum wage protections. And our interpretation of NRS 608.011 must provide a structure that lower courts may also use to assess the realities of various working relationships under the section. Viewed with an eye toward such practical necessities, it is clear that these definitions are insufficiently precise—a security guard, for example, may be somewhat responsible for the safety of employees in the facility he or she guards and thus fall within the definition of "employer" suggested by the conventional dictionary definition of "custody," but it seems unreasonable to deem such an individual responsible for the wages of his or her coworkers. Thus, the interpretation to which these definitions lead is not tenable. *See Harris Assocs. v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (explaining that this court eschews interpretations that produce unreasonable results).

In 2006, Nevada voters provided a new baseline minimum wage law, Article 15, Section 16 of Nevada's Constitution (the Minimum Wage Amendment), and a definition of "employer" to accompany that platform. This definition does not control the analysis here—the performers do not raise their right to minimum wages under the Minimum Wage Amendment; and though this court has recognized that the text of the Minimum Wage Amendment supplants that of our statutory minimum wage laws to some extent, *see Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518, 522 (2014) (holding that "[t]he text of the Minimum Wage Amendment . . . supersedes and supplants the taxicab driver exception set out in NRS 608.250(2)"), the Department of Labor continues to use the definition of "employer" found in NRS 608.011, not that in the Minimum Wage Amendment. NAC 608.070. Still, because of the overlap between the Minimum Wage Amendment and NRS Chapter 608,

the Minimum Wage Amendment's definition of employer could be instructive, were it not equally, if not more, tautological than NRS 608.011—" '[e]mployer' means any . . . entity that may employ individuals." Nev. Const. art. 15, § 16(C). Thus, apart from signaling this state's voters' wish that more, not fewer, persons would receive minimum wage protections, *see Nev. Yellow Cab Corp.*, 130 Nev. at 486-87, 327 P.3d at 520-21 (relying on the "broad" definition of employee in the Minimum Wage Amendment to identify the voters' intent to extend minimum wage protections to taxicab drivers), the Minimum Wage Amendment offers little elucidation. So it is that a more concrete interpretative aid—one extrinsic from Nevada's statutory and constitutional minimum wage frameworks—is required.

[Headnotes 4, 5]

The performers urge this court to adopt the economic realities test that federal courts use under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (2012), as that interpretive aid. Though the parties argue to the contrary, this court has not yet decided the applicability of this federal test under our minimum wage laws. In *Prieur v. D.C.I. Plasma Center of Nevada, Inc.*, we stated that the existence of an employment relationship was determined by looking to the "economic reality" of said relationship, but we did so only in dicta. 102 Nev. 472, 473, 726 P.2d 1372, 1373 (1986). And, while we later denied that *Prieur* had adopted the economic realities test to resolve minimum wage disputes, we did not reject the test in its entirety. *Boucher v. Shaw*, 124 Nev. 1164, 1170-71 n.27, 196 P.3d 959, 963 n.27 (2008). It must be said that the language of NRS 608.011 and the relevant FLSA provisions differs—the FLSA defines an "employer" as one who suffers or permits another to work. 29 U.S.C. § 203(d) & (g) (2012). But the Legislature has long relied on the federal minimum wage law to lay a foundation of worker protections that this State could build upon, *see* 1965 Nev. Stat., ch. 333, § 2, at 696 (extending Nevada's minimum wage protections to those not covered under the FLSA), and so in many significant respects, Nevada's minimum wage laws and those set federally run parallel. *See, e.g.*, NRS 608.250 (directing the Labor Commissioner to set the minimum wage "in accordance with federal law"); *see also* Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 18, 1975) (testimony by Raymond D. Bohart, Federated Employers of Nev.) (acknowledging that the bill in question, which extended Nevada's minimum wage statutory protections to both men and women, was "a duplication of the [FLSA] in many aspects"). Such parallels are part of a larger national pattern of laws that have emerged to deal with common problems in the minimum wage context, and many other states have adopted the economic realities test to determine whether an employment relationship exists

under their respective state minimum wage laws. *See, e.g.*, *Campusano v. Lusitano Const. LLC*, 56 A.3d 303, 308 (Md. Ct. Spec. App. 2012); *Cejas Commercial Interiors, Inc. v. Torres-Lizama*, 316 P.3d 389, 394 (Or. Ct. App. 2013); *Commonwealth, Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004); *Anfinson v. FedEx Ground Package Sys., Inc.*, 244 P.3d 32, 40-41 (Wash. Ct. App. 2010), *aff'd*, 281 P.3d 289 (Wash. 2012). Where, as here, a statute that requires this court's interpretation implicates broad questions of public policy, the divergent acts of foreign jurisdictions dealing with similar subject matter may properly inform that interpretation. *See Schimek v. Gibb Truck Rental Agency*, 174 A.2d 641, 643 (N.J. Super. Ct. App. Div. 1961); *cf. Klamath Cnty. v. Laborers Int'l Union of N. Am., Local No. 915*, 534 P.2d 1169, 1172 (Or. Ct. App. 1975) (holding that the National Labor Relations Act was relevant to interpret a differently worded state labor relations statute).

True, this court has signaled its willingness to part ways with the FLSA where the language of Nevada's statutes has so required. *See Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 32-34, 176 P.3d 271, 274-75 (2008); *Boucher*, 124 Nev. at 1170-71 n.27, 196 P.3d at 963 n.27. Thus, in *Golden Coin*, this court held that Nevada law excluded tips from the calculation of an employee's minimum wages—contrary to the rule under the FLSA—because the language of the relevant statutes was entirely conflicting. 124 Nev. at 32-33, 176 P.3d at 274-75; *compare* 29 U.S.C. § 203(m) (2012) (stating that the minimum wage calculation includes "the cash wage paid" plus "the tips received"), *with* NRS 608.160(1)(b) (making it "unlawful for any person to . . . [a]pply as a credit toward the payment of the statutory minimum hourly wage . . . any tips or gratuities bestowed upon the employees of that person"). And in *Boucher* we determined that the language of NRS 608.011 was not intended to "pierce the corporate veil and extend personal liability to individual managers" for unpaid minimum wages because the Legislature had specifically excluded all references to "manager[s]." 124 Nev. at 1170, 196 P.3d at 963. Again, the FLSA's rule runs contrary, but the relevant statutory language expressly states that "any person acting directly or indirectly in the interest of an employer in relation to an employee" can also be held liable for back wages. 29 U.S.C. § 203(d), 206 (2012). Here, and in contrast to the circumstances of *Golden Coin* and *Boucher*, given the breadth of NRS 608.011's definition and the lack of direction it provides, we cannot say that there is any language in NRS 608.011 so "materially different" from that of 29 U.S.C. § 203(d) and (g) that it would caution this court against adopting the economic realities test to interpret the former. *See Rivera v. Peri & Sons Farms, Inc*., 735 F.3d 892, 900 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

Moreover, it seems that our Legislature intended that NRS 608.011 would encompass as many or more entities as the FLSA definition, *see* Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 20, 1975) (testimony by Stan Jones, Nev. State Labor Comm'r) (explaining that the bill that added the definition was necessary because "there are many workers in Nevada that the people in Washington have forgotten"), and to avoid preemption, our state's minimum wage laws may only be equal to or more protective than the FLSA. *See* 29 U.S.C. § 218 (1967); *Golden Coin*, 124 Nev. at 32-33, 176 P.3d at 274-75. In accordance with the FLSA's remedial purpose, 29 U.S.C. § 203(d) and (g) are necessarily broad, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003); indeed, it has been said that "a broader or more comprehensive coverage of employees [than that provided in the FLSA's definitions] would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (internal quotations omitted). And, recognizing that "a constricted interpretation of the phrasing by the courts would not comport with [such a] purpose," the Supreme Court has indicated that it fashioned the economic realities test to be wide-reaching. *Cf. United States v. Silk*, 331 U.S. 704, 711-12 (1947), *superseded by statute as recognized in Donovan v. Agnew*, 712 F.2d 1509, 1513 (1st Cir. 1983). Thus, the economic realities test examines the *totality of the circumstances* and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33 (1961); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013). Given this backdrop, this court has difficulty fathoming a test that would encompass more workers than the economic realities test, short of deciding that all who render service to an industry would qualify, a result that NRS Chapter 608 and our case law specifically negate. *See* NRS 608.255; *Prieur*, 102 Nev. at 474, 726 P.2d at 1373.

Thus, to the extent that our test could only, from a pragmatic standpoint, seek to be equally as protective as the economic realities test, and having no substantive reason to break with the federal courts on this issue, "judicial efficiency implores us to use the same test as the federal courts" under the FLSA. *See Moore v. Labor & Indus. Review Comm'n*, 499 N.W.2d 288, 292 (Wis. Ct. App. 1993) (adopting, for analogous state law purposes, the test used by federal courts to determine whether someone is an employee for the purpose of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012)). That the Legislature repeatedly heard testimony as to the burden on businesses and potential confusion should Nevada's Minimum Wage Act and the FLSA fail to operate harmoniously—*see, e.g.*, Hearing on A.B. 219 Before the Assembly

Labor & Mgmt. Comm., 58th Leg. (Nev., February 24, 1975) (testimony by Stan Warren, Nev. Bell) (discussing his concern that if the FLSA and Nevada's Minimum Wage Act were inharmonious it would "increase their operation costs and bring about inefficiency" because "they would have to keep two sets of books"); *id.* (testimony by Louis Bergevin, Nevada Cattlemen's Association) (suggesting that the bills in question "be amended to read as the FLSA reads" for clarity)—and that it responded to these concerns by amending the bill in question—1975 Nev. Stat., ch. 353, § 1, at 500-01 (clarifying the protections to which employees that fell under the FLSA were entitled)—reflects and further illuminates this administrative need, and further supports our adoption of the federal standard in this instance.

Inasmuch as the Legislature borrowed the language of NRS 608.010 from Nevada's workers' compensation statute, NRS 616A.105, *see* A.B. 48, 72d Leg. (Nev. 2003), the district court's adoption of the test formerly applied to NRS 616A.105 under NRS Chapter 608 was somewhat logical. But NRS Chapter 608 and the Nevada Industrial Insurance Act (NIIA) are not *in pari materia* because the underlying purpose of this state's workers' compensation laws—to wit, to limit "private controversy and litigation between employer and employee" and to give workers the right to compensation regardless of fault, *Pershing Quicksilver Co. v. Thiers*, 62 Nev. 382, 389, 152 P.2d 432, 436 (1944)—is distinct from that of the statutory minimum wage scheme, which seeks to safeguard the "health and welfare of persons required to earn their livings by their own endeavors." *See* NRS 608.005. And, while labor and employment laws that effectuate different goals "should not be entirely discounted, we must remain cognizant that they were not enacted for precisely the same purpose as the Minimum Wage Act."[1] *Stuber*, 822 A.2d at 872-73. With this in mind, other states utilize different tests for employment under their respective minimum wage and workers' compensation schemes. *Compare id*. (adopting the economic realities test to determine employment under Pennsylvania's minimum wage act), *with Southland Cable Co. v. W.C.A.B. (Emmett*), 598 A.2d 329, 330-31 (Pa. Commw. Ct. 1991) (adopting the common-law control test to determine employment under Pennsylvania's workers' compensation act); *also compare Campusano*, 56 A.3d at 308 (adopting the economic realities test to determine employment under Maryland's minimum wage act), *with Mackall v. Zayre Corp.*, 443 A.2d 98, 103 (Md. Ct. App. 1982) (reiterating that the control test is used to determine employment under Maryland's workers' compensation

[1]Thus, Sapphire's advancement of the *Meers v. Haughton Elevator*, 101 Nev. 283, 701 P.2d 1006 (1985), "normal work" test—the test for employment under this state's *current* workers' compensation statutes—is likewise unavailing.

act); *also compare Cejas*, 316 P.3d at 394 (adopting the economic realities test to determine employment under Oregon's minimum wage act), *with Dep't of Consumer & Bus. Servs. v. Clements*, 246 P.3d 62, 66-67 (Or. Ct. App. 2010) (applying a control-based test to determine employment under Oregon's workers' compensation act); *also compare Anfinson*, 244 P.3d at 40-41 (adopting the economic realities test to determine employment under Washington's minimum wage act), *with D'Amico v. Conguista*, 167 P.2d 157, 160 (Wash. 1946) (applying the common-law control test to determine employment under Washington's workers' compensation act).

Moreover, prior to 2003, NRS 608.010's definition of employee did not track that found in the workers' compensation statutes. *See* 2003 Nev. Stat., ch. 291, § 2, at 1518. It appears that the Legislature imported NRS 616A.105's language to the statutory minimum wage context solely because NRS 616A.105 had been read to encompass all workers regardless of immigration status, *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 448, 25 P.3d 175, 178 (2001), and the Legislature sought to revise the minimum wage statutes to also protect "persons unlawfully employed." *See* Hearing on A.B. 48 Before the Assembly Commerce & Labor Comm., 72d Leg. (Nev., Feb. 26, 2003). Thus, the Legislature did not have in mind any additional interpretive gloss that this court previously gave NRS 616A.105 or its predecessor, NRS 616.055. So, even setting the disparate purposes of NRS Chapter 608 and NIIA aside, there is no justification for deeming this specific post-enactment amendment to control NRS 608.010's meaning, so as to construe the sections harmoniously, as this court might otherwise be inclined to do. *See* 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:2 (7th ed. 2012) (noting that courts "assume that a legislature always has in mind previous statutes relating to the same subject when it enacts a new provision").

Thus, the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course, and for the practical reasons examined above, our state's and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. We therefore adopt the FLSA's "economic realities" test for employment in the context of Nevada's minimum wage laws.

III.

[Headnotes 6, 7]

While it is not necessary to list exhaustively every factor that could be relevant in the totality of circumstances that make up a working relationship's economic reality, there are some factors which courts nearly universally consider:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
>
> 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
>
> 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
>
> 4) whether the service rendered requires a special skill;
>
> 5) the degree of permanence of the working relationship; and
>
> 6) whether the service rendered is an integral part of the alleged employer's business.

Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); *see also* Deborah T. Landis, Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.S. § 203(e)(1))*, 51 A.L.R. Fed. 702 § 2 (1981) (collecting cases). With this in mind, we examine the district court's summary judgment regarding the performers' relationship with Sapphire de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), and because the material facts in this case are undisputed, we decide whether an employment relationship exists between them as a matter of law. *See Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 325 (9th Cir. 1996); *cf. Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 47, 910 P.2d 271, 274 (1996) (suggesting that the question of whether an agency relationship exists may be a question of law where no material facts are disputed).

As to the "control" factor considered under the totality of the circumstances, at first look, the facts may appear mixed. Sapphire did not produce a set schedule for performers, theoretically allowing them to work any day they wished for as long as they wished, provided that they met a six-hour shift minimum or received permission to depart early. Additionally, though the club set a two stage-dance minimum for performers not paying the off-stage fee, and discouraged performers from refusing to give a lap dance if a customer requested one, the decision of whether or not to stage dance ultimately lay in the discretion of the performers, as did their acceptance or rejection of a patron's invitation for a private dance. And, while Sapphire required performers to accept "dance dollars"—from which the club took a cut—whether or not they preferred to, performers were also permitted to accept cash, to which the club laid no claim.

But this court is mindful that Sapphire's supposed lack of control may actually reflect "a framework of false autonomy" that gives performers "a coercive 'choice' between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity." Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization*

Debate Through the Lens of Strippers' Rights, 19 Mich. J. Gender & L. 339, 347 (2013). Put differently, Sapphire emphasizes that performers may "choose[ ] not to dance on stage at Sapphire" so long as they also "choose to pay an optional 'off-stage fee,'" and similarly that a performer may "choose[ ] not to dance for a patron she knows will pay with dance dollars, she may make that choice," though the performer may not ask that patron to pay in cash, and in making either choice the performers also risk taking a net loss for their shift. But by forcing them to make such "choices," Sapphire is actually able to "heavily monitor [the performers], including dictating their appearance, interactions with customers, work schedules and minute to minute movements when working," while ostensibly ceding control to them. *Id.* at 342 n.12. This reality undermines Sapphire's characterization of the "choices" it offers performers and the freedom it suggests that these choices allow them; the performers are, for all practical purposes, "not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

Added to this is the weight of other economic realities factors. *See Real*, 603 F.2d at 754. First, given that the performers risked little more than their daily house fees, personal grooming expenditures, costume costs, and time, and that the one who "takes the risks . . . reaps the returns," their opportunity for profit was limited accordingly. *See Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1351-52 (M.D. Fla. 1997). That a performer might increase her profits through "hustling," that is using her interpersonal skills to solicit larger tips, is not dispositive—"[a]s is the case with the zealous waiter at a fancy, four star restaurant, a dancer's stake, her take and the control she exercises over each of these are limited by the bounds of good service . . . ." *Id.* at 1352; *see also Clincy v. Galardi S. Enters., Inc.*, 808 F. Supp. 2d 1326, 1345-46 (N.D. Ga. 2011).

With regard to the relative investment of the parties, we note that Sapphire provides all the risk capital, funds advertising, and covers facility expenses. The performers' financial contributions are limited to those noted above—their costume and appearance-related expenses and house fees. Thus, the performers are "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments," *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (internal quotation omitted); *see also Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 920 (S.D.N.Y. 2013); *Clincy*, 808 F. Supp. 2d at 1347; *Harrell*, 992 F. Supp. at 1350; *Reich v. Priba Corp.*, 890 F. Supp. 586, 593 (N.D. Tex. 1995); *Jeffcoat v. State, Dep't of Labor*, 732 P.2d 1073, 1077 (Alaska 1987), and this factor also weighs in the performers' favor.

[Headnote 8]

All work requires some skill, so in the economic realities context, courts look specifically for workers' "special" skills; namely, whether their work requires the initiative demonstrated by one in business for himself or herself. *See Circle C.*, 998 F.2d at 328. Sapphire suggests that the performers' ability to "hustle" clients is one such skill. But inasmuch as Sapphire does not appear to have interviewed the performers for any indication of their hustling prowess, it is not apparent that their work actually requires such initiative. In any case, though it may well be that a good "hustle" is a considerable boon in the field, "the ability to develop and maintain rapport with customers is not the type of 'initiative' contemplated by this factor." *Id.*

According to Sapphire, "[d]ancers are itinerant *because* they have the freedom to ply their dancing trade at a multitude of gentlemen's clubs," and so the factor looking to the permanency of the relationship should weigh in its favor. True, Sapphire allowed the performers to work at other venues, and different performers testified that they continued schooling or other employment during their tenure at Sapphire. But, that the performers "were free to work at other clubs or in other lines of work . . . do[es] not distinguish them from countless workers in other areas of endeavor who are undeniably employees . . . for example, waiters, ushers, and bartenders." *Rick's Cabaret*, 967 F. Supp. 2d at 921. The ultimate inquiry is the nature of the performers' dependence on the club, and "[e]ven if the freedom to work for multiple employers may provide something of a safety net, unless a worker possesses specialized and widely-demanded skills, that freedom is hardly the same as true economic independence." *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452-53 (5th Cir. 1988), *modified on other grounds*, 867 F.2d 875 (5th Cir. 1989). Thus, though the temporary nature of the relationship at issue weighs against it being that of employer/employee, this factor carries little persuasive value in the context of topless dancers and the clubs at which they perform, and cannot alone tilt the scales in Sapphire's favor. *See Priba Corp.*, 890 F. Supp. at 593-94.

Sapphire contends that "[e]xotic dancing is customarily performed by independent contractors, and therefore, is not an integral part of Sapphire's business." Quoting *Meers v. Haughton Elevator*, 101 Nev. 283, 286, 701 P.2d 1006, 1007 (1985), Sapphire argues that "the test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business[,] . . . [t]he test . . . is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors." Even assuming it is true that "exotic dancing" is typically performed by independent contractors—a tenuous proposition given that most foreign precedent demonstrates it is per-

formed by *employees*, *see, e.g.*, *Circle C.*, 998 F.2d at 330 (holding that exotic dancers were employees not independent contractors); *Rick's Cabaret*, 967 F. Supp. 2d at 925-26 (accord); *Clincy*, 808 F. Supp. 2d at 1350 (accord); *Thompson v. Linda & A.*, 779 F. Supp. 2d 139, 151 (D.D.C. 2011) (accord); *Harrell*, 992 F. Supp. at 1354 (accord); *Priba Corp.*, 890 F. Supp. at 594 (accord); *Jeffcoat*, 732 P.2d at 1078 (accord)—Sapphire cites no authority supporting the application of the *Meers* "normal work" test to this factor in the economic realities context. And to do so simply makes no sense; if we are examining whether work is "integral" to an employer's business, the test *must be* whether it is "useful, necessary, or even absolutely indispensable" to the business. *See Merriam-Webster's Collegiate Dictionary* 650 (11th ed. 2007) (defining "integral" as "essential to completeness"). Given that Sapphire bills itself as the "World's Largest Strip Club," and not, say, a sports bar or night club, we are confident that the women strip-dancing there are useful and indeed necessary to its operation. *See Linda & A.*, 779 F. Supp. 2d at 150 (calling it a "self-evident conclusion that nude dancers formed an integral part of [the strip club's] business").

Thus, based on our review of the totality of the circumstances of the working relationship's economic reality, Sapphire qualifies as an employer under NRS 608.011, and the performers therefore qualify as employees under NRS 608.010. In so holding, this court is in accord with the great weight of authority, which has almost "without exception . . . found an employment relationship and required . . . nightclub[s] to pay [their] dancers a minimum wage." *See Clincy*, 808 F. Supp. 2d at 1343 (internal quotation omitted) (collecting cases). We therefore reverse the district court's grant of summary judgment in favor of Sapphire and remand for further proceedings consistent with this opinion.

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

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR COMMUNITY BANK OF NEVADA, APPELLANT, *v.* JAMES M. RHODES, RESPONDENT.

No. 59309

October 30, 2014 336 P.3d 961

Appeal from a district court order dismissing a deficiency judgment action as time barred. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

The Federal Deposit Insurance Corporation (FDIC), as a judgment creditor, filed a claim for a deficiency judgment against mortgagor. The district court dismissed the FDIC's action as time-barred. The FDIC appealed. The supreme court, SAITTA, J., held that the FDIC's extender statute expressly preempted state's six-month time limitation for deficiency judgment actions.

Affirmed in part, reversed in part, and remanded.

GIBBONS, C.J., with whom PARRAGUIRRE and CHERRY, JJ., agreed, dissented.

Smith Larsen & Wixom and *Michael B. Wixom* and *Katie M. Weber*, Las Vegas, for Appellants.

Santoro Whitmire and *Nicholas J. Santoro* and *Jason D. Smith*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   Federal Deposit Insurance Corporation (FDIC) did not waive on appeal its argument that statute, which extends time period for FDIC in its capacity as a failed institution's conservator or receiver to bring a contract claim otherwise barred by a state statutory time limitation, expressly preempted state's six-month time limitation for deficiency judgment actions when FDIC failed to raise issue in the district court; even though FDIC more explicitly raised preemption doctrine on appeal than it did in the district court, and the district court's order did not mention preemption doctrine, substance of order concerned doctrine and implied that statute did not override state's time limit for a deficiency judgment action. U.S. CONST. art. 6, cl. 2; Federal Deposit Insurance Act, § 2[11], 12 U.S.C. § 1821(d)(14)(A); NRS 40.455(1).
2. APPEAL AND ERROR.
   The supreme court generally does not address arguments that are made for the first time on appeal and that were not asserted before the district court.
3. LIMITATION OF ACTIONS; STATES.
   The issue of whether an action is governed by a state statutory time limitation or federal statutory time limitation is inherently a matter that concerns the preemption doctrine. U.S. CONST. art. 6, cl. 2.

4. Limitation of Actions; States.
   Federal Deposit Insurance Corporation's (FDIC) extender statute, which extended the time period for the FDIC, in its capacity as a failed institution's conservator or receiver to bring a contract claim otherwise barred by a state statutory time limitation, expressly preempted state's six-month time limitation for deficiency judgment actions, regardless of whether state statute was a statute of limitations or repose; the extender statute expressly set out the applicable statute of limitations for any action brought by the FDIC, and through the use of the term "shall" barred the possibility of some other time limitation applying to the FDIC's claim. U.S. Const. art. 6, cl. 2; Federal Deposit Insurance Act, § 2[11], 12 U.S.C. § 1821(d)(14)(A); NRS 40.455(1).
5. States.
   Whether a federal law preempts a conflicting state law is a matter of congressional intent. U.S. Const. art. 6, cl. 2.
6. States.
   Because there is a strong presumption that federal law does not supersede state law in areas that states generally regulate, the intent to preempt state law must be clear and manifest. U.S. Const. art. 6, cl. 2.
7. States.
   Express preemption occurs when Congress explicitly conveys in its statutory language the intent to preempt state law. U.S. Const. art. 6, cl. 2.
8. Limitation of Actions.
   A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action; moreover, a statute of limitations can be equitably tolled.
9. Limitation of Actions.
   A statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred; it conditions the cause of action on filing a suit within the statutory time period and defines the right involved in terms of the time allowed to bring suit.
10. Limitation of Actions.
    A statute of repose seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded.

Before the Court En Banc.

OPINION

By the Court, Saitta, J.:

Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), appellant Federal Deposit Insurance Corporation (the FDIC) acts as a "conservator or receiver" for failed financial institutions. 12 U.S.C. § 1821(d)(2)(A) (2012). FIRREA extends the time period for the FDIC, in its capacity as the failed institution's conservator or receiver, to bring a contract claim that has otherwise been barred by a state statutory time limitation:

> [T]he applicable statute of limitations with regard to any action brought by [the FDIC] as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law.

12 U.S.C. § 1821(d)(14)(A) (2012) (hereinafter the FDIC extender statute). This statute has been applied to govern the timeliness of the deficiency judgment suits that are brought by the FDIC. *See, e.g.*, *Cadle Co. v. 1007 Joint Venture*, 82 F.3d 102, 104 (5th Cir. 1996) (in the context of a deficiency judgment suit, indicating that the FDIC extender statute governs the timeliness of "a suit by the FDIC to collect on a note"); *Twenty First Century Recovery, Ltd. v. Mase*, 665 N.E.2d 573, 576-78 (Ill. App. Ct. 1996) (concluding that the FDIC extender statute governed the timeliness of an action for a deficiency judgment); *Trunkhill Capital, Inc. v. Jansma*, 905 S.W.2d 464, 465-68 (Tex. App. 1995) (concluding that the FDIC extender statute governed an action for a deficiency judgment). However, Nevada provides for a shorter six-month time limitation for deficiency judgment actions under NRS 40.455(1), which states that

> upon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust. . . .

Here, the FDIC filed its claim for a deficiency judgment after NRS 40.455(1)'s six-month deadline but within the FDIC extender statute's six-year time limitation. The district court dismissed the FDIC's deficiency judgment claim as untimely. It concluded that the FDIC needed but failed to meet NRS 40.455(1)'s deadline regardless of the FDIC extender statute.

In this matter, we address whether the FDIC extender statute preempts NRS 40.455(1)'s six-month time limitation. We conclude that it does. The plain meaning of the FDIC extender statute clearly and manifestly mandates that its six-year time limitation governs the timeliness of the FDIC's deficiency-judgment action if that time limitation is longer than "the period applicable under State law." 12 U.S.C. § 1821(d)(14)(A) (2012). Thus, the FDIC extender statute expressly preempts NRS 40.455(1)—the period applicable under Nevada law— regardless of whether the state statute is a statute of limitations or repose. Therefore, because the FDIC filed its deficiency judgment action within the FDIC extender statute's six-year time limitation, the district court erred in dismissing the FDIC's deficiency-judgment action as untimely.

FACTS AND PROCEDURAL HISTORY

In 2005, under a promissory note secured by a deed of trust, Community Bank of Nevada loaned $2,625,000 to Tropicana Durango Ltd., of which respondent James M. Rhodes was a general partner. The deed of trust encumbered a piece of Tropicana Durango's real property for the benefit of Community Bank. Additionally, Rhodes executed a guarantee agreement, under which he guaranteed the repayment of Tropicana Durango's debt to Community Bank.

In August 2009, the Nevada Financial Institutions Division closed and took possession of Community Bank and appointed the FDIC as "receiver/liquidator" for Community Bank. At this time, Tropicana Durango was in default on its 2005 loan. In November 2009, the FDIC recorded a "Notice of Default and Election to Sell," and a trustee's sale was held for the real property that was secured by the deed of trust. The FDIC purchased the real property with a credit bid of $750,000.

In February 2011, after six months but within six years of the trustee's sale, the FDIC filed a suit for a deficiency judgment against Rhodes to recover the money still owed on the 2005 loan after the trustee's sale. In so doing, it contended that its deficiency judgment action was timely because the FDIC extender statute permitted it to bring the action within six years of the date on which it could first bring its deficiency judgment claim, which was the date of the trustee's sale. *See Sandpointe Apartments, L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. 813, 824, 313 P.3d 849, 856 (2013) ("The trustee's sale marks the first point in time that an action for deficiency can be maintained . . . .").

Rhodes filed a motion to dismiss, asserting that NRS 40.455(1) was a statute of repose and that its six-month time limitation for deficiency judgments, which started from the date of the trustee's sale, barred the FDIC's complaint that was filed beyond that time period. In so asserting, Rhodes primarily relied on *Resolution Trust Corp. v. Olson*, 768 F. Supp. 283, 285-86 (D. Ariz. 1991), which provided that a statute like the FDIC extender statute could not elongate the time to file an action that was otherwise barred by a state statute of repose.

The district court granted Rhodes' motion and dismissed the FDIC's complaint in its entirety. In so doing, it concluded that "the 6 month period after the date of the foreclosure sale or the trustee's sale to bring an application for a deficiency judgment under NRS 40.455 is a substantive statute of repose" with which the FDIC needed but failed to comply. This appeal followed.

DISCUSSION

[Headnote 1]

The FDIC argues that the district court erred in dismissing its claim for a deficiency judgment, contending that the FDIC extender

statute preempts NRS 40.455(1), regardless of whether the latter is a statute of limitations or repose. In addition, the FDIC specifically contests Rhodes' reliance on *Olson* for his motion to dismiss the deficiency judgment claim, asserting that the *Olson* court erroneously interpreted other authorities for the conclusion that federal statutes cannot control over state statutes of repose.

Rhodes responds that the district court did not err in determining that NRS 40.455(1) was a statute of repose that barred the FDIC's complaint. As to the FDIC's preemption arguments, Rhodes argues that the FDIC waived these arguments because it did not assert them before the district court. In the alternative, he contends that if the preemption issue was not waived, NRS 40.455(1) is a statute of repose that is not preempted by the FDIC extender statute because the latter's statutory language only mentions a statute of limitations and not a statute of repose. Regarding *Olson*, Rhodes asserts that the *Olson* court correctly concluded that a federal agency must comply with state statutes that create substantive conditions for an action under state law. Accordingly, Rhodes maintains that NRS 40.455(1)'s six-month time limitation is a condition precedent for a deficiency judgment action and, as a result, it is a statute of repose that imposes a substantive time limitation that the FDIC failed to meet.

The parties raise issues that concern the preemption doctrine and the meaning of a federal statute and a state statute. Thus, de novo review governs our analysis and resolution of the issues that are before us. *See Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (providing that whether a federal statute preempts a state statute is a question of law that is reviewed de novo); *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006) (providing that de novo review applies to statutory interpretation issues).

The parties' arguments inherently concern preemption

[Headnote 2]

In arguing that the issue of preemption was waived, Rhodes correctly notes that we generally do not address arguments that are made for the first time on appeal and which were not asserted before the district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). But we disagree with Rhodes' contention that the preemption issue was not raised below.

[Headnote 3]

As they did before the district court, the parties on appeal dispute whether the timeliness of the FDIC's deficiency judgment action is governed by NRS 40.455(1) or the FDIC extender statute. The issue of whether an action is governed by a state statutory time limitation or federal statutory time limitation is inherently a matter that concerns the preemption doctrine. *See, e.g.*, *Waldburger v. CTS Corp.*,

723 F.3d 434, 438, 442-44 (4th Cir. 2013) (employing the preemption doctrine to resolve a conflict between a federal statutory time limitation and a state statute of repose), *rev'd on other grounds*, 134 S. Ct. 2175 (2014); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F. Supp. 2d 1018, 1024-30 (C.D. Cal. 2013) (doing the same with respect to the FDIC extender statute and a state statute of repose). Although neither party explicitly invoked the preemption doctrine before the district court, their arguments concerned a potential conflict between a federal statute and state statute and thus implicated the doctrine. Moreover, in contesting Rhodes' motion to dismiss its complaint, the FDIC cited to two authorities that concerned the preemption doctrine for its contention that the FDIC extender statute governed its deficiency judgment action: *Stonehedge/Fasa-Texas JDC v. Miller*, No. 96-10037, 1997 WL 119899 (5th Cir. March 10, 1997), and *WRH Mortgage, Inc. v. Butler*, 684 So. 2d 325 (Fla. Dist. Ct. App. 1996).

Although the FDIC more explicitly raises the preemption doctrine on appeal than it did before the district court, its arguments on appeal are primarily the same as those that it asserted in contesting Rhodes' motion. Before the district court, it contended that the FDIC extender statute displaced NRS 40.455(1). On appeal it argues the same, but it does so by explicitly raising the preemption doctrine.

Whereas the district court's order did not mention the preemption doctrine, the substance therein concerns the doctrine. In its order, the district court concluded that NRS 40.455(1) was a statute of repose that barred the FDIC's action. In determining that the FDIC extender statute did not override NRS 40.455(1), the district court implied that the former did not preempt the latter.

Therefore, we conclude that the arguments before the district court and the district court's order innately involved the preemption doctrine. And thus the issue of whether the FDIC extender statute preempts NRS 40.455(1) is properly before us.

The FDIC extender statute preempts NRS 40.455(1)

[Headnotes 4-7]

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution, which states: "[T]he Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Whether a federal law preempts a conflicting state law is a matter of congressional intent. *Nanopierce*, 123 Nev. at 370, 168 P.3d at 79. Because there is a strong presumption that federal law does not supersede state law in areas that states generally regulate, the intent to preempt state law must be " 'clear and manifest.' " *Id.* at 370-71, 168 P.3d at 79 (quoting *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005)). Of the multiple

types of preemption, express preemption is relevant to this appeal. Express preemption occurs when Congress explicitly conveys in its statutory language the intent to preempt state law. *Id.* at 371, 168 P.3d at 79.

Here, the FDIC extender statute expressly sets out "the applicable statute of limitations" for "any action brought by" the FDIC. 12 U.S.C. § 1821(d)(14)(A) (2012). In using the term "shall" to mandate that the "applicable statute of limitations . . . shall be . . . the longer of" six years after the FDIC's claim accrues or "the period applicable under State law," Congress barred the possibility that some other time limitation would apply to the FDIC's claim. *See id.*

[Headnotes 8-10]

In contending that the FDIC extender statute does not expressly preempt state statutes of repose, Rhodes emphasizes that the FDIC extender statute includes the phrase "statute of limitations" and omits the phrase "statute of repose." The distinction between these two terms is often overlooked. A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). Moreover, a statute of limitations can be equitably tolled. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (identifying equitable tolling as an indicia of a statute of limitations). In contrast, a statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred. *Allstate Ins. Co.*, 104 Nev. at 775 n.2, 766 P.2d at 906 n.2; *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 364 n.1, 325 P.3d 1276, 1280 n.1 (2014). It conditions the cause of action on filing a suit within the statutory time period and "defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004). Such a statute seeks to give a defendant peace of mind by barring delayed litigation, so as to prevent unfair surprises that result from the revival of claims that have remained dormant for a period during which the evidence vanished and memories faded. *See Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002) (providing that statutes of repose are concerned with a defendant's peace of mind); *Joslyn v. Chang*, 837 N.E.2d 1107, 1112 (Mass. 2005) (noting that statutes of repose prevent stale claims from springing up and surprising parties when the evidence has been lost).

Emphasizing the distinction between statutes of limitations and repose, Rhodes asserts that the FDIC extender statute's term "statute of limitations" conveys that the federal statute only contemplates the displacement of state statutes of limitations and not repose. We disagree and find this reading of the FDIC extender statute to be unreasonable. Rhodes' reading of the FDIC extender statute appears to

overlook that the statute's phrase "statute of limitations" expressly identifies the time limitation set by the FDIC extender statute itself; the phrase does not refer to the time limitations in other state statutes that the FDIC extender statute displaces. In identifying the state time limitations that are displaced by its six-year time limitation, the FDIC extender statute states that its six-year time limitation controls over the shorter "*period applicable under State law*." 12 U.S.C. § 1821(d)(14)(A) (2012) (emphasis added). Therefore, regardless of whether the "period applicable under State law" is a statute of limitations or repose, the FDIC extender statute's language expresses the intent to have the six-year time limitation preempt all other shorter state law time limitations, including NRS 40.455(1). *See* 12 U.S.C. § 1821(d)(14)(A) (2012).

As we deliberated on this appeal, the United States Supreme Court issued *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), wherein it concluded that a federal statute that is similar, but not identical, to the FDIC extender statute does not preempt state statutes of repose. *Id.* at 2180-89. In making its determinations, the United States Supreme Court relied on statutory language that is not present in the FDIC extender statute. *See id.* The federal statute at issue in *CTS Corp.*, 42 U.S.C. § 9658, provides a " 'federally required commencement date' " for the accrual of state law environmental tort claims. *Id.* at 2184 (quoting 42 U.S.C. § 9658(a)(1) (2012)). In particular, 42 U.S.C. § 9658 provides that the federally required commencement date applies "if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date." 42 U.S.C. § 9658(a)(1) (2012). Additionally, the federal statute separately defines the term "applicable limitations period" as "the period specified in a statute of limitations." 42 U.S.C. § 9658(b)(2) (2012).

In *CTS Corp.*, the United States Supreme Court reasoned that it would be "awkward" for Congress to use the phrase "applicable limitations period," which conveys the preempted state time period in the singular, to preempt *both* statutes of limitations and repose, and in so reasoning it concluded that "the context" of 42 U.S.C. § 9658 reveals Congress's "intent not to cover statutes of repose." *Id.* at 2186-87. That context was partially comprised of a congressional study group report—which preceded the federal statute and which was specific to the subject matter that the federal statute covered—that acknowledged the distinction between statutes of limitations and repose. *Id.* at 2180-81, 2186. Additionally, the United States Supreme Court emphasized that the phrase "applicable limitations period" was statutorily defined in a way that concerned state statutes of limitations and that a statutory provision that equitably tolled the

federally required commencement date indicated that Congress only intended to preempt state statutes of limitations. *Id.* at 2187-88.

CTS Corp.'s analysis does not dissuade us from concluding that the FDIC extender statute preempts both statutes of limitations and repose. The FDIC extender statute is different than the federal statute that was evaluated in *CTS Corp*. Although the FDIC extender statute appears near two tolling provisions, 12 U.S.C. § 1821(d)(5)(F) and 12 U.S.C. § 1821(d)(8)(E), these tolling provisions are different from the tolling provision that was considered in *CTS Corp.* The tolling provision in *CTS Corp.* specifically defined and delayed the "federally required commencement date," as that phrase appears in 42 U.S.C. § 9658, for certain state law actions that have earlier commencement dates under the state's applicable limitations period. 42 U.S.C. § 9658(a)(1), (b)(4)(B) (2012); *CTS Corp.*, 134 S. Ct. at 2184. But 12 U.S.C. § 1821(d)(5)(F) and 12 U.S.C. § 1821(d)(8)(E) toll the "applicable statute of limitations" in the context of an administrative claims process with respect to the action of a claimant who files a "claim with the receiver." Thus, these tolling provisions are unlike the tolling language in *CTS Corp.* that expressly applied to and defined language in the federal statute that displaced a state statute of limitations. Thus, 12 U.S.C. § 1821(d)(5)(F) and 12 U.S.C. § 1821(d)(8)(E) do not indicate what Congress intended to preempt with the FDIC extender statute.

Moreover, the FDIC extender statute uses the broad phrase "period applicable under State law" to identify what is preempted. 12 U.S.C. § 1821(d)(14)(A) (2012). Unlike the similar statutory phrase in *CTS Corp.* that was defined by language that indicated Congress's intent to only preempt statutes of limitation, the FDIC extender statute's phrase "period applicable under State law" is undefined. *See id.* Although the analysis in *CTS Corp.* identified that the singular form of "applicable limitations period" was an "awkward way" to preempt statutes of limitations in the *context* of a federal statute that defined the "applicable limitations period" with language indicating the intent to preempt only a statute of limitations, 134 S. Ct. at 2186-87, we conclude that in the *context* of the FDIC extender statute, the plain meaning of the broad and undefined phrase "period applicable under State law" conveys the intent to preempt any applicable state time limitation, including state statutes of repose. *See In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006) (providing that an undefined statutory phrase is construed based on its plain meaning); *Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (indicating that an undefined statutory term is not ipso facto ambiguous and that such terms are to be given their plain meaning); *see also* 1 U.S.C. § 1 (2012) ("[U]nless the *context* indicates otherwise[,] words importing the

singular include and apply to several . . . things . . . ." (emphasis added)).

Yet on the premise that NRS 40.455(1) is a statute of repose, Rhodes contends that a federal statute cannot preempt a state statute of repose because federal agencies must comply with state statutes of repose that establish substantive conditions for a cause of action under state law. In so contending, he directs us to at least two authorities that contain arguably similar conclusions: (1) *Resolution Trust Corp. v. Olson*, 768 F. Supp. 283 (D. Ariz. 1991), and (2) *In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation*, 966 F. Supp. 2d 1018 (C.D. Cal. 2013).

The *Countrywide* court perceived a conceptual difficulty in permitting a federal statute to preempt a state statute of repose, in that a statute of repose generally "defines, limits, and even terminates the right" that is to be enforced. 966 F. Supp. 2d at 1029. According to the *Countrywide* court, when a state statute of repose lapses for a claim, the claim ceases to exist and the FDIC extender statute cannot revive it. *Id.* at 1029-30 & n.8. The *Olson* court reached the same result pursuant to a slightly different analysis. *Olson*, 768 F. Supp. at 285-86. The *Olson* court characterized a state statute of repose as being substantive in nature and concluded that a federal agency must satisfy a state statute of repose's time limitation because it must satisfy state statutes that are substantive, rather than procedural, in nature. *Id.* Here, the district court seemed to be persuaded by Rhodes' reliance on *Olson* when it concluded that NRS 40.455(1) was a "substantive statute of repose" with which the FDIC needed to comply regardless of the FDIC extender statute.

But unlike the district court, we are not persuaded by the reasoning in *Countrywide* or *Olson*. Although we find *Countrywide*'s analysis to be more persuasive than that in *Olson*, in that the former offers a more cogent analysis for its conclusions, neither case convinces us that a federal statute cannot preempt a state statute of repose. We do not agree with *Olson*'s conclusion that the determination of whether a federal statute controls over a state statute is based on whether the latter is "procedural" or "substantive." *See Olson*, 768 F. Supp. at 285-86; *see also Countrywide*, 966 F. Supp. 2d at 1030 n.8 (rejecting *Olson*'s analysis that focused on whether a state statute was procedural or substantive); *Butler*, 684 So. 2d at 328 (rejecting *Olson*). And in light of other authorities wherein federal statutes preempted state statutes of repose, we hesitate to adopt *Countrywide*'s conclusion—which is primarily based on reasoning absent legal authority that directly addresses the issue—that a statute of repose cannot be preempted. *See Countrywide*, 966 F. Supp. 2d at 1029-30; *see also Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1150-52 (N.D. Fla. 1994) (concluding that a federal statute preempts state statutes

of repose); *A.S.I., Inc. v. Sanders*, 835 F. Supp. 1349, 1355, 1358 (D. Kan. 1993) (applying the preemption doctrine to conclude that a federal statute preempted a state statute of repose while rejecting the argument that a statute of repose is immunized from being preempted because it is substantive in nature); *Butler*, 684 So. 2d at 327-28 (concluding that the FDIC extender statute preempted a state statutory time limitation, regardless of whether the latter was a statute of limitations or repose); *Tow v. Pagano*, 312 S.W.3d 751, 761 (Tex. App. 2009) (concluding that a federal statute can preempt a state statute of repose, albeit with respect to a federal bankruptcy statute).

Accordingly, we need not characterize NRS 40.455(1) as a statute of limitations or repose. NRS 40.455(1) is a "period applicable under State law" that is shorter than the FDIC extender statute's six-year time limitation. 12 U.S.C. § 1821(d)(14)(A) (2012). Thus, we conclude that the FDIC extender statute's six-year time limitation expressly preempts NRS 40.455(1).

CONCLUSION

In light of the above, we conclude that the district court erred in dismissing the FDIC's action for a deficiency judgment when it determined that NRS 40.455(1) was a statute of repose that barred the action that the FDIC filed after NRS 40.455(1)'s six-month deadline but before the expiration of the FDIC extender statute's six-year time limitation. A plain reading of the FDIC extender statute indicates that its six-year time limitation expressly preempts any shorter state statutory time limitation, including the limitation provided in NRS 40.455(1), regardless of whether the state statute is a statute of limitations or repose. Accordingly, we reverse the portion of the district court's order that dismissed the FDIC's deficiency judgment claim as time-barred and remand this matter to the district court for further proceedings that are consistent with this opinion. As the FDIC failed to meaningfully dispute the determinations in the order beyond the district court's conclusion about the timeliness of its suit for a deficiency judgment, we affirm and do not address those determinations.[1]

PICKERING, HARDESTY, and DOUGLAS, JJ., concur.

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[1]In addition to raising the preemption issue, the FDIC asserts that the district court erred in dismissing its contract-based claims beyond its deficiency judgment action. But it makes this assertion without meaningful analysis or a citation to salient authority. In the absence of a cogent argument about the dismissal of the contract-based claims, we do not address that issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that we need not address an issue that is not cogently argued). Moreover, we have considered the remaining contentions on appeal and conclude that they lack merit.

GIBBONS, C.J., with whom PARRAGUIRRE and CHERRY, JJ., agree, dissenting:

The FDIC failed to preserve its preemption argument

I would affirm the judgment of the district court. The FDIC failed to preserve its preemption argument by failing to raise the argument before the district court. The majority concedes that the preemption doctrine argument was not explicitly raised before the district court. This court does not address arguments that are made for the first time on appeal and which are not asserted before the district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

The FDIC extender statute does not preempt state statutes of repose

In addition, NRS 40.455(1) is a statute of repose that bars the FDIC's action. As the majority acknowledges, statutes of repose are distinct from statutes of limitation. Statutes of repose bar a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred. *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). The majority concludes that the FDIC extender statute applies to both statutes of limitation and statutes of repose. I disagree.

First, when addressing what the applicable statute of limitations should be, the FDIC extender statute refers to "the period applicable under State law." 12 U.S.C. § 1821(d)(14)(A)(i)(II) (2012). As the United States Supreme Court concluded, "[using 'period' in a singular form] would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014) (addressing whether a federal statute preempts statutes of repose applicable to state-law tort actions in certain circumstances).

Second, the FDIC extender statute contains a provision that provides for tolling of the statute of limitations. 12 U.S.C. § 1821(d)(5)(F)(i) (this section, entitled "Statute of limitation tolled," states that "[f]or purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action") This "suggests that the statute's reach is limited to statutes of limitations, which traditionally have been subject to tolling." *See CTS Corp.*, 134 S. Ct. at 2188.

Lastly, the FDIC extender statute extends the time period for "any action" to be brought. *Black's Law Dictionary* defines "action" as a "civil or criminal judicial proceeding." *Black's Law Dictionary* 31 (8th ed. 2004). Similar to the United States Supreme Court's analysis of "civil action" in *CTS Corp.*, the use of the term "ac-

tion" presupposes that a cause of action exists. *CTS Corp.*, 134 S. Ct. at 2187. While "in a literal sense a statute of repose limits the time during which a suit 'may be brought' because it provides a point after which a suit cannot be brought," statutes of repose are not related to the existence of any cause of action. *Id.* ("A statute of repose . . . may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs.") Thus, the FDIC extender statute is best interpreted to reference only statutes of limitations, which generally begins to run after a cause of action accrues. *Id*.

The majority concludes that the federal statute at issue in *CTS Corp.* is sufficiently different from the FDIC extender statute and that a departure from the Court's holding in that case is warranted. However, both federal statutes use the term "period" in a singular form when addressing which limitation period is covered; both federal statutes provide for tolling of statutes of limitation; and both federal statutes address the time limit for when an "action" may be brought. Moreover, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *CTS Corp.*, 134 S. Ct. at 2188 (quotations omitted). As such, I agree with the conclusion of the federal district court in the case of *In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation*, 966 F. Supp. 2d 1018, 1024-30 (C.D. Cal. 2013), that the federal extender statute does not preempt state statutes of repose. As a consequence, the district court correctly concluded that the deficiency action initiated by the FDIC was time-barred.

JOE VALDEZ, Individually and on Behalf of All Others Similarly Situated, Appellant, *v.* COX COMMUNICATIONS LAS VEGAS, INC.; and VIDEO INTERNET PHONE INSTALLS, INC., Respondents.

No. 65383

November 6, 2014 336 P.3d 969

Motion to dismiss in part, for lack of jurisdiction, an appeal from a district court order in an unpaid wage action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Employee brought class action against employers alleging failure to pay wages in accordance with state law and Fair Labor Standards Act. The district court severed claims against one employer from claims against other employers. Employee appealed. The supreme

court held that one must take an appeal from an order finally resolving severed claims, even if the unsevered claims remain pending.

Motion granted; appeal dismissed in part.

Leon Greenberg Professional Corporation and *Leon M. Greenberg* and *Dana Sniegocki*, Las Vegas, for Appellant.

Duane Morris LLP and *Ryan A. Loosvelt*, Las Vegas; *Chamberlain Hrdicka* and *Annette A. Idalski*, Atlanta, Georgia, for Respondent Cox Communications Las Vegas, Inc.

Littler Mendelson, P.C., and *Rick D. Roskelley, Montgomery Y. Paek*, and *Kathryn B. Blakey*, Las Vegas, for Respondent Video Internet Phone Installs, Inc.

1. Appeal and Error.
   One must take an appeal from an order finally resolving severed claims, even if the unsevered claims remain pending. NRCP 21.
2. Appeal and Error.
   A judgment resolving claims properly severed under rule of civil procedure governing misjoinder and nonjoinder of parties is appealable. NRCP 21.
3. Appeal and Error.
   An order finally resolving severed claims does not need to be certified as final before a party may appeal from it because once the claims are severed, two separate actions exist. NRCP 21, 54(b).
4. Appeal and Error.
   All interlocutory orders regarding a party whose claims are severed, entered before the severance order, may be challenged on appeal from the order finally resolving the severed claims.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

Per Curiam:

Appellant Joe Valdez filed the underlying action against four defendants. Ultimately, the claims against respondent Video Internet Phone Installs, Inc. (VIPI), were severed from the rest of the claims and thereafter resolved. Instead of appealing from the order resolving the severed claims against VIPI, however, Valdez waited to appeal from the order finally resolving the unsevered claims before challenging interlocutory orders regarding VIPI. We issue this opinion to clarify that one must take an appeal from an order finally resolving severed claims, even if the unsevered claims remain pending.

FACTS AND PROCEDURAL HISTORY

Valdez filed a class action against VIPI; Cox Communications Las Vegas, Inc.; Quality Communications, Inc.; and Sierra Communications Services, Inc., alleging failure to pay wages in accordance with Nevada law and the federal Fair Labor Standards Act. After the action was removed to federal court and the claims against Quality Communications were resolved, the state law claims against the remaining three defendants were remanded to Nevada state court.

The claims against VIPI were severed in April 2013 and thereafter resolved in an October 18, 2013, order. The notice of entry of that order was served on November 18, 2013. Valdez did not file a notice of appeal from the October 2013 order. Instead, Valdez appealed from the district court's March 4, 2014, order approving the class action settlement between Valdez and Sierra Communications, which finally resolved the remaining claims and dismissed the complaint with prejudice. While Valdez does not challenge the March 2014 order in his appeal, he challenges three interlocutory orders, two of which involve VIPI and one of which involves Cox Communications.

VIPI filed a motion to dismiss the appeal as to it, arguing that Valdez could not challenge the interlocutory orders regarding VIPI because Valdez had failed to timely appeal from the October 2013 order, which finally resolved all the severed claims against VIPI.[1] Valdez filed an opposition to that motion and VIPI filed a reply. In his opposition, Valdez contends that he could not appeal from the October 2013 order because it was never certified as final under NRCP 54(b).

DISCUSSION

[Headnotes 1, 2]

Under NRCP 21, when a claim against a party is severed, that claim proceeds separately from the unsevered claims. Federal courts, recognizing that claims severed under FRCP 21 "'may be . . . proceeded with separately,'" treat severed claims as a separate suit, and when a judgment has been entered resolving claims properly severed, it is final and appealable, despite the existence of other pending, unsevered claims. *See Acevedo-Garcia v. Monroig*, 351 F.3d 547, 559 (1st Cir. 2003) (quoting former FRCP 21 and explaining that an order resolving properly severed claims is final despite any unresolved, unsevered claims); *United States v. O'Neil*, 709 F.2d 361, 368-69 (5th Cir. 1983) (same); *Spencer, White &*

[1]VIPI also requested sanctions against Valdez; because the jurisdictional issues presented in this appeal are complicated, we deny that request.

Prentis Inc. of Conn. v. Pfizer Inc., 498 F.2d 358, 361 (2d Cir. 1974) (same). As NRCP 21 parallels FRCP 21, we conclude likewise that a judgment resolving claims properly severed under NRCP 21, Nevada's equivalent to FRCP 21, is appealable. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (recognizing that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules").

[Headnotes 3, 4]

Further, an order finally resolving severed claims does not need to be certified as final under NRCP 54(b) before a party may appeal from it because once the claims are severed, two separate actions exist. *See Acevedo-Garcia*, 351 F.3d at 559-60 (explaining that severance creates two separate actions in part so that parties may pursue separate appeals); *see also* NRAP 3A(b)(1) (providing that this court has jurisdiction to consider an appeal from a final judgment). And all interlocutory orders regarding the party whose claims are severed, entered before the severance order, may then be challenged on appeal from the order finally resolving the severed claims. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (explaining that this court may hear a challenge to interlocutory orders on appeal from the final judgment).

Because Valdez failed to timely appeal from the October 2013 order resolving the severed claims against VIPI, *see* NRAP 4(a)(1) (requiring an appellant to file a notice of appeal within 30 days of the written notice of entry of the judgment), Valdez cannot now challenge the orders regarding VIPI in an appeal from the March 2014 order. Thus, we conclude that we lack jurisdiction to consider this appeal against VIPI, and we grant VIPI's motion to dismiss this appeal as to it. As it appears, however, that the March 2014 order constitutes the final judgment regarding the unsevered claims in this case, this appeal may proceed as to Cox Communications. Briefing as to the remainder of this appeal from the final judgment will be reinstated in a separate order.

STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Appellant, *v.* CHECK CITY PARTNERSHIP, LLC, dba CHECK CITY, a Nevada Limited Liability Company, Respondent.

No. 62888

November 13, 2014 337 P.3d 755

Appeal from a district court order in a declaratory relief action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Deferred deposit lender brought action against the Financial Institutions Division for declaratory relief in the form of clarification of statute that limited the amount of a deferred deposit loan to 25 percent of the borrower's expected gross monthly income. The district court entered summary judgment in favor of lender. Division appealed. The supreme court, Parraguirre, J., held that statutory cap of 25 percent on deferred deposit loans included both the principal amount loaned and any interest or fees charged.

Reversed.

Catherine Cortez Masto, Attorney General, and *Christopher Eccles, Daniel D. Ebihara*, and *David J. Pope*, Deputy Attorneys General, Carson City, for Appellant.

Holland & Hart LLP and *Patrick J. Reilly* and *Nicole E. Lovelock*, Las Vegas, for Respondent.

1. Statutes.
   When examining the plain meaning of a statute, the supreme court presumes that the Legislature intended to use words in their usual and natural meaning.
2. Statutes.
   When a term is defined in a statute, the statutory definition must govern.
3. Consumer Credit.
   Statute that prohibited deferred deposit loan that exceeded 25 percent of the expected gross monthly income of the customer when the loan was made defined the phrase "deferred deposit loan" to include principal, interest, and fees, not just the principal amount borrowed, and, thus, statutory cap of 25 percent on deferred deposit loans included both the principal amount loaned and any interest or fees charged. NRS 604A.425.
4. Administrative Law and Procedure.
   Exhaustion of administrative remedies is not required when the only issue is the interpretation of a statute.
5. Injunction.
   The possibility of a license suspension may constitute irreparable harm for the purpose of granting a preliminary injunction, which would be sufficient to form a justiciable case or controversy.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

NRS 604A.425 limits the amount of a deferred deposit loan to 25 percent of a borrower's expected gross monthly income. In this appeal, we are asked to determine whether that cap includes only the principal borrowed or the principal amount plus any interest or fees charged. We conclude that NRS 604A.425 unambiguously provides that the 25-percent cap includes both principal and any interest or fees charged. Accordingly, we reverse the district court's order granting declaratory relief in Check City's favor.

FACTS

A deferred deposit loan is a transaction wherein a borrower is given a loan that must be repaid in full within a relatively short time frame. The lender generally charges a flat fee based on a very high interest rate. As collateral, the borrower gives the lender a post-dated check that includes the principal amount and any interest or fees to be incurred.[1] The lender then holds that check during the term of the loan. At the end of the loan's term, the borrower may either pay the lender, who will return the post-dated check, or the lender may deposit the check. The loan is for a short, fixed period that cannot exceed 35 days. NRS 604A.408. Loans for longer periods are referred to as "high-interest loans," which are governed by separate provisions of NRS 604A.425. NRS 604A.408(2).

As an example, the record in this case includes a loan agreement under which a customer borrowed $300 and agreed to pay $321 the following week. The federal Truth in Lending Act requires lenders to disclose fees as an annual percentage rate (APR). 15 U.S.C. § 1601 *et seq*. (2012); 12 C.F.R. § 226.17 (2014). According to the loan document, the $21 "Finance Charge" was based on a 1-week loan term and an APR of 364. Nevada does not have a usury law, so there is no statutory cap on interest rates.

However, NRS 604A.425 limits the amount of a deferred deposit loan to 25 percent of the borrower's expected gross monthly income. In 2008, the Nevada Financial Institutions Division (FID) began enforcing the 25-percent cap as including both

[1]Instead of a post-dated check, the borrower may provide the lender with a written authorization for an electronic transfer of money from the borrower's bank account. NRS 604A.050(1)(b). We acknowledge both methods but refer only to "checks" for the sake of simplicity.

the principal borrowed and interest charged.[2] In two separate Reports of Examination issued to Check City, the FID informed Check City of this interpretation, but did not fine or cite it for issuing loans that violated the FID's interpretation of NRS 604A.425.

In June 2013, Check City filed a complaint for declaratory relief in the Eighth Judicial District seeking clarification of NRS 604A.425. The FID filed a motion to dismiss, arguing that there was no justiciable controversy and Check City had not exhausted its administrative remedies. The district court rejected these arguments and granted Check City's motion for summary judgment, concluding that the 25-percent cap only applied to the principal borrowed. The FID now brings this appeal.

DISCUSSION

On appeal, the FID argues that the district court erred in concluding that NRS 604A.425's 25-percent cap only refers to the principal borrowed, rather than to the principal plus interest and fees.

We review questions of statutory interpretation de novo. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857, 265 P.3d 688, 690 (2011). We will not look beyond the plain language of a statute to determine its meaning when the statute is unambiguous. *Id.* "[A] statute is ambiguous when it is capable of being understood in two or more senses by reasonably informed persons . . . ." *Id.* (internal quotation marks omitted). If a statute is ambiguous, this court will look to " 'the context and the spirit of the law or the causes which induced the legislature to enact it.' " *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 738 (2007) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)). To determine the Legislature's intent, we look to "legislative history, reason, and considerations of public policy . . . ." *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 681 (2008).

The threshold inquiry, then, is whether NRS 604A.425 unambiguously states that the 25-percent cap includes both the principal

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[2]The FID and another deferred deposit lender, Advanced Check Cashing & Payday Loan (ACC), filed a joint petition for declaratory relief seeking clarification of NRS 604A.425 in 2008. The district court in that case concluded that the 25-percent cap includes both interest and principal. Check City focuses a portion of its argument on the fact that it was not informed of, or included in, the joint petition that the FID filed with ACC. Check City, however, does not argue that it was a necessary party to that case under NRCP 19(a), and it does not provide a legal basis for its argument that it should have been informed of, or included in, the ACC case. Furthermore, the specifics of the ACC case are not material because this case requires de novo review of the relevant statute. Accordingly, we do not address the extensive references Check City makes to being excluded from the ACC case.

amount borrowed and any interest or fees charged. NRS 604A.425 provides: "A licensee shall not . . . [m]ake *a deferred deposit loan* that exceeds 25 percent of the expected gross monthly income of the customer when the loan is made." NRS 604A.425(1)(a) (emphasis added). NRS 604A.050 defines "deferred deposit loan" as follows:

> "Deferred deposit loan" means a *transaction* in which, *pursuant to a loan agreement*:
>
> 1. A customer tenders to another person:
>
> (a) A personal check drawn upon the account of the customer; or
>
> (b) Written authorization for an electronic transfer of money for a specified amount from the account of the customer; and
>
> 2. The other person:
>
> (a) Provides to the customer an amount of money that is equal to the face value of the check or the amount specified in the written authorization for an electronic transfer of money, less any fee charged for the transaction; and
>
> (b) Agrees, for a specified period, not to cash the check or execute an electronic transfer of money for the amount specified in the written authorization.

(Emphases added.)

The district court applied what it considered a plain-language, commonsense meaning for the phrase "deferred deposit loan," concluding that the phrase only encompassed the principal borrowed. However, we find that the language of NRS 604A.050 does not limit deferred deposit loans to just the amount borrowed, as it clearly contemplates that a deferred deposit loan is a *transaction* based on a loan agreement. That loan agreement, in turn, is made up of various terms including both the amount borrowed and any fees charged. Therefore, deferred deposit loans are not limited to just the amount borrowed.

NRS 604A.050 defines "deferred deposit loan" by describing a deferred deposit loan transaction. NRS 604A.050(1) describes the customer's basic obligations, and NRS 604A.050(2) describes the basic obligations of the "other person," typically a licensed lender. When these two subsections are read together, a "deferred deposit loan" is a transaction with three distinctive characteristics that separate it from other types of loan agreements: (1) the customer secures a loan with a check; (2) the lender finances an amount that is equal to the check the customer tendered, minus any fees due to the lender; and (3) the lender holds the check as security and deposits it only when an agreed-upon date has arrived.

NRS 604A.050 makes clear that the principal amount borrowed is merely one aspect of the larger transaction. NRS 604A.050(2)(a) states that as a part of the overall transaction, the lender will "[p]rovide[ ] to the customer an amount of money that is equal to the face value of the check [held as security] . . . *less any*

fee charged for the transaction." (Emphasis added.) Accordingly, by its terms, a deferred deposit loan transaction encompasses more than simply the amount borrowed but also includes some consideration to the lender beyond the customer's promise to repay the amount borrowed. Moreover, the amount of a deferred deposit loan must be fixed by the value of the entire loan transaction, including principal, fees, and interest, because NRS 604A.050 unambiguously defines a deferred deposit loan as "a transaction."

In light of the statutory definition provided by NRS 604A.050 for "deferred deposit loan," we hold that NRS 604A.425 unambiguously limits the total amount of a deferred deposit loan transaction—comprised of principal, interest, and any additional fees—to 25 percent of a customer's expected gross monthly income.

[Headnotes 1-3]

Check City relies on *Black's Law Dictionary*'s since-revised definition of a "loan" to argue that the unambiguous meaning of "loan" is nothing more than the amount borrowed.[3] When examining the plain meaning of a statute, "we presume that the Legislature intended to use words in their usual and natural meaning." *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). Even if we were to accept Check City's interpretation of the usual and natural meaning of the word "loan," that definition would conflict with the Legislature's statutory definition. Specifically, NRS 604A.080 defines "loan" by referring the reader to NRS 604A.050's definition of deferred deposit loan.[4] In such a case, the statutory definition must govern. *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002) ("A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute.").

[Headnotes 4, 5]

Thus, we conclude that NRS 604A.425's 25-percent cap on deferred deposit loans includes both the principal amount loaned and any interest or fees charged. NRS 604A.050 defines the phrase "deferred deposit loan" to include principal, interest, and fees, not

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[3]Check City cites the sixth edition of *Black's Law Dictionary*, which defines a "loan" as:

> A lending. Delivery by one party to and receipt by another party a sum of money upon agreement, express or implied, to repay it with or without interest. Anything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use.

Black's Law Dictionary 936 (6th ed. 1990) (citations omitted). The most recent edition defines a loan as "1. An act of lending; a grant of something for temporary use . . . . 2. A thing lent for the borrower's temporary use; esp., a sum of money lent at interest . . . ." *Black's Law Dictionary* 1019 (9th ed. 2009).

[4]" 'Loan' means any deferred deposit loan, high-interest loan or title loan, or any extension or repayment plan relating to such a loan . . . ." NRS 604A.080.

just the principal amount borrowed, and neither NRS 604A.425 nor NRS 604A.050 is ambiguous. Accordingly, we reverse the district court's order granting summary judgment.[5]

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

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[5]The FID argues that Check City has not exhausted its administrative remedies and that this matter does not present a justiciable case or controversy. We disagree. Exhaustion is not required where, as here, the only issue is the interpretation of a statute. *Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). Additionally, the possibility of a license suspension—a consequence Check City might have faced if it failed to comply with the FID's interpretation of NRS 604A.425—may constitute irreparable harm for the purpose of granting a preliminary injunction, see *Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 369-70, 294 P.3d 1223, 1228 (2012), which would be sufficient to form a justiciable case or controversy, *see Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).