along with the post-April 2007 Mezzanine Deeds of Trust are in junior priority position to the aforementioned encumbrances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED a further stay of this litigation is granted pending a petition to the Nevada Supreme Court provided such is timely filed and for which no bond is required.

In cases such as this one, where the right to appeal a final disposition is still viable, the best practice would have been to not only deny APCO's motion for a stay, but also to immediately deny APCO's writ as soon as possible without the necessity of extensive appellate proceedings.

For the above reasons, I would agree the writ should be denied, but I worry that in considering the writ, we are sending the wrong message to the Nevada Bar concerning pretrial extraordinary writs.[1]

DENNIS TALLMAN, Individually and on Behalf of Others Similarly Situated, Petitioner, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, District Judge, Respondents, and CPS SECURITY (USA), INC.; and CPS CONSTRUCTION SECURITY PLUS, INC., Real Parties in Interest.

No. 60673

DONALD MIKA; and BERYL HARTER, Individually and on Behalf of Others Similarly Situated, Petitioners, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, District Judge, Respondents, and CPS SECURITY (USA), INC.; and CPS CONSTRUCTION SECURITY PLUS, INC., Real Parties in Interest.

No. 61390

September 24, 2015 359 P.3d 113

Original petitions for writ of mandamus challenging district court orders compelling arbitration in an employment action.

Former employees brought separate actions against employer asserting violations of Fair Labor Standards Act (FLSA) and state law.

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[1]This is not to say that the published opinion by the majority is not an excellent appellate disposition because it is a well-written opinion affirming the district court in all respects.

The district court entered orders compelling arbitration of former employees' claims and denying their motions for class certification. Former employees sought writs of mandamus. The supreme court, PICKERING, J., held that: (1) employer's failure to sign long-form arbitration agreement did not invalidate agreement, (2) employer's individual agents were entitled to enforce arbitration agreement, (3) Federal Arbitration Act prohibited state court from invalidating class action arbitration waiver, (4) National Labor Relations Act did not invalidate class-action waiver, and (5) employer did not waive its right to arbitrate class claims under state law by removing former employee's action to federal court based on claims brought under FLSA.

Petitions denied.

Leon Greenberg Professional Corporation and *Leon M. Greenberg*, Las Vegas, for Petitioners.

Kamer Zucker Abbott and *Carol Davis Zucker* and *Timothy W. Roehrs*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS.
   The party seeking extraordinary writ relief from an order compelling arbitration should show why an eventual appeal does not afford a plain, speedy, and adequate remedy in the ordinary course of law and that the matter meets the other criteria for extraordinary writ relief, i.e., that mandamus is needed to compel the performance of an act that the law requires or to control a manifest abuse of discretion by the district court. NRS 34.170.
2. MANDAMUS.
   The supreme court would accept mandamus review of orders compelling arbitration of employees' claims against former employer, even though an order compelling arbitration may have been reviewable on appeal from final judgment or order confirming or vacating award; the supreme court's prior case law may have invited parties to assume that lack of right of interlocutory direct appeal made mandamus readily available, and employees presented nonfrivolous argument that National Labor Relations Act invalidated class and collective action waivers in employment arbitration agreements. National Labor Relations Act, §§ 7, 8, 29 U.S.C. §§ 157, 158; NRS 34.170, 38.247.
3. ALTERNATIVE DISPUTE RESOLUTION.
   Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that the supreme court reviews de novo.
4. ALTERNATIVE DISPUTE RESOLUTION.
   As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.
5. ALTERNATIVE DISPUTE RESOLUTION.
   Employer's failure to sign long-form arbitration agreement with employees that contained class action waiver did not invalidate agreement, where employer did sign short-form agreement that did not contain waiver, employees signed and dated short- and long-form agreements together, long-form agreement granted employee a 30-day opt-out period, and clause

in short-form agreement stated that agreement could be modified only by a written instrument executed by employee and employer. NRS 38.219(1).

6. Alternative Dispute Resolution.
Former employer's individual agents were entitled to enforce arbitration agreement against former employees, even though agents did not personally sign agreement; the wrong that employees alleged tied directly to employer's policies, which agents allegedly devised and carried out, and the agreement covered claims not only against employer but also against its officers, directors, managers, employees, or agents.

7. Alternative Dispute Resolution; States.
Federal Arbitration Act prohibited state court from invalidating class action waiver in arbitration clause between employer and employees, even if such a waiver violated substantive state law by depriving employees of the means to vindicate their statutory overtime and minimum wage claims. 9 U.S.C. § 2; NRS 608.018, 608.250.

8. Alternative Dispute Resolution; States.
When the Federal Arbitration Act applies, it preempts contrary state law whether the preemption issue arises in state or federal court. 9 U.S.C. § 2.

9. Alternative Dispute Resolution.
The importance of a right does not entitle a litigant to arbitrate on a class basis when the litigant has agreed to arbitrate the statutory claims on an individual basis.

10. Alternative Dispute Resolution; Commerce; States.
Under the Federal Arbitration Act, a state court may not invalidate a class arbitration waiver in a transaction involving commerce on the basis that individual arbitration hampers effective vindication of an employee's state-law-based overtime and minimum wage claims. 9 U.S.C. § 2.

11. Alternative Dispute Resolution.
National Labor Relations Act (NLRA) did not invalidate class action waiver in arbitration agreement between employer and employees; NLRA did not amount to a contrary congressional command overriding the Federal Arbitration Act's mandate to enforce arbitration agreements as written. 9 U.S.C. § 2; National Labor Relations Act, §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1).

12. Labor and Employment; Removal of Cases.
Employer did not waive its right to arbitrate class claims under state law by removing former employee's action to federal court based on claims brought under Fair Labor Standards Act (FLSA), even though employer did not formally move to compel arbitration of state claims until those claims were remanded to state court; parties assumed that collective action waiver could not be enforced as to employee's FLSA claims and that those claims could not be litigated simultaneously with his state-law-based class action claims in federal court. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b).

13. Alternative Dispute Resolution.
Waiver of a contractual right to arbitration is not lightly inferred.

14. Alternative Dispute Resolution.
The party opposing arbitration must demonstrate that the party seeking to arbitrate (1) knew of his or her right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his or her inconsistent acts.

15. Alternative Dispute Resolution.
Prejudice to the party opposing arbitration is the primary focus in determining whether arbitration has been waived.

16. Alternative Dispute Resolution.
Prejudice to the party opposing arbitration, in determining whether arbitration has been waived, may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts.

17. Alternative Dispute Resolution.
Waiver of a contractual right to arbitration is generally a question of fact, but when the determination rests on the legal implications of essentially uncontested facts, then it may be determined as a matter of law.

18. Alternative Dispute Resolution; Removal of Cases.
A defendant does not automatically waive his or her right to compel arbitration by removing an action from state to federal court.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

Petitioners Donald Mika, Beryl Harter, and Dennis Tallman seek writs of mandamus directing the district court to vacate its orders compelling arbitration of their claims against their former employer, real party in interest CPS Security (USA), Inc., and certain of its agents and associates (collectively, CPS). All three petitioners signed the same long-form arbitration agreement, which includes a clause waiving the right to initiate or participate in class actions. They urge this court to invalidate the agreement, first, because it was not countersigned by CPS and, second, because its class action waiver assertedly violates state and federal law. Petitioner Tallman also maintains that CPS waived its right to compel arbitration by litigating with him in state and federal court. The district court acted properly in compelling individual arbitration of petitioners' claims. We therefore deny writ relief.

I.

A.

CPS provides security services to construction companies in Nevada and elsewhere. Petitioners worked 50 to 70 hours per week for CPS as trailer guards. As a condition of their employment, CPS required petitioners to sleep overnight in small trailers located at its work sites. CPS did not pay petitioners for their sleep time except when they were called out to respond to an alarm or other activity at the site. Petitioners allege, and CPS denies, that they are owed at least the minimum wage for the required on-site sleep time, whether called out during the night or not, as well as overtime pay.

Petitioners signed both short- and long-form arbitration agreements with CPS. The short-form agreement is entitled "Arbitration

Agreement (Outside CA)" and includes concise language assenting to binding arbitration and providing that it can only be modified "by a written instrument executed by EMPLOYEE and Chris Coffey, on behalf of the COMPANY." The long-form agreement is entitled "Offer to Participate in Arbitration of Disputes" and is much more detailed. It specifies that arbitration shall be conducted pursuant to the JAMS Employment Arbitration Rules at a location convenient to the employee and provides for a written award, judicial review of the award, and for CPS to bear the costs of arbitration, including the arbitrators' fees.

The long-form arbitration agreement includes a clause entitled "Waiver of Right to Initiate or Participate in Collective or Class Actions." This clause states that, "The Arbitrator shall not consolidate Claims of different employees into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action." It continues:

> By entering into this Agreement, the Company [(CPS)] and I are agreeing to waive rights we might otherwise have including, but not limited to, the rights (a) to initiate representative actions, collective actions, and/or class actions; and (b) to participate in representative actions, collective actions, or class actions initiated by others.

The long-form agreement also includes an acknowledgment that CPS "is engaged in transactions involving interstate commerce[and] that the employment relationship between us affects interstate commerce."

The long-form agreement has two signature pages. Each of the petitioners signed both pages of his or her long-form agreement. The first signature page of the long-form agreement also includes a signature line for CPS, which CPS left blank and never signed. The second and final signature page is set up for only the employee to sign. It contains three paragraphs, all in capital letters, headed "VOLUNTARY AGREEMENT," "RIGHT TO CONSULT COUNSEL," and "30 DAY PERIOD TO OPT-OUT." The paragraph headed "OPT-OUT" acknowledges "THAT I WAS ADVISED THAT CHOOSING TO SIGN THIS AGREEMENT IS NOT A CONDITION OF MY EMPLOYMENT," and that "I HAVE BEEN GIVEN A COPY OF MY SIGNED AGREEMENT AND HAVE A FULL THIRTY (30) DAY PERIOD TO OPT-OUT OF THE AGREEMENT IF I CHANGE MY MIND."

B.

Tallman sued CPS in state court, asserting minimum wage and overtime claims individually and on behalf of others similarly situated under Nevada law, NRS Chapter 608, and the federal Fair

Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (2014). CPS removed Tallman's complaint to federal court, which retained jurisdiction of the FLSA claims but declined to exercise supplemental jurisdiction over, and therefore remanded, the Nevada-law-based claims. Thereafter, Mika and Harter filed a second state court suit against CPS. Their complaint, also styled as a class action, reasserts Tallman's NRS Chapter 608 claims against CPS but adds new defendants and civil racketeering claims under NRS Chapter 207. The two suits were assigned to the same district court judge who, after briefing and argument, entered orders compelling individual arbitration of Tallman's, Mika's, and Harter's claims and denying their motions for class certification. It is from these orders that Tallman, Mika, and Harter seek extraordinary writ relief.

II.

Nevada has adopted the Uniform Arbitration Act of 2000 (UAA). NRS 38.206 to 38.248. Consistent with its policy favoring efficient and expeditious enforcement of agreements to arbitrate, *see* NRS 38.219; *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004), the Act authorizes interlocutory appeals from orders *denying* arbitration but makes no provision for interlocutory appeals of orders *compelling* arbitration. NRS 38.247(1)(a). We have said that the reason for not allowing interlocutory appeals of orders compelling arbitration is "obvious": "[I]f at the very threshold of the proceeding the defaulting party could appeal and thereby indefinitely delay the matter of arbitration, the object of the law [favoring arbitration] and the purpose of the written agreement of the parties would be entirely defeated." *Clark Cnty. v. Empire Elec., Inc.*, 96 Nev. 18, 20, 604 P.2d 352, 353 (1980) (internal quotations omitted) (addressing an earlier version of the UAA).

[Headnote 1]

Since petitioners have no immediate right of direct appeal, they ask this court to exercise original mandamus jurisdiction over the district court's orders compelling arbitration. Mandamus affords interlocutory appellate review in cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. The petitioners assume, and CPS accepts, that they have no "plain, speedy and adequate remedy" besides mandamus because NRS 38.247(1)(a) does not provide for direct, interlocutory appeals from compelling arbitration. *See also Kindred v. Second Judicial Dist. Court*, 116 Nev. 405, 409, 996 P.2d 903, 906 (2000) (reviewing an order compelling arbitration on a writ of mandamus and "conclud[ing] that [petitioner] has no remedy available other than that provided by a writ"). But error in ordering arbitration may be reviewed on appeal from the final judgment or order confirming or vacating the award, *see* NRS 38.247; *Clark Cnty. v. Empire Elec.,*

Inc., 96 Nev. at 20, 604 P.2d at 353, eventual appellate review that the Uniform Arbitration Act deems adequate and appropriate. *See In re Gulf Exploration, LLC*, 289 S.W.3d 836, 841-43 (Tex. 2009) (discussing the tension between mandamus review of orders compelling arbitration and "the legislative preference for moving cases to arbitration quickly" evident in the Uniform Arbitration Act's withholding a right of direct interlocutory appeal of such orders). Thus, the party seeking extraordinary writ relief from an order compelling arbitration still should show why an eventual appeal does not afford "a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170,[1] and that the matter meets the other criteria for extraordinary writ relief, i.e., that mandamus is needed "to compel the performance of an act that the law requires or to control a manifest abuse of discretion" by the district court. *State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009) (also emphasizing that "the decision to entertain" a petition for mandamus challenging an order compelling arbitration is not automatic, but a matter "addressed solely to our discretion").

[Headnote 2]

The parties do not meaningfully address the requirements for extraordinary writ relief in their briefs. We nonetheless accept mandamus review of the petitions before us for two reasons. First, our case law may have invited the parties to assume that the lack of a right of interlocutory direct appeal made mandamus readily available. *See supra* note 1; *Kindred*, 116 Nev. at 409, 996 P.2d at 906; *cf. Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 843-44 (2004) (although concluding that appeal, not mandamus, is the appropriate vehicle to review orders dismissing actions on forum non conveniens grounds, "because we previously indicated that the proper method of review in this type of case is a petition for a writ of mandamus, we will exercise our original jurisdiction and consider this petition"). Second, our decision to invalidate class action waivers in consumer arbitration agreements, *see Picardi v. Eighth Judicial Dist. Court*, 127 Nev. 106, 251 P.3d 723 (2011), conflicts with the Supreme Court's more recent decision in *AT&T*

[1]We question *Kindred* to the extent it suggests that orders compelling arbitration automatically satisfy NRS 34.170's requirement that there not be "a plain, speedy and adequate remedy in the ordinary course of law." While the unavailability of an immediate appeal from an order compelling arbitration *may* present a situation in which an eventual appeal from the order confirming the award or other final judgment in the case will not be plain, speedy, or adequate, it is an overstatement to say this holds true in all cases where arbitration has been compelled. *See generally In re Gulf Exploration*, 289 S.W.3d at 841-42 (rejecting the argument that the lack of an immediate appeal from an order compelling arbitration under the Texas version of the UAA could or should satisfy the requirement that the party seeking mandamus show no adequate remedy at law).

Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and petitioners present a nonfrivolous argument that, notwithstanding *Concepcion*, the National Labor Relations Act, 29 U.S.C. §§ 157, 158 (2014), may invalidate class and collective action waivers in employment arbitration agreements. *But see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 141-42 (Cal. 2014). The conflict between our decision in *Picardi* and the Supreme Court's decision in *Concepcion*, and the injury the petitioners and the class members they sought to represent would suffer if the district court's orders compelling individual arbitration proved wrong, together persuade us to consider the petitions on the merits.

III.

Petitioners raise a threshold question whether the long-form arbitration agreement, which contains the objected-to class action waiver, constitutes a valid contract. They contend that CPS's failure to sign the long-form agreement makes it unenforceable and that the short-form agreement, which CPS did sign and which does not include a class action waiver clause, therefore controls. Petitioners Mika and Harter separately argue that the additional defendants they sued, certain individuals and entities associated with CPS, were not party to and cannot enforce either form of arbitration agreement.

[Headnotes 3, 4]

NRS 38.219(1) expresses Nevada's fundamental policy favoring the enforceability of arbitration agreements. Similar to § 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2 (2013), it provides that, "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except . . . upon a ground that exists at law or in equity for the revocation of a contract." "Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that we review de novo." *State ex rel. Masto*, 125 Nev. at 44, 199 P.3d at 832. "As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." *Id.*

[Headnote 5]

Petitioners' argument that CPS's failure to sign the long-form arbitration agreement invalidates the agreement fails. While NRS 38.219(1) requires that the arbitration agreement be "contained in a record," it does not require that the written record of the agreement to arbitrate be signed. 1 Thomas H. Oehmke, *Commercial Arbitration* § 7:1, at 7-2 (3d ed. 2014) (noting that, while the UAA requires that "the terms of an arbitration agreement . . . be in a *record*," this

only means that "the arbitration contract must be in writing[;] neither the FAA nor the UAA (2000) require that the arbitral contract be executed"); *see also Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 842, 477 P.2d 870, 872 (1970) ("Although an agreement to arbitrate future controversies must be in writing, a signature is not required." (internal citations omitted)).

Petitioners dated and signed the short- and long-form agreements together; that CPS did not pre-sign the latter makes sense given the 30-day opt-out period the long-form agreement extended the signing employee. We agree with the district court, which held that the petitioners accepted the "offer" that was the long-form agreement when they signed it and did not thereafter timely opt out. The clause in the fully executed short-form agreement stating that "This Agreement can be modified only by a written instrument executed by EMPLOYEE and Chris Coffey, on behalf of the COMPANY," does not alter the analysis. *Silver Dollar Club v. Cosgriff Neon Co., Inc.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964) ("Even where they include in the written contract an express provision that it can only be modified or discharged by a subsequent agreement in writing, nevertheless their later oral agreement to modify or discharge their written contract is both provable and effective to do so." (quoting *Simpson on Contracts* § 63, at 228)); *see* UAA of 2000, § 6, cmt. 1, 7 U.L.A., part 1A 25 (2009) (noting that if an initial writing agreeing to arbitration exists, "a subsequent oral agreement about terms of an arbitration contract is valid"); *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015) (enforcing revisions to an arbitration agreement as acknowledged in an employee handbook and noting that, while the FAA requires a writing, it need not be signed).

[Headnote 6]

Also unavailing is the argument by petitioners Mika and Harter that the additional defendants they sued did not sign and so cannot enforce the CPS arbitration agreements. By its terms, the long-form arbitration agreement covers claims not only against CPS but also "against its officers, directors, managers, employees or agents." "When the non-signatory party is an employee of the signatory corporation and the underlying action in the dispute was undertaken in the course of the employee's employment, there is a uniform federal rule, founded on general state law principles of agency: [if] 'a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.'" 1 Thomas H. Oehmke, *supra*, 7:3, at 88 (2015 Supp.) (quoting *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993)). The wrong that Mika and Harter allege they suffered ties directly to CPS's trailer guard compensation and arbitration policies, which they allege

the additional defendants, as CPS's "managers, officers, directors and/or controlling agents" and "agent or alter ego," devised and carried out. Given this record, the district court correctly treated Mika's and Harter's asserted claims against the additional defendants named in their complaint as covered by the long-form arbitration agreement they signed with CPS.

IV.

A.

[Headnote 7]

This brings us to the crux of the matter. Petitioners assert statutory overtime and minimum wage claims under NRS Chapter 608. Prosecuted individually, these are relatively small-dollar claims. If the long-form arbitration agreement stands, petitioners must proceed individually, and not by class action. Petitioners opposed CPS's motions to compel arbitration with an affidavit from their counsel, which estimates the size of their potential recoveries and the likely expense involved and concludes that, if the class action waiver is enforced, pursuing petitioners' statutory claims is economically infeasible. Citing *Gentry v. Superior Court*, 165 P.3d 556, 567-68 (Cal. 2007), *abrogation recognized by Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 135-36 (Cal. 2014), petitioners urge us to invalidate the class action waiver in the long-form arbitration agreement on the grounds it violates substantive state law by depriving them of the means to vindicate their statutory overtime and minimum wage claims.

This court addressed the validity of a class action waiver in an arbitration agreement in *Picardi v. Eighth Judicial District Court*, 127 Nev. 106, 251 P.3d 723 (2011). In *Picardi*, "we consider[ed] whether an arbitration agreement is unenforceable because it is unconscionable or contrary to public policy when it requires consumers to waive their rights to participate in any form of class action litigation to pursue common claims that they may have concerning a retail installment sales contract." 127 Nev. at 108, 251 P.3d at 724. Because "Nevada public policy favors allowing consumer class action proceedings when the class members present common legal or factual questions but their individual claims may be too small to be economically litigated on an individual basis," we held "that a clause in a contract that prohibits a consumer from pursuing claims through a class action, whether in court or through arbitration, violates Nevada public policy." *Id.* Of note, the arbitration agreement in *Picardi* specified that it "shall be governed by the Federal Arbitration Act." *Id.* at 111, 251 P.3d at 726. Nonetheless, we concluded that "the FAA does not require states to enforce arbitration agreements" that offend substantive state policy. *Id.* at 112, 251 P.3d at 726. Because "the class action waiver in the arbitration agreement

violates [Nevada] public policy," we deemed it unenforceable. *Id.* at 114, 251 P.3d at 728.

The United States Supreme Court handed down its decision in *Concepcion* after we decided *Picardi*. At issue in *Concepcion* was whether the FAA preempted California's *Discover Bank* rule;[2] the Supreme Court held that it did. In *Discover Bank*, the California Supreme Court had held, much as we held in *Picardi*, that class arbitration waivers in the context of consumer contracts of adhesion are unconscionable and unenforceable when the amounts involved are too small to be challenged individually, such that enforcing a class waiver allows the stronger party to escape liability. 113 P.3d at 1109. The high court in *Concepcion* invalidated the rule in *Discover Bank*. In its view, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. To require class arbitration, in the face of an agreement disallowing resort to class action procedures, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. Thus, "[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is pre-empted by the FAA." *Id.* at 352 (internal quotation and citation omitted).

Petitioners recognize that, although *Concepcion* does not mention *Picardi* by name, the high court's opinion abrogates *Picardi* as fully as it abrogates *Discover Bank*. Nonetheless, they urge us to distinguish *Concepcion* on two bases. First, they insist that *Concepcion* is limited to the consumer arbitration context and does not affect cases like the underlying cases and *Gentry*, 165 P.3d at 567-68, in which the California Supreme Court invalidated a class arbitration waiver on the grounds that it made effective vindication of an employee's small-dollar wage and overtime claims impossible. Second, they argue that *Concepcion* only applies to cases litigated in federal, not state court. Neither argument has merit.

The argument that *Gentry* survived *Concepcion* was considered and rejected by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). The plaintiff in *Iskanian* was an employee who sought "to bring a class action lawsuit on behalf of himself and similarly situated employees for his employer's alleged failure to compensate its employees for, among other things, overtime and meal and rest periods." 327 P.3d at 133. Like petitioners here, Iskanian "had entered into an arbitration agreement that waived the right to class proceedings." *Id.* He acknowledged that *Concepcion* abrogated *Discover Bank* but tried

[2]*Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005).

to distinguish *Gentry*, as follows: "Unlike *Discover Bank*, which held consumer class action bans generally unconscionable, *Gentry* held only that when a statutory right is unwaivable because of its public importance, banning class actions would in some circumstances lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." *Id.* at 135 (internal quotations omitted).

The California Supreme Court was not persuaded. In its view, "the fact that *Gentry*'s rule against class waiver is stated more narrowly than *Discover Bank*'s rule does not save it from FAA preemption under *Concepcion*." *Id.* at 135. On this basis, the California Supreme Court upheld the district court's order compelling individual arbitration of Iskanian's wage and hour claims and held that *Concepcion* effectively overruled *Gentry*, in addition to *Discover Bank*:

> The high court in *Concepcion* made clear that even if a state law rule against consumer class waivers were limited to "class proceedings [that] are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," it would still be preempted because states cannot require a procedure that interferes with fundamental attributes of arbitration "even if it is desirable for unrelated reasons." It is thus incorrect to say that the infirmity of *Discover Bank* was that it did not require a case-specific showing that the class waiver was exculpatory. *Concepcion* holds that *even if* a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA. Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers.

Id. at 135-36 (alteration in original) (quoting *Concepcion*, 563 U.S. at 351). We agree with the California Supreme Court that, while *Concepcion* specifically addressed class waivers in consumer arbitration agreements, nothing in *Concepcion* suggests that the FAA preemption principles it articulates do not apply broadly in other contexts, including state-law-based wage and hour claims. We therefore reject petitioners' argument that *Concepcion* does not apply to require individual arbitration, as per the long-form arbitration agreements, of their NRS Chapter 608 and other state-law claims.

[Headnote 8]

Nor are petitioners correct that the FAA only applies to cases litigated in federal court. By its terms, the Federal Arbitration Act governs the enforceability of "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2 (2013). So long as "commerce" is involved, the FAA applies. "[T]hough state laws affecting arbitration can supplement the FAA in areas not addressed by federal law," 1 Thomas H. Oehmke,

supra, § 3:16, at 41 (2015 Supp.), when the FAA applies, it preempts contrary state law whether the preemption issue arises in state or federal court. *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012). The Supreme Court has made it unmistakably clear that state courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const. art. VI, cl. 2, and by the opinions of [the Supreme] Court interpreting that law." *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012).

Petitioners' employment by CPS involves commerce. Indeed, the long-form arbitration agreements so stipulate. Thus, the FAA applies. *Concepcion* teaches that the FAA protects class waivers in arbitration agreements, even when requiring individual arbitration hampers effective vindication of statutory claims. *See also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (upholding class arbitration waiver under the FAA against the argument that doing so will prevent vindication of small-dollar antitrust claims, thereby thwarting the policies of the federal antitrust laws and noting, "[t]he class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." (internal citations omitted)).

[Headnotes 9, 10]

NRS 608.018 and NRS 608.250 afford Nevada employees the right to overtime and minimum wage for work performed. So vital is the right to a minimum wage that it is secured by the Nevada Constitution. Nev. Const. art. 15, § 16.[3] But the importance of a right does not entitle a litigant to arbitrate on a class basis when he has agreed to arbitrate his statutory claims on an individual basis. *Concepcion*, 563 U.S. at 351 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). *Concepcion* does not permit a state court to invalidate a class arbitration waiver in a transaction involving commerce on the basis that individual arbitration hampers effective vindication of an employee's state-law-based overtime and minimum wage claims.

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[3]Petitioners argue that class actions are a "remedy" protected by Article 15, Section 16B of the Nevada Constitution, which guarantees minimum wage and "all remedies available under the law or in equity appropriate to remedy any violation" of the minimum wage law, "including but not limited to back pay, damages, reinstatement or injunctive relief." As the list of remedies suggests, a class action is a procedural device, not a remedy. *See D.R. Horton v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) ("[t]he use of class action procedures . . . is not a substantive right" or remedy; a class action is a procedural device). While a person's right to minimum wage is unwaivable, Nev. Const. art. 15, § 16, he may validly enter into an arbitration agreement that sets "not only the situs of suit but also the procedure to be used in resolving" it. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

B.

[Headnote 11]

Petitioners next contend that the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq*. (2014), invalidates the class action waiver in the long-form arbitration agreement and that, as the more specific and more recent law, the NLRA overcomes the FAA and its pro-arbitration provisions. Section 7 of the NLRA grants covered employees certain substantive rights, including the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) of the NLRA makes it illegal for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by § 7. *Id*. § 158(a)(1). Petitioners cite as support for their argument the decision of the National Labor Relations Board (NLRB) in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274, *1 (Jan. 3, 2012) (*Horton I*), *enforcement denied in part by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), holding that it is unlawful under § 8 of the NLRA for employers to require that employees agree to arbitrate all employment-related claims on an individual basis, thereby giving up their right under § 7 to access class or collective procedures in judicial or arbitral forums for their "mutual aid or protection." *Accord Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, 2014 WL 5465454 (Oct. 28, 2014). In the NLRB's view, this rule does not conflict with the FAA because the FAA does not require enforcement of illegal contracts and because § 7 of the NLRA amounts to a "contrary congressional command" overriding the FAA. *Id.* at *12 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).[4]

D.R. Horton filed a petition for review of the NLRB's decision, and the Board cross-applied for enforcement of its order. On review, the United States Court of Appeals for the Fifth Circuit disagreed with the NLRB and overruled *Horton I* to the extent it invalidated the class arbitration waiver as illegal. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359-61 (5th Cir. 2013) (*Horton II*). Relying on *Concepcion*, the Fifth Circuit concluded that the Board's decision in *Horton I* effectively prohibits class action waivers, whether in an arbitral or judicial forum, and therefore constitutes "an actual impediment to arbitration [that] violates the FAA." *Horton II*, 737 F.3d at 359-60. The Fifth Circuit then considered whether "the FAA's mandate" to enforce arbitration agreements as written "has been 'overridden by a contrary congressional command,'" *id.* (quoting *CompuCredit*,

[4]Petitioners filed charges against CPS before the NLRB and submitted to this court as a supplemental authority a copy of an administrative law judge's decision that, under *Horton I*, the class action waiver in the long-form arbitration agreement is illegal. CPS filed exceptions to the administrative law judge's decision. The NLRB has yet to resolve the exceptions or seek enforcement of the ALJ's decision.

565 U.S. at 98), and concluded that "[n]either the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA," *id.* at 361. Finally, the Fifth Circuit concluded that there is no inherent conflict between the FAA and the NLRA and that, indeed, the "courts repeatedly have understood the NLRA to permit and require arbitration." *Id.*

Iskanian considered *Horton I* and *Horton II* in detail and concluded, as we do, that *Horton I*'s invalidation of class arbitration waivers cannot be reconciled with the FAA as authoritatively interpreted by the Supreme Court in *Concepcion* and *Italian Colors*. *Iskanian*, 327 P.3d at 141-42. In light of the FAA's "liberal federal policy favoring arbitration," *Concepcion*, 563 U.S. at 339, §§ 7 and 8 of the NLRA cannot fairly be taken as a "contrary congressional command" sufficient under *CompuCredit*, 565 U.S. at 98, to override the FAA. Our conclusion in this regard is consistent with *Horton II*, *Iskanian*, and with "the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue." *Iskanian*, 327 P.3d at 142 (citing *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013), *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013), and *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 789-90 (E.D. Ark. 2012)); *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (similarly collecting cases that "have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act").

V.

[Headnote 12]

As to Tallman, a final issue of waiver remains. Petitioner Tallman sued separately from petitioners Mika and Harter and included in his complaint both class claims under NRS Chapter 608 and collective claims under the FLSA, 29 U.S.C. § 216(b) (2014). CPS removed Tallman's action to federal court based on the FLSA claims. The federal court thereafter severed the FLSA from the state-law claims and remanded the latter to state court. In its answer and in its exchanges with Tallman, CPS demanded individual arbitration of Tallman's state-law claims. But it did not formally move to compel arbitration of them until those claims were remanded to state court. Tallman argues that CPS waived its right to compel arbitration by removing the action and thereafter litigating Tallman's collective FLSA claims in federal court. Of note, both Tallman and CPS assume that waiver was for the court, not the arbitrator to decide.

[Headnotes 13-16]

Waiver of a contractual right to arbitration is not "lightly inferred." *Clark Cnty. v. Blanchard Constr. Co.*, 98 Nev. 488, 491,

653 P.2d 1217, 1219 (1982). The party opposing arbitration must demonstrate that "the party seeking to arbitrate (1) knew of his right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his inconsistent acts." *Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005). Prejudice to the party opposing arbitration is the "primary focus in determining whether arbitration has been waived." *Id.* "Prejudice may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts." *Id.* at 90-91, 110 P.3d at 485.

[Headnote 17]

The district court rejected Tallman's waiver argument. While CPS knew of its right to arbitrate, the district court found that it did not act inconsistently with that right by removing the case to federal court, or prejudice Tallman by its activities in federal court. "Waiver is generally a question of fact[, b]ut when the determination rests on the legal implications of essentially uncontested facts, then it may be determined as a matter of law." *Id.* at 89, 110 P.3d at 484 (internal citation omitted).

The record does not permit us to rule as a matter of law that CPS waived its right to compel arbitration of Tallman's state-law claims, much less to say that the district court acted arbitrarily or capriciously in rejecting the waiver claim. The federal district court's order declining supplemental jurisdiction and remanding Tallman's state-law claims to state court authoritatively recites the history of proceedings in federal court. It emphasizes, as the state district court did in finding no waiver, that discovery had been stayed for a period of time to enable the parties to pursue mediation. *Cf. Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 641 (7th Cir. 1981) (rejecting the argument that pursing settlement waives arbitration in dispute involving both arbitrable and nonarbitrable claims). In holding that Tallman's state-law claims substantially predominate over their FLSA claims, justifying rejection of supplemental jurisdiction over them, severance, and remand, the federal district court gave no indication that it considered or addressed the state claims or class certification on the merits. Indeed, the parties stipulated not to conduct discovery on potential class members' damages until class certification was resolved. This does not appear to be a case in which the party seeking arbitration " 'test[ed] the judicial waters' " before moving to compel arbitration. *Id.* at 91, 110 P.3d at 485 (quoting *Uwaydah v. Van Wert Cnty. Hosp.*, 246 F. Supp. 2d 808, 814 (N.D. Ohio 2002)).

Both sides appear to have assumed that the collective action waiver in the long-form arbitration agreement could not be enforced as to Tallman's FLSA claims and/or that there is an inherent inconsis-

tency in pursuing collective FLSA claims and class state-law claims in the same federal district court suit. *See* Mikel J. Sporer, *In and Out: Reconciling "Inherently Incompatible" Group Action Procedures Under FLSA and Rule 23*, 28 ABA J. Lab. & Emp. L. 367 (2013). Recent cases cast doubt on both assumptions. *See Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174, 179 (2d Cir. 2015); *Ervin v. OS Restaurant Servs., Inc.*, 632 F.3d 971, 973-74 (7th Cir. 2011). But given the state of flux in the law on these issues, it is fair to credit the parties' assumptions that the collective action waiver could not be enforced as to Tallman's FLSA claims, and that those claims could not be litigated simultaneously with his state-law-based class action claims in federal court.

[Headnote 18]

A defendant does not automatically waive his right to compel arbitration by removing an action from state to federal court, *Halim v. Great Gatsby's Auction Gallery, Inc.*, 516 F.3d 557, 562 (7th Cir. 2008), and "[w]here issues in litigation are separate and distinct from arbitrable controversies, no waiver . . . occurs." 3 Thomas H. Oehmke, *supra*, § 50:35, at 50-58; *see Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 463 (2d Cir. 1985). From the limited excerpts of record we have, it appears that the federal court proceedings did not prejudice but may actually have facilitated eventual arbitration of Tallman's state-law claims. His argument that denial of class arbitration prejudices unnamed potential class members may be true but follows from *Concepcion*, not CPS's delay in moving to compel arbitration. *See also Iskanian*, 327 P.3d at 143-44 (refusing to find waiver of the right to compel individual arbitration where, as here, the motion to compel arbitration was filed shortly after *Concepcion* abrogated *Discover Bank* and, by extension, *Gentry*).

For these reasons, we conclude that writ relief is inappropriate and therefore deny the petitions for extraordinary writ relief in these cases.

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

SUSAN MARDIAN; AND LEONARD MARDIAN, APPELLANTS, *v.* MICHAEL AND WENDY GREENBERG FAMILY TRUST, RESPONDENT.

No. 62061

September 24, 2015 359 P.3d 109

Appeal from a district court judgment in a deficiency action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Following foreclosure, lender brought action against guarantors seeking deficiency judgment. After denying guarantors' summary judgment motion and following a bench trial, the district court entered judgment in favor of lender. Guarantors appealed. The supreme court, CHERRY, J., held that: (1) pursuant to choice of law provision, Nevada statute of limitations applied; (2) deficiency statute permitted deficiency action following Arizona foreclosure; and (3) Nevada law required application for deficiency to be filed within six months of foreclosure.

Reversed.

Hutchison & Steffen, LLC, and *Michael K. Wall, Cami M. Perkins*, and *Tanya S. Gaylord*, Las Vegas, for Appellants.

Fredrickson, Mazeika & Grant and *Tomas V. Mazeika* and *Matthew D. Peterdy*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   Although a district court's order denying summary judgment is not independently appealable, where a party properly raises the issue on appeal from the final judgment, the supreme court will review the decision de novo.
2. JUDGMENT.
   Summary judgment is proper only if, when considering the evidence in a light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law.
3. APPEAL AND ERROR.
   Issues of law, including statutory interpretation, are reviewed de novo on appeal.
4. STATUTES.
   When a statute's language is unambiguous, the supreme court does not resort to the rules of construction and will give that language its plain meaning.
5. STATUTES.
   The supreme court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.
6. STATUTES.
   Generally, statutes should not be interpreted to render language meaningless or superfluous.

7. Statutes.
   The supreme court presumes that a statute does not modify common law unless such intent is explicitly stated.
8. Guaranty.
   Choice of law provision contained in guaranties for promissory note specified that Nevada law applied to disputes, and therefore, Nevada law, rather than Arizona law, applied in determining whether deficiency action brought in Nevada following foreclosure under deed of trust in Arizona was time-barred due to statute of limitations.
9. Mortgages.
   Deficiency statute permitted deficiency action in Nevada following Arizona foreclosure; statute permitted deficiency judgments in Nevada following a foreclosure in another state, regardless of whether the foreclosure was judicial or nonjudicial. NRS 40.455.
10. Mortgages.
    Anti-deficiency statute is a statute that derogates from the common law, and the supreme court construes such provisions narrowly, in favor of deficiency judgments. NRS 40.455(1).
11. Guaranty; Mortgages.
    Deficiency statute required lender to file application for deficiency judgment within six months of Arizona foreclosure, and therefore action for deficiency judgment filed nine months after foreclosure sale against guarantors was time-barred. NRS 40.455(1).

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

This is an appeal from a district court judgment in a real property deficiency action. Appellants Susan and Leonard Mardian (the Mardians) guaranteed a promissory note executed in favor of respondents Michael and Wendy Greenberg Family Trust (Greenberg), which was secured by land in Arizona. The documents for the transaction were executed in Nevada and contained a Nevada choice-of-law provision. After default on the promissory note, Greenberg filed a complaint in Nevada and then initiated a foreclosure sale in Arizona. Nine months later, Greenberg sought a deficiency judgment on the guaranty through its initially filed complaint. The district court found that, because the foreclosure was in Arizona but the proceedings took place in Nevada, neither Nevada's nor Arizona's time limit for seeking a deficiency judgment applied and the deficiency action could proceed. We conclude that the district court erred when it found that neither the Nevada nor the Arizona limitations period applied. Because of the choice-of-law provision in the promissory note, the contract is governed by Nevada law. We also conclude that the district court erred when it denied appellants' motion to dismiss

the complaint as time-barred because the Greenbergs did not apply for a judgment within the limitations period under NRS 40.455(1).

FACTS AND PROCEDURAL HISTORY

In September 2007, Joshua Tree, LLC, executed a promissory note in the amount of $1,100,000 in favor of respondent Michael and Wendy Greenberg Family Trust (Greenberg). The note was secured by a deed of trust encumbering 280 acres of undeveloped real property located in Arizona, and also by personal guaranties, each for the full amount of the note, from appellants Susan Mardian and Leonard Mardian. Both guaranties stated that they were governed by Nevada law and waived the one-action rule found in NRS 40.430.

The parties agree that Joshua Tree defaulted on the loan and the guaranties were not upheld. In March 2009, Greenberg filed a complaint against the Mardians for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Greenberg then initiated foreclosure proceedings. A month later, Greenberg purchased the property at auction for $37,617. The property was then relisted for sale at $2,520,000. The price was subsequently reduced and, at the time this appeal was filed, the property had not yet sold.

In December 2009, the Mardians moved the district court to dismiss the underlying complaint for the entire amount due under the promissory note or, alternatively, for summary judgment because a deficiency application for the balance due on the loan was time-barred. Greenberg opposed the motion. At a hearing, the district court determined that it would not apply the limitations period in NRS 40.455 because the property was located in Arizona and sold pursuant to Arizona law, not Nevada law. Therefore, the district court indicated, neither Arizona's nor Nevada's limitations period applied. The court later entered an order denying the Mardians' motion.

The Mardians again moved for summary judgment in January 2012, which Greenberg opposed. At the hearing on that motion, a different district court judge stated that "the problem I have here is that we do have law of the case and we don't know why [the prior judge] ruled the way that she ruled, but it's her ruling." The district court then entered an order denying summary judgment, concluding that the motion for summary judgment was based on the same issues as the Mardians' previously denied motion.

Following a bench trial, the district court found that the Mardians owed $1,279,224 under the promissory note and that the fair market value of the property at the time of its sale was $350,000. Thus, the court determined that adding interest to the default amount while reducing it by the fair market value of the property resulted in a

deficiency totaling $929,224. Judgment was entered in Greenberg's favor for that amount. The Mardians appealed.

DISCUSSION

Standard of review

The Mardians argue that the statute of limitations applies regardless of whether the foreclosure was conducted pursuant to NRS 107.080 or pursuant to foreign law. Greenberg argues that NRS 40.455 encompasses only judicial foreclosures under NRS 40.430 or nonjudicial foreclosures under NRS 107.080. Greenberg asserts that because the property was in Arizona, it could not utilize the NRS 40.430 foreclosure process or the NRS Chapter 107 trustee's sale process and instead needed to initiate separate proceedings in Arizona.

[Headnotes 1, 2]

Although a district court's order denying summary judgment is not independently appealable, "where a party properly raises the issue on appeal from the final judgment, this court will review the decision de novo." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Summary judgment is proper only if, when considering the evidence "in a light most favorable to the nonmoving party," no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[Headnotes 3-7]

Issues of law, including statutory interpretation, are also reviewed de novo. *Cromer*, 126 Nev. at 109, 225 P.3d at 790. When a statute's language is unambiguous, this court does not resort to the rules of construction and will give that language its plain meaning. *Id.* "[T]his court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized." *Id*. at 110, 225 P.3d at 790. Generally, statutes should not be interpreted to "render[ ] language meaningless or superfluous." *In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 24, 272 P.3d 126, 132 (2012) (internal quotations omitted). Moreover, "[w]e presume that a statute does not modify common law unless such intent is explicitly stated." *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015).

Choice-of-law provision

[Headnote 8]

While the arguments made by the parties focus on Nevada law, the issue of whether the Arizona law should have been applied must

also be addressed. In this regard, Greenberg avers that it would not have been appropriate for the district court to apply the Arizona limitation period for foreclosures to the personal action commenced in Nevada because the guaranties specify that they are governed by Nevada law. We agree and conclude that because of the choice-of-law provision, Nevada law—particularly Nevada's limitations period, *see* NRS 40.455(1)—applies in this case. *See Key Bank of Alaska v. Donnels*, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) (concluding that where there was "no evidence or argument . . . regarding bad faith or evasion of Nevada law, the provision designating Alaska law in the promissory note [was] valid"). Having concluded that Nevada's deficiency statutes apply, we turn to the parties' arguments concerning the deficiency application.

Application of NRS 40.455(1)[1]

In this case, the Mardians are the guarantors of Joshua Tree's promissory note, which was held by Greenberg and which was secured by the Arizona real property. Although Greenberg sued the Mardians on their guaranties, we have previously held that Nevada's deficiency judgment statutes are applicable to actions on guaranty contracts when the underlying note is secured by real property. *First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 621, 730 P.2d 429, 432 (1986). Thus, in order to proceed against the Mardians on their guaranties, Greenberg was required to comply with Nevada's deficiency statutes.

[Headnotes 9, 10]

We first consider the parties' contentions regarding whether NRS 40.455(1) permits deficiency judgments in Nevada when the property foreclosed upon was in another state NRS 40.455(1) provides:

> Except as otherwise provided in subsection 3, 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 . . . .

NRS 40.455(1) (emphasis added). "NRS 40.455(1) is an anti-deficiency statute that derogate[s] from the common law, and this court construes such provisions narrowly, in favor of deficiency judgments." *Branch Banking*, 131 Nev. at 160, 347 P.3d at 1041 (internal quotations omitted).

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[1]The 2015 Legislature amended NRS 40.455 and related statutes. S.B. 453, 78th Leg. (Nev. 2015) (effective Oct. 1, 2015). This appeal is governed by the pre-amendment version of NRS 40.455, *see* NRS 40.455 (2009), and all references herein to NRS 40.455 are to the pre-amendment version.

In *Branch Banking*, we considered "whether NRS 40.455(1) precludes a deficiency judgment when the beneficiary nonjudicially forecloses upon property located in another state and the foreclosure is conducted pursuant to that state's laws instead of NRS 107.080." *Id.* at 1039. In that case, a note with a Nevada choice-of-law provision was secured by real property in Texas. *Id.* After default, the lender sold the property at a Texas nonjudicial foreclosure sale and then sought a deficiency judgment in Nevada. *Id.* We concluded that NRS 40.455(1) "does not . . . preclude[ ] deficiency judgments arising from nonjudicial foreclosure sales held in another state." *Id.* at 1041.

In this case, it is unclear whether Greenberg proceeded via a judicial or nonjudicial foreclosure sale against the Arizona property. However, the distinction is irrelevant. We held in *Branch Banking* that a lender who had proceeded via nonjudicial foreclosure in another state could seek a deficiency judgment in Nevada under NRS 40.455(1). *Id.* We also held in *Branch Banking* that "the foreclosure sale described [in NRS 40.455(1)] is a judicial foreclosure," and we further held that, as in the nonjudicial context, NRS 40.455(1) does not contain limiting language precluding deficiency judgments arising from judicial foreclosure sales held in another state. *Id.* ("NRS 40.455(1) . . . does not indicate that it precludes deficiency judgments arising from nonjudicial foreclosure sales held in another state."). Accordingly, NRS 40.455(1) is not a bar to Greenberg seeking a deficiency judgment from the Mardians solely because Greenberg foreclosed on real property in Arizona.

[Headnote 11]

Next, we turn to the Mardians' contention that NRS 40.455(1) required Greenberg to file an "application" for a deficiency judgment "within 6 months after the date of the foreclosure sale." We have previously addressed the six-month limitation period and what is required of an application for a deficiency judgment in *Walters v. Eighth Judicial District Court*, 127 Nev. 723, 263 P.3d 231 (2011), and *Lavi v. Eighth Judicial District Court*, 130 Nev. 344, 325 P.3d 1265 (2014).

In *Walters*, we considered the requisite form of a deficiency judgment application under NRS 40.455(1) and held that the motion for summary judgment constituted such an application "because it was made in writing, set forth in particularity the grounds for the application, and set forth the relief sought" in accordance with NRCP 7(b)(1).[2] *Walters*, 127 Nev. at 728, 263 P.3d at 234. Because the

[2]NRCP 7(b)(1) states that

> [a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

lender filed its motion for summary judgment within six months of the foreclosure, we concluded that the lender was not time-barred from seeking a deficiency judgment. *Id*.

In *Lavi*, a lender filed suit against the guarantor after the borrower defaulted on the loan. 130 Nev. at 345, 325 P.3d at 1266. Almost one year after the foreclosure sale, the lender filed a motion for summary judgment to recover the deficiency. *Id.* at 345, 325 P.3d at 1267. The guarantor responded by filing a countermotion for summary judgment, arguing that NRS 40.455 precluded the lender from any recovery because the lender did not apply for a deficiency judgment within six months of the foreclosure sale. *Id.* at 345-46, 325 P.3d at 1267. The district court concluded that the lender was not barred from seeking a deficiency judgment because the lender "sufficiently notified" the guarantor of its intent to pursue a judgment. *Id.* at 346, 325 P.3d at 1267. On appeal, we concluded that when the guarantor waived the one-action rule, the lender "was allowed to bring an action against [the guarantor] prior to completing the foreclosure on the secured property, but that waiver did not terminate the procedural requirements for asserting that separate action" within six months of the foreclosure sale. *Id*. at 348, 325 P.3d at 1267.

Here, the promissory note is governed by Nevada law, despite the location of the collateral property, so Greenberg was required to make its application pursuant to NRS 40.455(1). We conclude that it failed to comply with NRS 40.455(1) because it did not apply for a deficiency judgment within six months of the foreclosure sale. Therefore, the district court erred when it denied the Mardians' motion for summary judgment, and we reverse both the district court's judgment in favor of Greenberg and the district court's order denying the Mardians' motion for summary judgment.[3]

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

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[3]We have considered respondent's other arguments and conclude that they lack merit. Furthermore, we conclude that the parties' remaining arguments are moot and decline to consider them. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (indicating that this court will generally not consider moot issues).

AMERICA FIRST FEDERAL CREDIT UNION, A FEDERALLY CHARTERED CREDIT UNION, APPELLANT, *v.* FRANCO SORO, AN INDIVIDUAL; MYRA TAIGMAN-FARRELL, AN INDIVIDUAL; ISAAC FARRELL, AN INDIVIDUAL; KATHY ARRINGTON, AN INDIVIDUAL; AND AUDIE EMBESTRO, AN INDIVIDUAL, RESPONDENTS.

No. 64130

September 24, 2015 359 P.3d 105

Appeal from a district court order dismissing a deficiency judgment action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

After lender held trustee's sale of property that secured commercial loan, lender brought deficiency action against borrowers. The district court dismissed for lack of subject matter jurisdiction. Lender appealed. On an issue of apparent first impression, the supreme court, HARDESTY, C.J., held that forum selection clause was permissive rather than mandatory.

Reversed and remanded.

Ballard Spahr, LLP, and *Stanley W. Parry, Timothy R. Mulliner*, and *Matthew D. Lamb*, Las Vegas, for Appellant.

Bogatz Law Group and *I. Scott Bogatz* and *Charles M. Vlasic III*, Las Vegas, for Respondents.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's decision regarding subject matter jurisdiction de novo.
2. APPEAL AND ERROR.
   Contract interpretation is a question of law and, as long as no facts are in dispute, the supreme court views contract issues de novo, looking to the language of the agreement and the surrounding circumstances.
3. CONTRACTS.
   The objective of interpreting contracts is to discern the intent of the contracting parties.
4. CONTRACTS.
   When interpreting a contract, the supreme court initially determines whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written.
5. CONTRACTS.
   An ambiguous contract is susceptible to more than one reasonable interpretation, and any ambiguity should be construed against the drafter.
6. CONTRACTS.
   Clause in commercial loan agreement stating that the parties were required to "submit themselves to the jurisdiction of" another state constituted a permissive forum selection clause, rather than a mandatory forum

selection clause, and therefore clause did not deprive the district court of subject matter jurisdiction over action seeking to recover deficiency following trustee's sale of real property that secured loan, where there was no language within clause containing words of exclusivity.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this opinion, we must determine whether a contract clause stating that the parties "submit themselves to the jurisdiction of" another state results in a mandatory forum selection clause requiring dismissal of the Nevada action. We hold that such a clause consenting to jurisdiction is permissive and therefore reverse the district court's order granting a motion to dismiss based on lack of subject matter jurisdiction in Nevada.

FACTS AND PROCEDURAL HISTORY

In 2002, appellant America First Federal Credit Union (the credit union) loaned $2.9 million, secured by real property in Mesquite, Nevada, to respondents (borrowers)[1] for the purchase of a liquor/mini-mart. The borrowers defaulted, and the credit union held a trustee's sale, resulting in a deficiency on the loan balance of approximately $2.4 million. The Utah-based credit union sued the borrowers in Clark County to recover the deficiency.

The borrowers moved to dismiss the action under NRCP 12(b)(1), arguing that the credit union could not sue to recover the deficiency in Nevada and citing several clauses in the "Commercial Promissory Note" and "Business Loan Agreement" to support their argument. An "Applicable Law" clause in the loan agreement stated that "[t]his Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah." The loan agreement also contained the following: "Jurisdiction. The parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement." A clause in the note stated: "If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located."

The district court agreed with the borrowers and granted the motion to dismiss. The district court found that the note and loan agree-

[1]While eight individuals signed the note and loan agreement, the only borrowers in the instant action are Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro.

ment "contain language which clearly expresses the parties' intent to submit litigation relating to the Agreement and the Note, to the jurisdiction of the State of Utah. . . . [T]he language clearly enough identifies Utah as the forum[,] which they selected for purposes of subject matter jurisdiction." This appeal followed.

DISCUSSION

On appeal, the credit union argues that the district court erred in enforcing the clauses in question to preclude its complaint for a deficiency action.[2] More specifically, the credit union argues that the jurisdiction clauses here were permissive, and while the complaint could have been brought in Utah, the clauses do not mandate that Utah was the exclusive forum. In response, the borrowers contend that whether a forum selection clause is mandatory or permissive is a matter of contract interpretation, and therefore, the clauses are ambiguous and must be construed against the credit union as the contract drafter. Whether forum selection clauses may be mandatory or permissive is an issue of first impression for this court.

Standard of review

[Headnotes 1-5]

This court reviews a district court's decision regarding subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Additionally, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011). The objective of interpreting contracts "is to discern the intent of the contracting parties. . . . [T]raditional rules of contract interpretation are employed to accomplish that result." *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (citation and internal quotation marks omitted). This court initially determines whether the "language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.* An ambiguous contract is susceptible to more than one reasonable interpretation, and "[a]ny ambiguity, moreover, should be construed against the drafter." *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007).

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[2]Additionally, the credit union argues that Nevada's six-month statute of limitations for recovery of deficiency judgments applies to the action, not Utah's three-month statute of limitations. However, because the district court did not decide this issue, we do not address it here.

The district court erred when it dismissed the case based on the forum selection clauses

[Headnote 6]

The credit union argues that the clauses do not contain any mandatory language and, therefore, all of the forum selection clauses are merely permissive. We agree.

We have not yet distinguished between mandatory and permissive forum selection clauses. In *Tuxedo International, Inc. v. Rosenberg*, 127 Nev. 11, 251 P.3d 690 (2011), we reversed a district court's grant of a motion to dismiss based on the defendants' argument that any litigation must be brought in Peru. *Id.* at 14, 24-25, 251 P.3d at 692, 699. There, we remanded the case to the district court to determine which of three separate forum selection clauses potentially controlled the dispute. *Id.* at 26, 251 P.3d at 699-700. In analyzing the clauses, we noted that one of the clauses contained both a consent to jurisdiction in Peru and a Peruvian choice-of-law provision. *Id.* at 22-23, 251 P.3d at 697. We then stated:

> It can be argued, however, that there is no requirement contained in this clause that Peru is the *exclusive* forum for jurisdiction over any dispute between the parties. *See, e.g.*, *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-77 (9th Cir. 1987) (distinguishing between exclusive and nonexclusive forum selection clauses). If it is determined that the parties did not intend for the clause to act as an *exclusive* forum selection clause, then arguably, there is no contractual bar to [plaintiff] bringing its tort claims in the Nevada district court.

Id. at 23-24, 251 P.3d at 698 (second emphasis added). We also noted that another clause "resemble[d] a traditional exclusive forum selection clause," containing language that "any action . . . must be brought in a court in the Country of Peru." *Id.* at 24, 251 P.3d at 698. Thus, *Tuxedo International* observed the distinctions between mandatory and permissive forum selection clauses, but the facts of the case did not provide an opportunity for us to affirmatively adopt a rule. *See id.* at 26 n.5, 251 P.3d at 700 n.5.

Other state courts have distinguished between mandatory and permissive forum selection clauses. *See, e.g.*, *Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274 (Fla. 1987) (recognizing that a mandatory jurisdiction clause requires "a particular forum be the exclusive jurisdiction for litigation," while permissive jurisdiction is merely a consent to jurisdiction in a venue (internal quotation marks omitted)); *Polk Cnty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co.*, 734 N.W.2d 750, 758-59 (Neb. 2007) (distinguishing a mandatory forum selection clause based on the words "shall be brought

only in" a particular jurisdiction from a permissive forum selection clause where parties only "consent and submit to the jurisdiction" of other courts); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 338-39 (W. Va. 2009) ("[T]o be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive."). For example, the Wisconsin Court of Appeals stated:

> Clauses in which a party agrees to submit to jurisdiction are not necessarily mandatory. Such language means that the party agrees to be subject to that forum's jurisdiction *if sued there.* It does not prevent the party from bringing suit in another forum. The language of a mandatory clause shows more than that jurisdiction is *appropriate* in a designated forum; it unequivocally mandates *exclusive* jurisdiction. Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.

Converting/Biophile Labs., Inc. v. Ludlow Composites Corp., 722 N.W.2d 633, 640-41 (Wis. Ct. App. 2006) (citations and internal quotation marks omitted).

Similarly, federal circuit courts generally agree that

> where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.

Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992); *see Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (describing the "mandatory/permissive dichotomy" and concluding that the clause, "jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado," was mandatory (internal quotation marks omitted)); *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52-53 (2d Cir. 1994) (holding the forum selection clause, "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts," as permissive (internal quotation marks omitted)); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-78 (9th Cir. 1987) (holding the forum selection clause, "[t]he courts of California, County of

Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract," as permissive, and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction (internal quotation marks omitted)); *Keaty v. Freeport Indon., Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974) (holding the forum selection clause, "[t]his agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York," as permissive (internal quotation marks omitted)).

We agree with the distinctions made by other state and federal courts regarding mandatory and permissive forum selection clauses described above. Here, there are two jurisdictional clauses at issue. First, the loan agreement contains a clause entitled "Jurisdiction," which provides that "[t]he parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement." We conclude that this language is permissive as there is no language within the clause containing words of exclusivity. Absent such language, we deem the clause permissive.

Second, a clause in the note stated: "If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located." This language is also permissive as there is no language within the clause containing words of exclusivity. *See Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n*, 874 So. 2d 1231, 1233-37 (Fla. Dist. Ct. App. 2004) (concluding that the language, "[i]f there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota" as permissive, and thus permitted, but did not require, that the action be brought in Minnesota (internal quotation marks omitted)). Thus, the case may be heard in another appropriate venue besides the courts in Utah.

Without articulating why, the borrowers argue that the forum selection clauses are ambiguous and therefore must be construed against the credit union. We conclude that this argument is without merit as the clauses are clear and unambiguous and this court need not interpret the contract any differently from the contract's plain meaning. *See, e.g.*, *Hunt Wesson Foods*, 817 F.2d at 77 ("A primary rule of interpretation is that '[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.'" (quoting 4 Samuel Williston & Walter H. E. Jaeger, *A Treatise on the Law of Contracts* § 618 (3d ed. 1961)). The clauses provide no words of exclusivity and to interpret the clauses as mandatory forum selection clauses would read language into the contract that is not there.

CONCLUSION

In this case, none of the clauses contain exclusive language. Accordingly, all clauses are permissive forum selection clauses, and the district court erred when it found Utah was the sole forum for any controversy and dismissed the case for lack of subject matter jurisdiction. We therefore reverse the district court's order dismissing the case and remand this matter to the district court for further proceedings.

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT, *v.* STEPHEN TANNER HANSEN, RESPONDENT.

No. 64484

September 24, 2015 357 P.3d 338

Certified questions under NRAP 5 regarding counsel in an insurance matter. United States District Court for the District of Nevada; Miranda M. Du, District Judge.

Motorist brought action against automobile insurer, which defended its insured under a reservation of rights, for breach of contract and declaratory relief, after insured admitted to negligently striking motorist and entered into a settlement agreement assigning his rights against insurer to motorist. Insurer's summary judgment motion was denied. As matters of first impression, the supreme court, CHERRY, J., held that: (1) insurer was required to satisfy its duty to defend by permitting insured to select independent counsel and paying reasonable costs of such counsel when an actual conflict of interest existed, and (2) reservations of rights did not create a per se conflict of interest.

Questions answered.

Lewis Brisbois Bisgaard & Smith, LLP, and *V. Andrew Cass* and *Jeffrey D. Olster*, Las Vegas, for Appellant.

Bowen Law Offices and *Jerome R. Bowen* and *Sarah M. Banda*, Las Vegas, for Respondent.

Morales, Fierro & Reeves and *Ramiro Morales*, Las Vegas, for Amici Curiae American Insurance Association, National Associa-

tion of Mutual Insurance Companies, and Property Casualty Insurers Association of America.

Payne & Fears, LLP, and *Gregory H. King* and *J. Kelby Van Patten*, Las Vegas, for Amici Curiae Centex Homes, Centex Real Estate Corporation, and Southern Nevada Home Builders Association.

1. INSURANCE.
   Insurer-appointed counsel represents both the insurer and the insured.
2. INSURANCE.
   When an actual conflict of interest exists between an insurer defending its insured under a reservation of rights to determine coverage and the insured, the insurer is required to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel. RPC 1.7(a), 1.8(f), 1.9(a).
3. ATTORNEY AND CLIENT.
   When a lawyer's responsibilities to a third party may impair the representation of a client, the lawyer must decline or withdraw from the representation. RPC 1.7.
4. ATTORNEY AND CLIENT.
   An attorney's representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees. RPC 1.7(b), 1.8(f).
5. INSURANCE.
   An insurer defending its insured under a reservation of rights to determine coverage is obligated to provide independent counsel of the insured's choosing only when an actual conflict of interest exists, and courts must inquire, on a case-by-case basis, whether there is an actual conflict of interest; a reservation of rights does not create a per se conflict of interest. RPC 1.7.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

The Federal District Court for the District of Nevada certified two questions to this court concerning Nevada's conflict-of-interest rules in insurance litigation. The first question asks whether "Nevada law require[s] an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured." The second asks whether, if the first question is answered affirmatively, this court would "find that a reservation of rights letter creates a *per se* conflict of interest."

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from the consideration of this matter.

We conclude that Nevada law requires an insurer to provide independent counsel for its insured when a conflict of interest arises between the insurer and the insured. Nevada recognizes that the insurer and the insured are dual clients of insurer-appointed counsel. When the insured and the insurer have opposing legal interests, Nevada law requires insurers to fulfill their contractual duty to defend their insureds by allowing insureds to select their own independent counsel and paying for such representation. We further conclude that an insurer is only obligated to provide independent counsel when the insured's and the insurer's legal interests actually conflict. A reservation of rights letter does not create a per se conflict of interest.

FACTS AND PROCEDURAL HISTORY

Our consideration of the facts in this case is limited to those in the certification order. *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012). In this case, the federal district court's November 19, 2013, certification order incorporated by reference the facts set forth in its December 12, 2012, order.

While leaving a house party, Stephen Hansen was injured in an altercation with other guests. The other party guests tried to prevent Hansen and his friends from leaving the party by sitting on or standing around their vehicle. Eventually Hansen and his friends were able to leave the party in their vehicle, but they later had to stop at the gated exit of the residential subdivision. While stopped at the gate, the vehicle of another party guest, Brad Aguilar, struck the vehicle in which Hansen was riding. Hansen filed a complaint against Aguilar and others in Nevada state district court alleging both negligence and various intentional torts.

Aguilar was insured by State Farm Mutual Automobile Insurance Company.[2] State Farm agreed to defend Aguilar under a reservation of rights. The reservation of rights letter reserved the right to deny coverage for liability resulting from intentional acts and punitive damages.

Aguilar admitted to negligently striking the other vehicle, and the district court granted summary judgment in favor of Hansen on the negligence claim. Aguilar then agreed to a settlement with Hansen, in which he assigned his rights against State Farm to Hansen.

Hansen filed this lawsuit in the United States District Court for the District of Nevada, alleging that State Farm, in its representation

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[2]Aguilar was also insured, through his parents' homeowners' insurance, by State Farm Fire and Casualty Company. Whether State Farm Fire's coverage applies appears to be at issue in the federal district court. However, because the distinction is irrelevant to the issues now before us, we will not distinguish between State Farm Auto and State Farm Fire.

of Aguilar, breached a contract, contractually or tortiously breached an implied covenant of good faith and fair dealing, and violated the Nevada Unfair Claims Practices Act. Hansen also asked for declaratory relief based on the stipulated judgments and assignment of rights. State Farm moved for summary judgment, arguing that Aguilar's assignment of rights to Hansen was void because it violated Aguilar's insurance contract. Hansen responded that, even if Aguilar violated the insurance contract, State Farm's prior breach terminated Aguilar's obligations under the contract.

The federal district court found that State Farm breached its contractual duty to defend Aguilar because it did not provide Aguilar with independent counsel of his choosing. The court said that State Farm's interests conflicted with Aguilar's interests because the insurance policy only covered Aguilar if he acted negligently; the policy did not cover intentional tortious acts. The court therefore applied the rule from *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 208 Cal. Rptr. 494, 506 (Ct. App. 1984), *superseded by statute as stated in United Enters., Inc. v. Superior Court*, 108 Cal. Rptr. 3d 25 (Ct. App. 2010), which states that an insurance company must provide independent counsel if its interests conflict with the insured's. Because State Farm did not comply with the *Cumis* rule, the district court found that State Farm violated its contractual duty to defend Aguilar.

State Farm moved for reconsideration. The federal district court granted, in part, State Farm's motion and certified these questions to this court. We accepted the certified questions under NRAP 5 because they present issues of first impression in Nevada.

DISCUSSION

The right to insurer-provided independent counsel

RPC 1.7(a) states the general rule that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." But when an insurer provides counsel to defend its insured, a conflict of interest may arise because the outcome of litigation may also decide the outcome of a coverage determination—a determination that may pit the insured's interests against the insurer's. For example, an insurer will want the litigation outcome to determine coverage in a way favorable to the insurer, such as by deciding that the insured's acts were intentional and therefore not covered. Conversely, the insured will want to be found negligent so that the insurer will pay his liabilities. By reserving the right to determine coverage *after* litigation, the insurer hopes that the litigation outcome effectively determines coverage on its behalf and in its favor. The insurer-provided lawyer will have a relationship with both the insured and the insurer, who each have legal interests opposing the other.

The *Cumis* rule says that, in order to avoid a conflict of interest resulting when an insurer reserves its rights to determine coverage, an insurer must satisfy its contractual duty to provide counsel by paying for counsel of the insured's choosing. *Cumis*, 208 Cal. Rptr. at 506. The issue here is whether the *Cumis* rule, or some alternative, applies in Nevada.

Courts rejecting the *Cumis* rule have not recognized the existence of a conflict of interest in such cases. These courts have reasoned that the sole client is the insured and, therefore, counsel only owes a duty to the insured. *See Finley v. Home Ins. Co.*, 975 P.2d 1145, 1152-53 (Haw. 1998).[3] True, some courts have mentioned other rationales, such as that professional ethics rules will keep counsel honest and that insureds have other remedies against unethical counsel. *See id.* But the main rationale is still that there is no conflict: The sole client is the insured, not the insurer. *See id.* at 1153.

[Headnote 1]

Nevada, in contrast, is a dual-representation state: Insurer-appointed counsel represents both the insurer and the insured. *See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 52, 152 P.3d 737, 742 (2007). In *Nevada Yellow Cab*, this court explicitly adopted the rule of dual representation, which is the same rule applied by the California courts and addressed in *Cumis*. *See id.* at 51-52, 152 P.3d at 741-42 (citing *Unigard Ins. Grp. v. O'Flaherty & Belgum*, 45 Cal. Rptr. 2d 565, 568-69 (Ct. App. 1995)); *Cumis*, 208 Cal. Rptr. at 498. We held that an attorney-client relationship exists between insurer-appointed counsel and the insurer. *Nev. Yellow Cab*, 123 Nev. at 52, 152 P.3d at 742.

Because Nevada is a dual-representation state, counsel may not represent both the insurer and the insured when their interests conflict and no special exception applies. RPC 1.7. This suggests that the *Cumis* rule, where the insurer must satisfy its contractual duty to provide counsel by paying for counsel of the insured's choosing, is appropriate for Nevada.

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[3]*See also L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303-04 (Ala. 1987) (adopting the Washington Supreme Court's approach requiring that counsel hired by the insurer understand that only the insured is a client); *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997) ("[A]n attorney's allegiance is to his client, not to the person who happens to be paying for his services. . . . Thus, even when an attorney is compensated . . . by a liability insurer, his or her duty of loyalty and representation nonetheless remains exclusively with the insured." (internal quotations omitted)); *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995) ("The employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client . . . . Where the employer is not also a client, a conflict will not occur . . . ."); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137 (Wash. 1986) ("[Washington Rule of Professional Conduct] 5.4(c) demands that counsel understand that he or she represents only the *insured*, not the company."). *But see Norman v. Ins. Co. of N. Am.*, 239 S.E.2d 902, 907 (Va. 1978) (addressing conflict of interest question without first discussing whether insurer is a client).

Amici curiae American Insurance Association, the National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America suggest two alternative approaches that are supposedly consistent with Nevada's rule of dual representation.[4] First, they suggest the primary-client model, where representation switches from dual-client to single-client (the insured, primary client) as soon as a conflict arises. But RPC 1.9(a) prohibits "[a] lawyer who has formerly represented a client in a matter" from representing a client "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Therefore, the primary client model appears to be unworkable in a dual-representation jurisdiction.

As a second alternative, amici suggest the contract model, where amici argue that no conflict of interest exists when an insurer selects an insured's counsel and contractually instructs counsel that only the insured is a client. But this may not eliminate the lawyer's conflict of interest because the lawyer is selected by and receives compensation from someone with legal interests opposed to the lawyer's client. This approach may violate the spirit of RPC 1.8(f), which says that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless . . . [t]here is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." When counsel is both selected and paid by a third party with legal interests directly opposed to the client's, there is a legitimate question whether counsel can be truly independent.[5] For instance, the attorney might have an incentive to act favorably toward the insurer in order to garner future business.

[Headnotes 2-4]

In sum, Nevada, like California, recognizes that the insurer and the insured are dual clients of insurer-appointed counsel. Where the clients' interests conflict, the rules of professional conduct prevent the same lawyer from representing both clients. California's *Cumis* rule is well-adapted to this scenario. It requires insurers to fulfill their duty to defend by allowing insureds to select their own counsel and paying the reasonable costs for the independent counsel's representation. *Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494, 506. We

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[4]This court has also granted Centex Homes, Centex Real Estate Corporation, and Southern Nevada Home Builders Association's motion for leave to file an amicus brief.

[5]We reject amici's argument that insurers can avoid a conflict of interest by contractually instructing counsel that they only represent the insured. That said, we do not hold that a per se conflict exists every time that an insurer selects and pays for counsel to represent the insured, even when the insured consents to such representation. Because this case does not involve informed consent under RPC 1.7(b) or RPC 1.8(f), we decline to consider that issue.

find this approach more workable than the alternatives presented by amici. Therefore, we answer the first certified question in the affirmative: When a conflict of interest exists between an insurer and its insured, Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel.[6]

The effect of a reservation of rights

Jurisdictions are divided on whether a reservation of rights creates a per se conflict of interest. Some jurisdictions apply a per se rule that a reservation of rights creates a conflict of interest between the insured and insurer-appointed counsel. *See Patrons Oxford Ins. Co. v. Harris*, 905 A.2d 819, 825-26 (Me. 2006).[7] Courts in these jurisdictions have reasoned that, if an insurer could control the case under a reservation of rights, it could insist on full litigation. The insurer would thereby expose the insured to the risk of personal liability and then seek to deny coverage if the verdict is unfavorable to the insured. *See id*. at 826. Courts see it as unfair to give insurers an opportunity for a second bite of the apple. *See id.*

Other jurisdictions look to the facts of the case to determine whether there is an actual conflict.[8] Courts in these jurisdictions

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[6]Although our holding applies to an insurer's contractual duty to defend its insured, we note that it is the duty of Nevada attorneys not to undertake the representation of clients with opposing interests. *See* RPC 1.7. And "[w]hen a lawyer's responsibilities to a third party may impair the representation of a client, the lawyer must decline or withdraw from the representation." *Duval Ranching Co. v. Glickman*, 930 F. Supp. 469, 473 (D. Nev. 1996). "The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees." *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012).

[7]*See also* Alaska Stat. Ann. § 21.96.100(c) (West 2014) ("[I]f the insurer reserves the insurer's rights on an issue for which coverage is denied, the insurer shall provide independent counsel . . . ."); *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.*, 178 P.3d 485, 491 (Ariz. Ct. App. 2008) ("When an insurer reserves its rights to contest indemnification liability, however, a conflict of interest is created between the insurer and the insured."); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 539 (Mass. 2003) ("When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.").

[8]*See Travelers Prop. v. Centex Homes*, No. C 10-02757 CRB, 2011 WL 1225982, at *8 (N.D. Cal. Apr. 1, 2011) (applying Cal. Civ. Code § 2860(b) to determine whether conflict existed); *Cardin v. Pac. Emp'rs Ins. Co.*, 745 F Supp. 330, 336 (D. Md. 1990) ("[T]he [Maryland] Court [of Appeals] did not hold . . . that in every circumstance where a reservation of rights is made due to the presence of covered and uncovered claims a conflict is created."); *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. Ct. App. 1991) ("[B]efore an insured will be entitled to counsel of its own choice, an actual conflict of

stress that the point of the *Cumis* rule is to enforce conflict-of-interest rules, so the focus should be on whether there is actually a conflict. *See, e.g.*, *Fed. Ins. Co. v. MBL, Inc.*, 160 Cal. Rptr. 3d 910, 920 (Ct. App. 2013). Courts must therefore consider whether a conflict of interest exists and not simply look for a reservation of rights. *See id.*

For example, in California, the codified *Cumis* rule requires an actual conflict of interest; it does not apply to every case in which there is a reservation of rights. "[W]hen an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest *may* exist." Cal. Civ. Code § 2860(b) (West 2014) (emphasis added). There are two elements: (1) a reservation of rights *and* (2) that the outcome of the coverage determination can be controlled by counsel in the underlying defense of the claim. *See id.*; *Travelers Prop. v. Centex Homes*, No. C 10-02757 CRB, 2011 WL 1225982, at *8 (N.D. Cal. Apr. 1, 2011) (applying Cal. Civ. Code § 2860(b) to determine whether conflict existed). But even after laying out those two elements, the statute uses the word "may," implying that it is still an issue of fact whether a conflict of interest actually exists.

What, then, is the standard that a trial court must apply when looking at whether the facts of the case create a conflict of interest? In California, courts apply the rules of ethics: "[T]he *Cumis* rule is not based on insurance law but on the ethical duty of an attorney to avoid representing conflicting interests. For independent counsel to be required, the conflict of interest must be significant, not merely theoretical, actual, not merely potential." *MBL*, 160 Cal. Rptr. 3d at 920 (internal quotations omitted). Therefore, even when (1) there is a reservation of rights and (2) insurer-provided counsel has control over an issue in the case that will also decide the coverage issue, courts must still determine whether there is an actual conflict of interest. This means that there is no conflict if the reservation of rights is based on coverage issues that are only extrinsic or ancillary to the issues actually litigated in the underlying action. *See id.*

[Headnote 5]

We conclude that the California approach, that a reservation of rights does not create a per se conflict, is most compatible with Nevada law. Courts must inquire, on a case-by-case basis, whether there is an actual conflict of interest. This approach follows Nevada law: We have held that dual-representation is appropriate as long as

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interest, rather than an appearance of a conflict of interest, must be established."); *Nisson v. Am. Home Assurance Co.*, 917 P.2d 488, 490 (Okla. Civ. App. 1996) ("[N]ot every perceived or potential conflict of interest automatically gives rise to a duty on the part of the insurer to pay for the insured's choice of independent counsel.").

there is "no actual conflict." *See Nev. Yellow Cab*, 123 Nev. at 51, 152 P.3d at 741. And we have approvingly cited opinions holding that "joint representation is permissible as long as any conflict remains speculative." *Id.* Moreover, because the *Cumis* rule derives from rules of professional conduct, *see MBL*, 160 Cal. Rptr. 3d at 920, it follows that the appropriate standard is whether there is an actual conflict under RPC 1.7. Therefore, an insurer is obligated to provide independent counsel of the insured's choosing only when an actual conflict of interest exists. A reservation of rights does not create a per se conflict of interest.

Hardesty, C.J., and Douglas, Saitta, Gibbons, and Pickering, JJ., concur.

In the Matter of the Guardianship of N.M., a Minor Child.

NAYELI M.G., Appellant, *v.* GRAVIEL G., Respondent.

No. 64694

September 24, 2015 358 P.3d 216

Petition for en banc reconsideration of a panel order affirming a district court order granting letters of guardianship over a minor child. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

Former boyfriend of child's aunt filed petition to be appointed child's general guardian. The district court appointed boyfriend as child's general guardian. Mother appealed. On rehearing en banc, the supreme court, Saitta, J., held that: (1) the district court had temporary emergency jurisdiction to protect child, (2) child had lived in state for requisite six-month period at time of general guardianship petition, and (3) the district court acted within its discretion in appointing aunt's former boyfriend as child's general guardian.

Petition for reconsideration granted; affirmed.

Richard F. Cornell, Reno, for Appellant.

Dolan Law, LLC, and *Massey K. Mayo Case*, Winnemucca, for Respondent.

1. Appeal and Error.
   The supreme court reviews de novo issues of subject matter jurisdiction.
2. Appeal and Error.
   The supreme court reviews a district court's factual findings for an abuse of discretion and will uphold them if they are supported by substan-

tial evidence; substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment.

3. Infants.
   The district court had temporary emergency jurisdiction to protect child, even though child had not lived in state for six months and had not been mistreated before moving to state, when child was physically present at time of petition and mother's half-sister had come to child's home at night and attempted to remove child. NRS 125A.335(1).
4. Child Custody.
   A district court exercising temporary emergency jurisdiction cannot make Nevada the child's home state, and thus does not have jurisdiction to make a custody determination, by issuing an order. NRS 125A.335(2).
5. Child Custody.
   In the absence of custody proceedings or a controlling custody order in another state, a Nevada court exercising temporary emergency jurisdiction may make a custody determination that becomes final once the child lives in Nevada for enough time to make Nevada the child's home state. NRS 125A.335(2).
6. Child Custody.
   Custody proceeding commenced, for purposes of requirement that child reside in state for six months before court could make custody determination, when custody petition was filed to make petitioner child's general guardian, rather than when petitioner had filed earlier emergency petition for appointment as child's temporary general guardian. NRS 125A.335(2).
7. Guardian and Ward.
   In appointing a guardian for a child, if neither parent is qualified and suitable, or if both parents are, the court must move to the second step, determination of who is most suitable. NRS 159.061(1).
8. Guardian and Ward.
   In appointing a guardian for a child, when determining whether a parent is qualified and suitable, the district court must give the child's basic needs and welfare priority over the parent's interest in custody. NRS 159.061(1).
9. Guardian and Ward.
   The parental preference presumption in appointing a guardian for a child can be overcome either by a showing that the parent is unfit or other extraordinary circumstances. NRS 159.061(1).
10. Guardian and Ward.
    One extraordinary circumstance that can overcome the parental preference presumption in appointing a guardian is the abandonment or persistent neglect of the child by the parent. NRS 128.012(1).
11. Guardian and Ward.
    When a court is appointing a guardian for a child, intent is the decisive factor in parental abandonment and may be shown by the facts and circumstances. NRS 128.012(1).
12. Guardian and Ward.
    If a parent or parents of a child leave the child in the care and custody of another without provision for the child's support and without communication for a period of six months, the parent or parents are presumed to have intended to abandon the child, for purposes of appointing a guardian; to overcome this presumption, the parent must demonstrate that he or she did not abandon the child. NRS 128.012(2).
13. Guardian and Ward.
    Evidence supported finding that mother had abandoned child, thus providing grounds for appointment of former boyfriend of mother's aunt

as general guardian for child; Mexican attorney's letter opined that mother had abandoned child in Mexico several years prior to guardianship petition, document signed by mother purportedly granted aunt and boyfriend custody over child, and mother did not attempt to exercise custody of child or to provide for her after aunt and boyfriend began caring for child. NRS 128.012(2).

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

NRS 125A.335 establishes a district court's temporary emergency jurisdiction to protect a child in Nevada from mistreatment or abuse.[1] We must decide whether a district court exercising temporary emergency jurisdiction may appoint a general guardian pursuant to NRS 125A.335(2) when (1) no court in another jurisdiction has entered an applicable custody order or commenced custody proceedings, and (2) Nevada has become the child's home state. We hold that a district court may appoint a general guardian in the appropriate case. Furthermore, we hold that the district court here did not abuse its discretion in appointing a guardian. Because substantial evidence supports the court's decision, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Appellant, a Mexican citizen, gave birth to N.M. in California in 2007. Later that year, appellant and N.M. moved to Mexico. In 2008, appellant left N.M. in the care of N.M.'s maternal grandparents, who were also in Mexico. N.M.'s grandmother and two agents from Mexico's National System for Integral Family Development (DIF) executed a document stating that the grandparents had custody of N.M. (the 2008 DIF document).

In 2009 or 2010, N.M.'s maternal aunt (the Aunt) and respondent, her then-fiancé or boyfriend, began caring for N.M. Respondent is a United States citizen. In August 2011, appellant signed a document purportedly giving the Aunt and respondent custody of N.M.

In September 2012, respondent moved N.M. to Nevada after his relationship with the Aunt ended. Appellant's half-sister then went to respondent's home at night and attempted to remove N.M. In response, respondent filed a verified emergency petition in November 2012 for appointment as N.M.'s temporary general guardian. The

[1]This case was originally decided in an unpublished order by a three-judge panel of this court. Because the issues presented are of significance to the law and practice of the state, we now publish this as an opinion of the en banc court. We limit our holding to the matters set forth herein and deny en banc reconsideration of all other issues raised in this appeal.

district court appointed respondent as N.M.'s temporary general guardian.

In March 2013, respondent filed a petition to be appointed N.M.'s general guardian. After a two-day evidentiary hearing, at which multiple witnesses testified about the events described above and respondent's fitness to be N.M.'s guardian, the district court found that appellant had abandoned N.M. The district court appointed respondent as N.M.'s general guardian. After appellant appealed, a panel of this court affirmed the award of custody to respondent. After the panel denied appellant's petition for rehearing, she filed the present petition for en banc reconsideration.

DISCUSSION

Standard of review

[Headnotes 1, 2]

We review de novo issues of subject matter jurisdiction. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). We further review a district court's factual findings for an abuse of discretion and will uphold them if they are supported by substantial evidence. *Id*. at 668, 221 P.3d at 704. Substantial evidence is "evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

The district court had subject matter jurisdiction to appoint respondent as N.M.'s general guardian

Appellant argues that the district court did not have jurisdiction to appoint respondent as N.M.'s general guardian because N.M. had not lived in Nevada for six months at the time respondent filed his first petition. Thus, we first consider whether the district court properly exercised temporary emergency jurisdiction before addressing whether it had jurisdiction to enter a general guardianship order in this case.

The district court properly exercised temporary emergency jurisdiction

A district court may exercise temporary emergency jurisdiction to protect a child who is physically present in Nevada if "the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." NRS 125A.335(1).

[Headnote 3]

Here, the parties do not dispute that N.M. was physically present in Nevada when the district court granted respondent's petition for a temporary guardianship. Although appellant argues that the district court lacked temporary emergency jurisdiction because there was

no evidence that N.M. was abused, mistreated, or neglected before moving to Nevada, this argument is without merit because N.M. faced a risk of harm while in Nevada. Since appellant's half-sister came to respondent's home at night and attempted to remove N.M., there was evidence to support the district court's finding that N.M. risked mistreatment. Therefore, we conclude that the district court did not abuse its discretion in exercising its temporary emergency jurisdiction.

The district court had jurisdiction to appoint respondent as N.M.'s general guardian

NRS 125A.335(2), which codifies section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), sets out three requirements for a district court that is exercising temporary emergency jurisdiction to enter a final order: (1) no court in another jurisdiction has entered an applicable custody order or commenced custody proceedings, (2) the district court's order provides that it is to be a final determination, and (3) Nevada has become the child's home state. *See also* UCCJEA § 204 (1997), 9 U.L.A. 676-77 (1999).

[Headnotes 4, 5]

The third requirement sets forth a time-of-residency-in-Nevada requirement and does not provide that a district court exercising temporary emergency jurisdiction can make Nevada the child's home state by issuing an order. *See* UCCJEA § 204 cmt., 9 U.L.A. 677 (stating that "an emergency custody determination made under this section becomes a final determination, if it so provides, *when the State that issues the order becomes the home State of the child*" (emphasis added)); *see also* NRS 125A.085(1) (setting out the time requirement for home state status). Our interpretation of this provision of NRS 125A.335(2) is consistent with other jurisdictions' interpretations of their statutes codifying UCCJEA § 204. *See, e.g.*, *Hensley v. Kanizai*, 143 So. 3d 186, 195 (Ala. Civ. App. 2013) (observing that a custody determination made by a trial court exercising temporary emergency jurisdiction can become final "only if the state becomes the home state of the child"); *In re E.D.*, 812 N.W.2d 712, 721 (Iowa Ct. App. 2012) (holding that a trial court exercising temporary emergency jurisdiction cannot issue an order making Iowa a child's home state because such an order would conflict with the UCCJEA's definition of home state); *In re J.C.B.*, 209 S.W.3d 821, 823 (Tex. App. 2006) (observing that Texas must become a child's home state before a custody determination made by a trial court exercising temporary emergency jurisdiction can become final). Thus, in the absence of custody proceedings or a controlling custody order in another state, a Nevada court exercising temporary emergency jurisdiction may make a custody determination that becomes final

once the child lives in Nevada for enough time to make Nevada the child's home state.[2]

[Headnote 6]

A child's home state is "[t]he state in which [the] child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence from the state, immediately before the commencement of a child custody proceeding." NRS 125A.085(1). A child custody proceeding is one that relates to the present custody dispute and not to any prior dispute between the parties. *Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 849, 264 P.3d 1161, 1166 (2011). A proceeding commences when its first pleading is filed. NRS 125A.065.

Here, the present custody proceeding commenced over six months after N.M. began residing in Nevada. Thus, Nevada became N.M.'s home state by the time respondent petitioned to be appointed as her general guardian. *See* NRS 125A.085. In addition, the record does not show that a child custody order had been entered or that a child custody proceeding had been initiated in another jurisdiction before the district court appointed respondent as N.M.'s general guardian. Therefore, we conclude that the district court was authorized to enter an order granting a general guardianship.

The district court did not abuse its discretion in granting a general guardianship to respondent

[Headnote 7]

Appellant argues that the district court abused its discretion by awarding guardianship of N.M. to respondent because there was not sufficient evidence to overcome the parental preference presumption.[3] This presumption provides that "[t]he parents of a minor, or either parent, if qualified and suitable, are preferred over all others for appointment as guardian for the minor." NRS 159.061(1). "If,

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[2]The cases that appellant relies on to limit the district court's jurisdiction under NRS 125A.335 are inapposite because, unlike the present case, they involve existing child custody orders. *See, e.g.*, *McDow v. McDow*, 908 P.2d 1049, 1051 (Alaska 1996) (limiting a court's temporary emergency jurisdiction when a child is subject to an existing custody order from another jurisdiction); *In re Appeal in Pima Cnty. Juvenile Action No. J-78632*, 711 P.2d 1200, 1206-07 (Ariz. Ct. App. 1985) (same), *approved in part and vacated in part on other grounds*, 712 P.2d 431, 435 (Ariz. 1986); *Perez v. Tanner*, 965 S.W.2d 90, 94 (Ark. 1998) (same); *In re Joseph D.*, 23 Cal. Rptr. 2d 574, 582 (Ct. App. 1993) (same), *superseded by statute as stated in In re C.T.*, 121 Cal. Rptr. 2d 897, 904 n.4 (Ct. App. 2002); *State ex rel. D.S.K.*, 792 P.2d 118, 127-28 (Utah Ct. App. 1990) (same).

[3]Appellant does not argue on appeal that the district court abused its discretion by determining that N.M.'s best interests would be served by appointing respondent as N.M.'s general guardian. Therefore, appellant waives this issue on appeal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

however, neither parent is qualified and suitable, or if both parents are, the statute requires the court to move to the second step, determination of who is most suitable." *In re Guardianship of D.R.G.*, 119 Nev. 32, 38, 62 P.3d 1127, 1130-31 (2003).

[Headnotes 8, 9]

When determining whether a parent is qualified and suitable, the district court must give "the child's basic needs [and] welfare" priority over the parent's interest in custody. *Id*. at 38, 62 P.3d at 1131. Thus, the parental preference presumption can be "overcome either by a showing that the parent is unfit or other extraordinary circumstances." *Litz v. Bennum*, 111 Nev. 35, 38, 888 P.2d 438, 440 (1995).

[Headnote 10]

One extraordinary circumstance that can overcome the parental preference presumption is the "'abandonment or persistent neglect of the child by the parent.'" *In re D.R.G.*, 119 Nev. at 38, 62 P.3d at 1131 (quoting *Locklin v. Duka*, 112 Nev. 1489, 1496, 929 P.2d 930, 934 (1996)). "'Abandonment of a child' means any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child." NRS 128.012(1).

[Headnotes 11, 12]

"Intent is the decisive factor in abandonment and may be shown by the facts and circumstances." *In re Parental Rights as to Montgomery*, 112 Nev. 719, 727, 917 P.2d 949, 955 (1996), *superseded by statute on other grounds as stated in In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 798-99, 8 P.3d 126, 132 (2000). "If a parent or parents of a child leave the child in the care and custody of another without provision for the child's support and without communication for a period of 6 months, . . . the parent or parents are presumed to have intended to abandon the child." NRS 128.012(2). To overcome this presumption, the parent must demonstrate that he or she did not abandon the child. *See In re N.J.*, 116 Nev. at 803, 8 P.3d at 134.

[Headnote 13]

In finding that appellant abandoned N.M., the district court relied on a Mexican attorney's letter purportedly opining that the 2008 DIF document stated that appellant abandoned N.M. in 2008.[4] The district court also considered a 2011 document signed by appellant that purportedly granted respondent and the Aunt custody over N.M. Finally, respondent testified that appellant expressed a desire to re-

[4]The only record of the letter's contents is the oral translation that the court interpreters provided. Because the actual letter was omitted from the appellate record, we must presume that it supports the district court's findings about its content. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

linquish custody of N.M. when she executed the 2011 document that purportedly gave custody to respondent and the Aunt. Thus, there was evidence to support the district court's finding that appellant intended to abandon N.M.

Furthermore, the evidence in the record demonstrates that respondent and the Aunt began caring for N.M. in 2009 or 2010. The record does not show that appellant attempted to exercise custody of N.M. or to provide for her after respondent and the Aunt began caring for her. Nor does it show that appellant attempted to communicate with N.M. while respondent and the Aunt cared for her or attempted to regain custody before N.M. moved to Nevada.

The evidence submitted in this case shows that the DIF concluded that appellant abandoned N.M. in 2008 and appellant ceased to care for N.M., and no admitted evidence shows that appellant provided support for N.M. or communicated with her for at least six months. Accordingly, there was substantial evidence to support the district court's finding that appellant abandoned N.M. *Ellis*, 123 Nev. at 149, 161 P.3d at 242. Thus, the district court did not abuse its discretion by finding that appellant's abandonment of N.M. overcame the parental preference presumption. *See Litz*, 111 Nev. at 38, 888 P.2d at 440. Therefore, we conclude that the district court did not abuse its discretion in appointing respondent as N.M.'s general guardian.

CONCLUSION

The record does not show that a custody proceeding was initiated or that a controlling custody order was entered in another jurisdiction before or during the district court's exercise of its temporary emergency jurisdiction. Furthermore, N.M. lived in Nevada for six months before general guardianship proceedings commenced. Thus, the district court had jurisdiction to appoint a general guardian. When exercising this jurisdiction, the district court did not abuse its discretion by appointing respondent as N.M.'s general guardian because substantial evidence supports its finding that appellant abandoned N.M. Therefore, we affirm the district court's order granting a permanent guardianship to respondent.[5]

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

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