LINDSIE NEWMAN, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 67756

LINDSIE NEWMAN, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 67763

April 28, 2016 373 P.3d 855

Consolidated appeals from a district court judgment revoking probation and from a judgment of conviction pursuant to a guilty plea to possession of a controlled substance. First Judicial District Court, Carson City; James Todd Russell, Judge.

The supreme court, Cherry, J., held that: (1) the district court did not plainly err when it considered defendant's status as a pregnant addict at the time of sentencing; and (2) defendant was not sentenced based on her status as a pregnant addict, and instead, she was sentenced based on a probation violation and felony conviction, and as such, there was no Eighth Amendment violation.

Dismissed (Docket No. 67756) and affirmed (Docket No. 67763).

Karin K. Kreizenbeck, State Public Defender, and *Sally S. deSoto*, Chief Appellate Deputy Defender, Carson City, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Jason Woodbury*, District Attorney, and *Iris F. Yowell*, Deputy District Attorney, Carson City, for Respondent.

1. Criminal Law.
   Whether the district court erred when it considered defendant's status as a pregnant drug addict at sentencing was not moot, even though defendant was no longer pregnant; defendant was currently subject to the district court's sentencing order and could be required to return to prison if she violated the terms of her parole.
2. Action.
   The courts generally will not decide moot cases.
3. Action.
   A case is moot if it seeks to determine an abstract question that does not rest upon existing facts or rights.
4. Action.
   Mootness is a question of justiciability; dispute must continue through all of the controversy's phases.
5. Action.
   A case may become moot due to later occurrences despite the existence of a "live controversy" at the beginning of the litigation.
6. Criminal Law.
   When a party fails to object to a trial court error, appellate review is precluded unless the error was plain.

7. Criminal Law.
   In determining whether an error was plain, the courts examine the following: whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.
8. Criminal Law.
   Defendant, asserting plain error, must show actual prejudice or a miscarriage of justice.
9. Sentencing and Punishment.
   Sentencing courts have discretion to consider a wide, largely unlimited variety of information to ensure that the punishment fits not only the crime, but also the individual defendant.
10. Criminal Law.
    The district court did not plainly err when it considered defendant's status as a pregnant addict at time of sentencing; aside from being a pregnant addict, the court sentenced defendant as it did because she committed two crimes and had numerous probation violations, and the court also wanted to assist defendant in safely delivering her baby by giving her access to better medical resources in prison than she would have received in the jail system—a goal defendant shared at the time of sentencing.
11. Sentencing and Punishment.
    Although the court considered defendant's status as a pregnant addict when it sentenced her, defendant was not sentenced based on her status as a pregnant addict, and instead, she was sentenced based on a probation violation and felony conviction, and as such, there was no Eighth Amendment violation, given that defendant was not sentenced based on her drug addiction. U.S. Const. amend. 8.

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

These are consolidated appeals from a district court judgment revoking probation following a guilty plea to conspiracy to commit grand larceny and a judgment of conviction pursuant to a guilty plea to possession of a controlled substance. We focus upon whether the district court plainly erred when it considered the status of appellant, Lindsie Newman, as a pregnant drug addict when it sentenced her to a term of imprisonment for possession of a controlled substance. Newman claims the district court erroneously based its sentence on her status as a pregnant drug addict instead of on the crime she committed. Ordinarily, the district court should not consider a defendant's status when determining a sentence, but we conclude that the district court did not plainly err by considering Newman's status because she raised the issue of her status as a pregnant addict at the sentencing hearing.[1]

[1]Although Newman appealed from the judgment of revocation for her conspiracy to commit grand larceny conviction, she has not presented any cogent arguments pertaining to that order for our consideration. Additionally, she has

FACTS AND PROCEDURAL HISTORY

Newman was convicted of conspiracy to commit grand larceny, a gross misdemeanor, after she entered a guilty plea. The district court sentenced her to nine months in jail, suspended the sentence, and placed Newman on probation for no more than two years with specific conditions. Less than five months later, Newman was charged with and pleaded guilty to possession of a controlled substance, a category E felony. Instead of imposing a sentence in that case, the court suspended the proceedings pursuant to NRS 453.3363 and placed Newman on probation for no more than three years with special conditions, including completion of the Western Regional Drug Court Program.

Newman had difficulty complying with the conditions of her probation. At one point, the drug court terminated her for noncompliance but then reinstated her and required her to complete a program at the City of Refuge[2] because she was pregnant. Newman, however, left the City of Refuge program before her baby was born. She was arrested for probation violations, and the Division of Parole and Probation submitted violation reports to the district court in both criminal cases. The reports alleged that Newman violated the special conditions of her probation by, among other things, possessing prescription pills for which she did not have a prescription, taking morphine pills, testing positive for methamphetamines, being discharged from drug court, and being difficult to supervise. Parole and Probation recommended the district court revoke Newman's probation and sentence her to a term of 12 to 32 months in the controlled substance case.

The district court conducted a hearing on the violation reports. At the hearing, Newman admitted to the violations but denied using methamphetamines. Newman's counsel then informed the court how Newman wished to proceed: "Ms. Newman . . . ask[s] for revocation in both of these cases today. She's appreciated the opportunities that the Court has afforded her by allowing her diversion and the drug court program as well as the City of Refuge so her baby will be born safe[ly]." Counsel also requested that the district court run her sentences concurrently.

---

been discharged from the nine-month sentence, so the probation revocation appeal is moot. We accordingly dismiss the district court's order from which Newman appeals in Docket No. 67756.

[2]The City of Refuge is a program designed to assist pregnant women who have unplanned pregnancies and wish to deliver, instead of abort, the baby but cannot do so without additional support. *See Welcome to City of Refuge*, City of Refuge, http://refugenevada.com/index2.html (last visited Apr. 5, 2016). The program gives these women a safe and nurturing environment during the gestational period. *Id.* The participants must pursue a high school diploma and/or perform undemanding work. *See Mission & Ministry*, City of Refuge, http://refugenevada.com/Mission&MInistry.html (last visited Apr. 5, 2016).

In deciding whether to impose the sentences concurrently or consecutively, the district court explained its "main concern" was that Newman "stays in custody long enough for that child to be born." Those concerns were the focus of the following colloquy between the court and defense counsel:

> THE COURT: [Counsel], do you understand my concern? I just want to make sure above all that she—and I'll sentence her accordingly—make sure she stays in custody until that child is born. Obviously, you couldn't trust her at the City of Refuge. You can't trust her anywhere. I don't want that child to be put at any risk in respect to this matter. . . .
>
> [COUNSEL]: Well, I understand that, Your Honor, and I appreciate the Court's concern. I don't see that anyone wouldn't share the same concerns.
>
> . . . .
>
> Well, I would rather see her—and I think she would agree—do her time, the remaining time in the actual prison system. There's more resources available to her. There's doctors. She's having problems getting [in to] seeing doctors in the jail.

After determining that the amount of credit applied to the 9-month sentence (265 days) would cause that sentence to expire before Newman gave birth, the court determined that it would have to impose a consecutive sentence in the controlled substance case to address its concerns. Ultimately, the district court revoked Newman's probation in the conspiracy to commit grand larceny case and executed the original sentence of nine months with credit for time served. The district court then sentenced Newman to 12 to 32 months in the Nevada Department of Corrections in the possession of a controlled substance case. The court ordered the sentences to run consecutively. At the conclusion of the hearing, the court informed Newman, "I'm doing this more than anything to protect that unborn child. I don't want to see you out doing anything until that child is born." Newman did not object below to either the sentence the court ordered or to the court's consideration of her status as a pregnant drug addict.

DISCUSSION

Whether this case is moot and, if so, whether this court should nonetheless entertain the appeal

[Headnote 1]

The primary issue before this court is whether the district court plainly erred when it considered Newman's status as a pregnant drug addict in deciding to impose a consecutive sentence in the controlled substance case. Newman argues that this issue became moot once her child was born but that this court should address the issue because of its significance.

[Headnotes 2-5]

Generally, we will not decide moot cases. *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). A case is moot if it "seeks to determine an abstract question which does not rest upon existing facts or rights." *Id.* Mootness is a question of justiciability. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). The dispute must continue through all of the controversy's phases. *Id.* A case may become moot due to later occurrences despite the existence of a "live controversy" at the beginning of the litigation. *Id.*

The issue that Newman raises is not moot. Newman's sentence has likely expired in her case for conspiracy to commit grand larceny, and we presume that she is no longer pregnant. However, in her case for possession of a controlled substance, the district court sentenced her to 12 to 32 months consecutive to her sentence in the conspiracy to commit grand larceny case, and the district court did not give Newman any credit for time served. Newman received parole on June 10, 2015, so we presume that she is currently subject to the district court's sentencing order and could be required to return to prison if she violates the terms of her parole. Accordingly, we will reach the merits of Newman's appeal.

Whether the district court plainly erred in sentencing Newman

Newman concedes that she did not object when the district court considered her status as a pregnant drug addict in determining her sentence or when it ordered consecutive sentences. However, she argues that the court's error was plain and impacted her due process right to be sentenced for her crimes, not her status as a pregnant drug addict. She contends the court sentenced her as it did solely to keep her incarcerated until her child was born. Newman does not contend that consecutive sentences violated Nevada law; she contends that the court inappropriately considered her status as a pregnant drug addict when it decided whether to order consecutive or concurrent sentences.

[Headnotes 6-8]

When a party fails to object to a trial court error, appellate review is precluded unless the error was plain. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). In determining whether an error was plain, we examine the following: "whether there was error," "whether the error was plain or clear," and "whether the error affected the defendant's substantial rights." *Id.* (internal citations and quotation marks omitted). The defendant must show "actual prejudice or a miscarriage of justice." *Id.*

[Headnote 9]

Nevada's sentencing courts have "discretion . . . to consider a wide, largely unlimited variety of information to [e]nsure that the

punishment fits not only the crime, but also the individual defendant." *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). But our precedents have set forth circumstances in which we will reverse a sentence that is within the statutorily prescribed limits: (1) when the record "demonstrate[s] prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence," *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976); (2) when "the statute fixing punishment is unconstitutional," *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal citations and quotation marks omitted); (3) when "the sentence is so unreasonably disproportionate to the offense as to shock the conscience," *id.*; and (4) when the court "consider[s] a defendant's nationality or ethnicity in its sentence determination," *Martinez*, 114 Nev. at 738, 961 P.2d at 145.

However, we have previously upheld a sentence where the district court considered a defendant's immigration status. *See Ruvalcaba v. State*, 122 Nev. 961, 963, 143 P.3d 468, 469 (2006). In *Ruvalcaba*, the defendant objected to the Presentence Investigation Report (PSI) because it referenced "his immigration status and illegal re-entry into the United States following deportation." At the sentencing hearing, the judge sentenced the defendant to a term of imprisonment instead of ordering probation and said that the sentence was not a result of the defendant's status as a Mexican national. *Id.* "Rather, the judge expressed concern that Ruvalcaba would be unable to comply with any probationary sentence because he would likely be deported upon his release from custody." *Id.* In affirming the sentence, we stressed that the lower court "did not sentence Ruvalcaba more harshly based on ethnicity or nationality" or because of "any animus towards illegal aliens." *Id.* at 964, 143 P.3d at 470. We noted that the lower court "denied Ruvalcaba's request for probation because, as an illegal alien, Ruvalcaba would likely be deported if he received probation and would thus ultimately avoid punishment." *Id.* In the end, we concluded that the district court correctly considered the defendant's status "to the limited extent indicated." *Id.* at 965, 143 P.3d at 471.

[Headnote 10]

The record here does not reflect that the district court plainly erred when it considered Newman's status as a pregnant addict in deciding to impose a consecutive sentence. Aside from being a pregnant addict, the court sentenced Newman as it did because she committed two crimes and had numerous probation violations. The district court also wanted to assist Newman in safely delivering her baby by giving her access to better medical resources in prison than she would have received in the jail system—a goal Newman apparently shared at the time of sentencing. The court also noted that if it did not order Newman to serve consecutive sentences, she would

not receive any additional punishment for her new crimes because of the credit she would receive toward her sentence for conspiracy to commit grand larceny. Accordingly, like in *Ruvalcaba*, we conclude the district court properly considered Newman's status for the limited purpose of sentencing her in the most appropriate manner.

[Headnote 11]

Newman additionally argues that the U.S. Supreme Court, in *Robinson v. California*, 370 U.S. 660, 662, 667 (1962), held that drug addiction is a status not an act and that a state violates the constitutional protection against cruel and unusual punishment by incarcerating a person for his or her addiction to narcotics. Newman's reliance upon *Robinson* is misplaced because the holding in *Robinson* does not prohibit a district court from considering a defendant's status as a drug addict in fashioning a sentence. *See id.* The *Robinson* Court held that the lower court violated the defendant's Fourteenth Amendment rights by imprisoning him because the law criminalized drug addiction even when a person "has never touched any narcotic drug within the State or been guilty of any irregular behavior there." *Id.* In contrast, the district court here did not imprison Newman because being a pregnant drug addict violates some Nevada law; the court imprisoned her because she violated the terms of her probation in one case and was convicted in another case. Although the court clearly considered Newman's status as a pregnant addict when it sentenced her, Newman was not subject to the court's jurisdiction because of her status as a pregnant addict. Instead, she was subject to the district court's jurisdiction because she violated the terms of her probation in a gross misdemeanor case and was convicted of a separate category E felony.

Newman also relies upon the case of *State v. Ikerd*, 850 A.2d 516, 518 (N.J. Super. Ct. App. Div. 2004), for the proposition that a trial court abuses its discretion when it sentences "a pregnant, drug-addicted woman who has violated the conditions of her probation . . . to prison for the avowed purpose of safeguarding the health of her fetus." However, *Ikerd*, besides not being binding upon this court, is distinguishable. Ikerd was convicted for acts of welfare fraud, sentenced to probation, and required, among other things, to complete a drug treatment program. *Id.* After she violated the terms of her probation, the court revoked probation and sentenced Ikerd to prison, "[n]ot because we want to punish her, but because we want to save the baby." *Id.* at 519. The trial court even explained that it would consider releasing Ikerd from custody when she delivered her baby or if she lost her baby. *Id.* at 520. The appellate court reversed the lower court's decision because "the extent of the punishment imposed upon Ikerd resulted *solely* from her status as a pregnant addict. It bore no relationship to the offense that she initially committed, was excessively punitive, and accomplished no legitimate penal aim." *Id.* at 521 (emphasis added).

Unlike in *Ikerd*, Newman's punishment is related to her crimes. She was originally convicted of conspiracy to commit grand larceny and then (after receiving probation) picked up new charges, violated the terms of probation, was kicked out of drug court, quit the City of Refuge program, violated several other terms of probation, and picked up more new charges. The district court did not make any provisions for Newman's release following the birth of her baby, and the court stated that keeping Newman off of the street was its main concern, not its sole concern. This at least implies that Newman's status as a pregnant addict, although the most significant, was not the only factor the court considered.

Additionally, we must review for plain error due to Newman's failure to object in the lower court. This places a burden on Newman that she cannot meet. The record before us shows Newman's claim that the district court should not have considered her status as a pregnant drug addict is disingenuous. At the beginning of the hearing in district court, Newman's counsel initiated the discussion of Newman's status as a pregnant addict and the importance of safeguarding her unborn child. Then, after further discussion about running the sentences for the two convictions consecutively or concurrently, Newman's counsel further explained that Newman should be incarcerated to protect her unborn child. Indeed, a comprehensive reading of the transcript of that hearing convinces us that Newman *wanted* the district court to consider her status as a pregnant addict when it sentenced her. Defense counsel, the prosecutor, and the district court actually worked together to fashion a sentence to accomplish Newman's goal of being imprisoned when her child was born to prevent Newman from further drug use and provide her with access to better medical resources than she would have had if she were in jail or released from custody.

Our decision is based upon the unique facts of this case. Nothing in our opinion today should be construed to indicate that courts *should* consider a defendant's status as a pregnant addict when imposing a sentence. But because Newman neglected to preserve this issue for appellate review and because Newman both participated in and initiated the lower court's consideration of her status as a pregnant addict, we must affirm the lower court's decision.

For the reasons set forth above, we conclude that the district court did not err when it considered Newman's status as a pregnant addict at the time of sentencing. Therefore, we dismiss Newman's appeal in Docket No. 67756 because her sentence has expired and affirm the district court's judgment of conviction in Docket No. 67763.

DOUGLAS and GIBBONS, JJ., concur.

JUSTIN PATRICK KELLEY, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 67777

April 28, 2016 371 P.3d 1052

Appeal from a judgment of conviction, pursuant to a guilty plea, of one count of felony eluding a police officer. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

The supreme court, DOUGLAS, J., held that offense of reckless driving was a lesser included offense of felony eluding police officer, and thus, pursuant to the Double Jeopardy Clause, defendant could not be punished for both crimes.

Reversed.

Frederick B. Lee, Jr., Public Defender, and *Roger H. Stewart*, Chief Deputy Public Defender, Elko County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Mark D. Torvinen*, District Attorney, and *Jonathan L. Schulman*, Deputy District Attorney, Elko County, for Respondent.

1. CRIMINAL LAW.
   The supreme court generally reviews a claim that a conviction violates the Double Jeopardy Clause de novo, and de novo review applies to both the constitutional issues and statutory interpretation involved. U.S. CONST. amend. 5.
2. DOUBLE JEOPARDY.
   Under the Double Jeopardy Clause, a criminal defendant may not be punished multiple times for the same offense without clear authorization from the legislature. U.S. CONST. amend. 5.
3. DOUBLE JEOPARDY.
   In determining whether multiple convictions violate the Double Jeopardy Clause, the supreme court applies the test in *Blockburger v. United States*, 284 U.S. 299 (1932), and pursuant to *Blockburger*, two offenses are separate if each offense requires proof of a fact that the other does not. U.S. CONST. amend. 5.
4. DOUBLE JEOPARDY.
   Under *Blockburger v. United States*, 284 U.S. 299 (1932), if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses. U.S. CONST. amend. 5.
5. DOUBLE JEOPARDY.
   General test for determining the existence of a lesser included offense, in the double jeopardy context, is whether the offense in question cannot be committed without committing the lesser offense. U.S. CONST. amend. 5.
6. DOUBLE JEOPARDY; INDICTMENT AND INFORMATION.
   Offense of reckless driving was a lesser included offense of felony eluding police officer, and thus, pursuant to the Double Jeopardy Clause, defendant could not be punished for both crimes; all of the elements of misdemeanor reckless driving were included in the elements of the offense of felony eluding a police officer. U.S. CONST. amend. 5; NRS 484B.550, 484B.653.

Before DOUGLAS, CHERRY and GIBBONS, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we are asked to determine whether the charge of misdemeanor reckless driving, NRS 484B.653(1)(a), is a lesser included offense of felony eluding a police officer, NRS 484B.550(3)(b). Because we conclude that reckless driving is a lesser included offense of felony eluding a police officer as charged in this case, we conclude that appellant may not be punished for both crimes.

FACTS AND PROCEDURAL HISTORY

On February 8, 2014, appellant Justin Patrick Kelley drove an all-terrain vehicle (ATV) through the city of Wells in Elko County. A deputy sheriff noticed Kelley driving the vehicle without brake lights or turn signals. The deputy followed Kelley, who then drove on the left side of the road facing oncoming traffic. Soon after, the deputy activated his overhead lights and police siren. Kelley did not stop, and a chase ensued. After they drove through several streets, with Kelley surpassing the speed limit, the deputy finally stopped Kelley and arrested him. Kelley was charged with felony eluding a police officer, pursuant to NRS 484B.550(3)(b). Based on the same incident, Kelley was charged with reckless driving, pursuant to Wells City Code 8-11-1 (NRS 484B.653(1)(a)).

On November 14, 2014, Kelley pleaded no contest to misdemeanor reckless driving. Then, on December 2, 2014, Kelley moved to dismiss the charge of felony eluding a police officer on the basis of double jeopardy. Ultimately, the district court decided that misdemeanor reckless driving did not constitute a lesser included offense of felony eluding. On January 5, 2015, Kelley pleaded guilty to felony eluding. This appeal follows.

DISCUSSION

Kelley argues that the district court erred in failing to dismiss his charge of felony eluding a police officer on the basis of double jeopardy.[1] According to Kelley, double jeopardy applies in this case because he was already convicted of a lesser included offense (misdemeanor reckless driving, pursuant to NRS 484B.653(1)(a)) and, thus, cannot be convicted of a greater offense (felony eluding, pursuant to NRS 484B.550(b)(3)). Kelley also argues that the plain lan-

[1]Kelley did not include a copy of the plea agreement in his appendix, but both parties agree in their appellate briefs that the plea agreement reserved Kelley's right to a review of the district court's adverse decision on his motion to dismiss. *See* NRS 174.035(3).

guage of the statutes pertaining to both offenses, NRS 484B.653 and NRS 484B.550, further demonstrates this relationship. We agree.

[Headnote 1]

Generally, this court reviews a claim that a conviction violates the Double Jeopardy Clause de novo. *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). De novo review applies to both the constitutional issues and statutory interpretation involved. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012).

[Headnotes 2-5]

Under the Double Jeopardy Clause, a criminal defendant may not be punished multiple times for the same offense without clear authorization from the legislature. *LaChance v. State*, 130 Nev. 263, 267-68, 321 P.3d 919, 923 (2014) (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). In determining whether multiple convictions violate the Double Jeopardy Clause, this court applies the test in *Blockburger v. United States*, 284 U.S. 299 (1932). *See Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006). Pursuant to *Blockburger*, "two offenses are separate if each offense requires proof of a fact that the other does not." *Estes*, 122 Nev. at 1143, 146 P.3d at 1127. Thus, under *Blockburger*, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." *Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). "The general test for determining the existence of a lesser included offense is whether the offense in question cannot be committed without committing the lesser offense." *McIntosh v. State*, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) (internal quotation omitted).

NRS 484B.653 governs the offense of reckless driving, while NRS 484B.550 governs the offense of felony eluding. In relevant part, NRS 484B.653 provides:

> 1. It is unlawful for a person to:
>
> (a) Drive a vehicle in willful or wanton disregard of the safety of persons or property.
>
> . . . .
>
> A violation of paragraph (a) . . . of this subsection or subsection 1 of NRS 484B.550 constitutes reckless driving.
>
> . . . .
>
> 3. A person who violates paragraph (a) of subsection 1 is guilty of a misdemeanor.

NRS 484B.653(1), (3). In relevant part, NRS 484B.550 provides:

> 1. Except as otherwise provided in this section, the driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude

> a peace officer in a readily identifiable vehicle of any police department or regulatory agency, when given a signal to bring the vehicle to a stop is guilty of a misdemeanor.
>
> . . . .
>
> 3. Unless the provisions of NRS 484B.653 apply if, while violating the provisions of subsection 1, the driver of the motor vehicle:
>
> (a) Is the proximate cause of damage to the property of any other person; or
>
> (b) Operates the motor vehicle in a manner which endangers or is likely to endanger any other person or the property of any other person,
>
> the driver is guilty of a category B felony . . . .

NRS 484B.550(1), (3).

[Headnote 6]

The elements of the felony eluding offense, as charged in this case, include: (1) driving a vehicle (2) in a manner that endangers or is likely to endanger any other person or the property of any other person. NRS 484B.550(1), (3). All of the elements of misdemeanor reckless driving—(1) driving a vehicle (2) in willful or wanton disregard of the safety of persons or property, NRS 484B.653(1)(a)—are included in the elements of the charged offense of felony eluding under NRS 484B.550(3)(b), making misdemeanor reckless driving a lesser included offense in this case. Because the offense of reckless driving is a lesser included offense of felony eluding as charged in this case, Kelley could not be punished for both crimes.

Accordingly, because Kelley was already convicted of a lesser included offense for the same act underlying the felony eluding offense, we conclude that his conviction for felony eluding violates double jeopardy and we reverse Kelley's conviction for felony eluding a police officer.[2]

CHERRY and GIBBONS, JJ., concur.

---

[2]We note that the State also argues that the two offenses in this case were directed at different acts. According to the State, Kelley's acts constituting reckless driving occurred on Moor Avenue and Shoshone Avenue. In contrast, Kelley's acts constituting felony eluding occurred on Shoshone Avenue and four other streets. Thus, although the reckless driving offense originated from the same event as the felony eluding offense, the City only charged a small part of the entire incident. We conclude that this contention lacks merit because the acts underlying both offenses are based on the same conduct. Further, the acts occurring on Moor Avenue and Shoshone Avenue are subsumed within the acts occurring on Shoshone Avenue and the additional four streets.

THE STATE OF NEVADA, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE EGAN K. WALKER, DISTRICT JUDGE, RESPONDENTS, AND AYDEN A., A MINOR, REAL PARTY IN INTEREST.

No. 68476

April 28, 2016 373 P.3d 63

Original petition for a writ of mandamus challenging a district court order dismissing the State's petition for involuntary placement of a child in locked facility after emergency admission.

The supreme court, CHERRY, J., held that: (1) the supreme court would consider writ petition even though it was moot, and (2) weekends and nonjudicial days would not be counted in determining whether the State had timely filed petition to extend placement.

Petition granted.

Christopher J. Hicks, District Attorney, and *Courtney E. Leverty*, Deputy District Attorney, Washoe County, for Petitioner.

Washoe Legal Services and *Jeffery A. Briggs* and *Kendra Bertschy*, Reno, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.
2. MANDAMUS.
   When there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available via a writ of mandamus.
3. INFANTS.
   An order arising from a proceeding under the chapter governing abuse and neglect of children is generally not appealable. NRS 432B.010 *et seq.*
4. MANDAMUS.
   Whether to consider a writ of mandamus is within the supreme court's discretion.
5. MANDAMUS.
   The supreme court may use its discretion to consider petitions for writs of mandamus when an important issue of law needs clarification and judicial economy is served by considering the writ petition.
6. MANDAMUS.
   It is petitioner's burden to demonstrate that the supreme court's extraordinary intervention via a writ of mandamus is warranted.
7. ACTION.
   A moot case is one that seeks to determine an abstract question that does not rest upon existing facts or rights.
8. ACTION.
   Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.

9. Appeal and Error.
   Even if an issue is moot at the time of appellate consideration, the supreme court may still consider the appeal as a matter of widespread importance capable of repetition.
10. Appeal and Error.
    The supreme court may consider a moot case when: (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.
11. Mandamus.
    The supreme court would exercise its discretion to consider moot petition for writ of mandamus involving juvenile's involuntary placement due to emotional disturbance, even though juvenile had been released; the State and the district courts needed clarification so that the district courts could consistently and correctly apply the law, and issue was an important matter pertaining to the State deprivation of individual liberty. NRS 432B.6075.
12. Appeal and Error; Mandamus.
    Statutory interpretation is a question of law that the supreme court reviews de novo, even in the context of a writ petition.
13. Time.
    Weekends and nonjudicial days would not be counted in determining whether the State had filed petition within requisite five days to extend involuntary placement of juvenile due to emotional disturbance. NRS 432B.6075; NRCP 6(a).

Before Douglas, Cherry and Gibbons, JJ.

OPINION

By the Court, Cherry, J.:

After a child is admitted to a locked mental health facility due to an emotional disturbance, NRS 432B.6075 allows the State up to five days to seek to extend the involuntary placement. In this original petition, the State and real party in interest ask this court to clarify whether the five days are calendar days or judicial days. The statute is silent. We conclude that the five days in NRS 432B.6075 must be judicial days based on NRCP 6(a)'s instructions on computing time. Because the district court used calendar days, we grant the State's petition and direct the district court to vacate its order denying the State's petition to extend the placement.

FACTS AND PROCEDURAL HISTORY

Ayden A., a 16-year-old minor, was admitted to West Hills Hospital on July 7, 2015, because he was deemed to be emotionally disturbed and a danger to himself. Exactly one week later, on July 14, 2015, the State filed a petition for involuntary placement in a locked facility after emergency admission pursuant to NRS Chapter 432B. The very next day, the district court held a hearing on the petition where the State argued that its petition was timely because five days as prescribed in NRS 432B.6075(2) means judicial days.

Ayden argued that the plain language of the statute indicates that five days means calendar days, which made the State's petition untimely. The district court ruled in favor of Ayden. Ayden was subsequently released.

DISCUSSION

This case presents an issue that is capable of repetition yet evading review

Although Ayden was released from involuntary placement and this matter is moot, the State argues that mandamus relief is appropriate because this is an issue of law that needs clarification. The State is concerned that courts will inconsistently apply the statute if this court does not intervene.

[Headnotes 1-4]

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.*[1] "Whether to consider a writ of mandamus is within this court's discretion." *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014) (internal citations omitted).

[Headnotes 5, 6]

We may use our discretion to consider writ petitions when an important issue of law needs clarification and judicial economy is served by considering the writ petition. *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559. It is petitioner's burden to demonstrate that our extraordinary intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnotes 7, 8]

"A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights." *NCAA v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). "Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events." *Id.*

[Headnotes 9, 10]

Even if an issue is moot at the time of appellate consideration, we may still consider the appeal as a matter of widespread importance capable of repetition. *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). We may consider such

[1]An order arising from a proceeding under NRS Chapter 432B is generally not appealable. *See Clark Cty. Dist. Att'y v. Eighth Judicial Dist. Court*, 123 Nev. 337, 342, 167 P.3d 922, 925 (2007).

a case when: "(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Id.*

[Headnote 11]

Ayden has long since been released from involuntary placement. Therefore, the ruling in this case will not directly affect Ayden's rights now or in the predictable future, which would ordinarily preclude consideration of this matter as moot. Nonetheless, we conclude that this particular issue is within the exception to the mootness doctrine because it involves a short time frame, is likely to appear again, and is an important matter. The time frame here is short because it involves emergency involuntary placements, which are necessarily temporary, unless properly extended. Although Ayden may not likely find himself in this situation again, the State and the district courts need clarification in this matter so that the district courts may consistently and correctly apply the law. *See Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) (entertaining writ petition when there was the potential for district courts to inconsistently interpret a legal issue). Finally, this is an important issue because it pertains to State deprivation of individual liberty, and such a deprivation cannot be taken lightly.

Because this case satisfies the factors set forth in *Bisch*, we will exercise our discretion and address the legal issue in the State's petition even though there is no actual relief to grant the State.

"5 days" in NRS 432B.6075 are necessarily judicial days

NRS 432B.6075(2) dictates that "[i]f a petition filed pursuant to this section is to continue the placement of the child after an emergency admission, the petition must be filed not later than 5 days after the emergency admission or the child must be released." The statute does not indicate whether the "5 days" are calendar days or judicial days. *Id.*

[Headnote 12]

"Statutory interpretation is a question of law that [this court] review[s] de novo, even in the context of a writ petition." *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559.

[Headnote 13]

Computing time is explicitly defined in the Nevada Rules of Civil Procedure. *See* NRCP 6(a). Rule 6(a) provides as follows:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . [w]hen the *period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and nonjudicial days shall be excluded in*

> *the computation* except for those proceedings filed under Titles 12 or 13 of the Nevada Revised Statutes.

(Emphasis added.) "NRCP 6(a), by its own terms, applies to the computation of any period of time prescribed or allowed by the NRCP, local rules of the district court, by an order of the court, or by any applicable statute." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 115, 294 P.3d 411, 415 (2013). We have previously explained that the Nevada Rules of Civil Procedure generally apply to proceedings under NRS Chapter 432B unless a specific rule of procedure conflicts with a provision in NRS Chapter 432B. *Joanna T. v. Eighth Judicial Dist. Court*, 131 Nev. 766, 770, 357 P.3d 932, 934 n.1 (2015); *see also Williams v. Clark Cty. Dist. Att'y*, 118 Nev. 473, 478, 50 P.3d 536, 539 (2002) (NRCP 6(a) governs the computation of time when the statute does not specify how to compute the time period). NRCP 6(a) does not conflict with NRS 432B.6075 because the statute does not specify how to compute the time.

NRCP 6(a) governs statutory computations of time and dictates that when calculating time limits that are less than 11 days, weekends and nonjudicial days should not be counted. In this case, by excluding from the calculation Saturday and Sunday following Ayden's admission on Tuesday, July 7, 2015, the fifth day fell on Tuesday, July 14, and the petition filed that day was timely. Thus, the district court erred when it interpreted the time limit by counting the calendar days and deeming the State's petition untimely.[2]

CONCLUSION

Accordingly, we grant the State's petition; the clerk of this court shall issue a writ of mandamus directing the district court to vacate its July 16, 2015, order in its entirety. *See Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 766, 59 P.3d 1180, 1191 (2002) (petition was moot, but we applied an exception; therefore, we granted the petition and directed the district court to simply vacate the order).

DOUGLAS and GIBBONS, JJ., concur.

---

[2]Although the legislative history and intent might support Ayden's position that the Legislature intended the five-day cap to refer to calendar days, we do not reach those arguments because we conclude that NRCP 6(a) controls.

MARK ANDERSON, APPELLANT, *v.*
SOPHIA SANCHEZ, RESPONDENT.

No. 62059

April 28, 2016 373 P.3d 860

Appeal from a district court divorce decree. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Husband filed complaint for divorce. Following mediated settlement, wife moved to enforce memorandum of understanding (MOU) pursuant to which husband would be awarded real property in exchange for payment of $75,000 to wife. The district court denied husband's request to rescind MOU and to join husband's sister as party in case, and entered divorce decree. Husband appealed. On transfer from the supreme court, the court of appeals reversed with respect to disposition of real property and remanded for evidentiary hearing on that issue. Wife's petition for review in the supreme court was granted. The supreme court held that: (1) MOU was not subject to rescission based on alleged mutual mistake; and (2) even if, at time husband and wife executed MOU, husband did not have sufficient knowledge of consequences of oral agreement with his sister that he and wife would hold title to real property in trust for sister, he bore risk of mistake.

Affirmed.

The Abrams & Mayo Law Firm and *Vincent Mayo*, Las Vegas, for Appellant.

Law Office of Daniel Marks and *Daniel Marks* and *Christopher L. Marchand*, Las Vegas, for Respondent.

1. DIVORCE.
   Memorandum of understanding (MOU) between husband and wife in divorce, pursuant to which parties agreed that real property would be awarded to husband in exchange for $75,000 payment to wife, was not result of mutual mistake, as justification for rescission, based on husband's claim that he and wife held title to property in trust for husband's sister, when husband and wife were aware of facts supporting sister's purported interest in property when they entered into MOU.
2. DIVORCE.
   An agreement to settle pending divorce litigation constitutes a contract and is governed by the general principles of contract law.
3. APPEAL AND ERROR.
   Contract interpretation generally presents a question of law subject to de novo review.
4. APPEAL AND ERROR; CONTRACTS.
   Whether a contract exists is a question of fact, and the supreme court will defer to the district court unless the factual findings are clearly erroneous or not supported by substantial evidence.

5. CONTRACTS.
   An enforceable contract requires an offer and acceptance, meeting of the minds, and consideration.
6. CONTRACTS.
   A mutual mistake may be grounds to equitably rescind a contract or to render a contract void.
7. CONTRACTS.
   A mutual mistake occurs, as a basis for rescinding a contract, when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain.
8. DIVORCE.
   Even if, at time husband and wife executed memorandum of understanding (MOU) in context of divorce, pursuant to which husband would be awarded real property in exchange for payment to wife of $75,000, husband did not have sufficient knowledge of consequences of oral agreement with his sister that he and wife would hold title to real property in trust for sister, he bore risk of mistake, and thus, MOU was not subject to rescission on basis of mutual mistake, when husband was aware of facts underlying his claim that property was subject of an equitable trust and therefore not appropriate for distribution under MOU, and he could have pursued issue further rather than agreeing to settlement.

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

OPINION

Per Curiam:

In this appeal, appellant seeks to set aside the parties' property settlement agreement incorporated into the divorce decree on the ground of mutual mistake and to join his sister as a third party to the action because she allegedly had an unresolved interest in certain real property, which was distributed as a community asset under the settlement agreement. We conclude that there was no mutual mistake because the parties were aware at the time they negotiated the settlement agreement of the facts supporting the sister's claim of interest in the property. Thus, appellant was not entitled to set aside the property settlement agreement and his request to join his sister in the action was properly denied. Accordingly, we affirm the divorce decree.

BACKGROUND

In 2012, appellant Mark Anderson filed a complaint for divorce from respondent Sophia Sanchez. The parties agreed to mediation before a retired district court judge to discuss the distribution of their assets and debts. At issue were several pieces of real property, including a home located on East Wilson Avenue in Orange, California (Wilson property). Both parties were represented by independent legal counsel during the mediation, reached a settlement

agreement resolving their issues, and signed a written Memorandum of Understanding (MOU) memorializing their agreement. As to the Wilson property specifically, the MOU stated that it was owned by the parties' trust and they agreed that the property would be awarded to Mark in exchange for a $75,000 payment to Sophia from Mark's retirement account, representing half of the property's net value. In the MOU, the parties acknowledged that they had carefully read the document, that it accurately reflected their agreement, and that each voluntarily signed it without undue influence or coercion and agreed to be contractually bound by its terms. The parties initialed each page of the MOU and signed it at the end.

When Mark filed a notice stating his intent to withdraw and revoke his signature from the MOU, Sophia moved to enforce it, arguing that the settlement agreement was valid and the parties had agreed to be contractually bound by its terms. Mark, in turn, moved to set aside the MOU as unenforceable, citing NRCP 60(b), and arguing that his sister Cheryl Parr had an ownership interest in the Wilson property. Although acknowledging that he and Sophia held title, Mark alleged that they had a prior oral agreement with Cheryl, under which Cheryl transferred title to Mark and Sophia for the purpose of facilitating loans needed to renovate the residence. He further alleged that once the loans were paid off from rental income generated by the property, Mark and Sophia had agreed to transfer title back to Cheryl. Consequently, Mark argued that he and Sophia were merely holding title to the Wilson property for Cheryl's benefit under a resulting or constructive trust theory, and because the parties lacked authority to enter into an agreement affecting property owned by Cheryl, the MOU as to the Wilson property should be set aside as void. To support his position, Mark provided offers of proof including trust documents and affidavits or other statements indicating knowledge of this arrangement between the parties and Cheryl. Mark also requested to join Cheryl in the divorce action and amend the pleadings to reflect her ownership rights in the Wilson property. In response, Sophia argued that she and Mark undisputedly held title to the Wilson property, the MOU was an enforceable settlement agreement, and Cheryl lacked standing to join the action.

After hearing argument, the district court ruled that the MOU was enforceable under Nevada law and denied the request to join Cheryl in the action.[1] On the record, the court observed that Mark and Sophia were legal owners of the property and any circumstances creating a constructive trust in Cheryl's favor were known to them. The court entered the divorce decree, which adopted the parties'

[1]Cheryl also moved to intervene below, but the district court denied her motion and she was never made a party to the action. Thus, Cheryl is not a party to this appeal. She did not file a separate writ petition challenging the decision on intervention.

MOU and ordered the property to be divided in accordance with their agreement.

Mark filed this appeal from the decree, and we transferred the case to the court of appeals. That court reversed and remanded as to the disposition of the Wilson property, concluding that the district court should have conducted an evidentiary hearing to decide the joinder issue before adjudicating the parties' property pursuant to the settlement agreement. We granted Sophia's petition for review and withdrew the court of appeals' opinion.

DISCUSSION

[Headnote 1]

The present dispute requires us to examine the creation and enforceability of the parties' property settlement agreement. Mark contends that the district court should have set aside the MOU based on the parties' mutual mistake that the Wilson property was community property subject to division. He argues that both he and Sophia shared a misconception during negotiations that title to the Wilson property in their name supplanted Cheryl's ownership interest and they were unaware of how a resulting or constructive trust in Cheryl's favor could affect their rights in, and authority to, dispose of the Wilson property.

[Headnotes 2-4]

An agreement to settle pending divorce litigation constitutes a contract and is governed by the general principles of contract law. *Grisham v. Grisham*, 128 Nev. 679, 685, 289 P.3d 230, 234 (2012); *see also* DCR 16 (requiring an agreement or stipulation between the parties to be in writing or entered into the minutes in the form of an order). Contract interpretation generally presents a question of law subject to de novo review. *Grisham*, 128 Nev. at 687, 289 P.3d at 236. Whether a contract exists is a question of fact, however, and this court will defer to the district court unless the factual findings are clearly erroneous or not supported by substantial evidence. *Id.*

[Headnotes 5-7]

An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). A mutual mistake may be grounds to equitably rescind a contract or to render a contract void. *Tarrant v. Monson*, 96 Nev. 844, 845, 619 P.2d 1210, 1211 (1980). "Mutual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain." *Gen. Motors v. Jackson*, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995).

We conclude that Mark's argument regarding mutual mistake is unavailing. It was undisputed that Mark and Sophia held title to the

Wilson property through a trust at the time they entered into the MOU. Holding title constitutes " 'the legal right to control and dispose of property.' " *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008) (quoting *Title*, *Black's Law Dictionary* (8th ed. 2004)). It was also undisputed that the parties were aware of the facts supporting Cheryl's purported interest in the Wilson property when they entered into the MOU. Indeed, Mark represented in his motion to set aside that the parties had always known the Wilson property belonged to Cheryl and he attached offers of proof to support that position. Thus, the parties' had no shared misconception of a vital fact concerning the Wilson property. *See Gen. Motors*, 111 Nev. at 1032, 900 P.2d at 349.

Despite his knowledge, Mark did not include in his pleadings any allegations as to Cheryl's interest, and he ultimately signed the MOU reflecting that he and Sophia were the sole holders of title to the Wilson property and agreeing to a specific division between them. Both parties were represented by independent legal counsel and engaged in the negotiations before a retired district court judge before signing the written MOU and each declared that they were "of sound mind and mental capacity to understand the nature and affect of [the] agreement." Both parties acknowledged that the MOU "represents what each believes to be a fair and reasonable resolution of the issues, and each agrees to be contractually bound by its terms."

[Headnote 8]

Even assuming, as Mark now argues, that the parties were unaware or misinformed of the legal effect Cheryl's purported interest had on their disposition of the Wilson property, mutual mistake is not grounds for rescission when the party bears the risk of mistake. *Land Baron Inv., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 694, 356 P.3d 511, 517 (2015). More specifically, "[i]f the party is aware at the time he enters into the contract 'that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient,' " the court will allocate the risk of mistake to that party. *Id.* (quoting Restatement (Second) of Contracts § 154 cmt. b (Am. Law Inst. 1981)); *see* Restatement (Second) of Contracts § 151(b) (observing that the law in effect at the time of the contract is "part of the total state of facts"). If Mark did not have sufficient knowledge of the legal consequences of any oral agreement with Cheryl, he was aware of the facts underlying his claim that the Wilson property was the subject of an equitable trust and therefore not appropriate for distribution under the MOU, and he could have pursued the issue further rather than agreeing to the settlement. *See* Restatement (Second) of Contracts § 154(c) (indicating that the court may allocate the risk of mistake to a party when it is reasonable under the circumstances); *cf. Janusz v. Gilliam*, 947

A.2d 560, 567 (Md. 2008) (holding that a mutual mistake of law was not grounds to rescind a property settlement agreement particularly where both parties were represented by counsel during the negotiations and were on equal footing to know or learn of the relevant law). Thus, Mark bore the risk of mistake when he entered into the MOU despite being aware of his limited knowledge. Accordingly, the district court's decision to enforce the MOU is supported by substantial evidence. *Grisham*, 128 Nev. at 687, 289 P.3d at 236.

Finally, because we conclude that the MOU was enforceable with respect to the parties' disposition of the Wilson property, Mark's request to join Cheryl in the action for the purpose of adjudicating any interest she may have in the property was properly denied. For the reasons set forth herein, the district court's divorce decree is affirmed.

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Appellant, *v.* IKON HOLDINGS, LLC, a Nevada Limited Liability Company, Respondent.

No. 63178

April 28, 2016 373 P.3d 66

Appeal from a district court judgment in a real property action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Before homeowners' association (HOA) could foreclose against former unit owner for nonpayment of HOA assessments and other costs, former unit owner's mortgage lender foreclosed on the unit, holding a foreclosure auction the same day, at which an individual bought the property, which he subsequently transferred to holding company by quit claim deed. HOA contacted company explaining that it had acquired the property subject to HOA's unextinguished superpriority lien. When the parties were unable to resolve the matter, company filed declaratory relief action regarding the lien. The district court granted company partial relief. HOA appealed. The supreme court, Hardesty, J., held that: (1) statutory superpriority lien does not include collection fees and foreclosure costs incurred by HOA preceding foreclosure sale; and (2) covenants, conditions, and restrictions (CC&Rs) provisions were superseded by statute and thus negated.

Affirmed in part and reversed in part.

Holland & Hart, LLP, and *Patrick J. Reilly* and *Nicole E. Lovelock*, Las Vegas; *Alverson, Taylor, Mortensen & Sanders* and *Kurt R. Bonds*, Las Vegas, for Appellant.

Adams Law Group and *James R. Adams*, Las Vegas; *Puoy K. Premsrirut, Inc.*, and *Puoy K. Premsrirut*, Las Vegas, for Respondent.

Adam Paul Laxalt, Attorney General, and *Michelle D. Briggs*, Senior Deputy Attorney General, Carson City, for Amicus Curiae State, Department of Business and Industry.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones, Carol L. Harris*, and *Nathanael R. Rulis*, Las Vegas, for Amicus Curiae Community Association Management Executive Officers, Inc.

1. Appeal and Error.
   Questions of statutory construction are reviewed de novo.
2. Statutes.
   When interpreting an ambiguous statute, the supreme court attempts to ascertain the Legislature's intent.
3. Statutes.
   To determine the Legislature's intent when interpreting statutes, the supreme court looks to legislative history, reason, and considerations of public policy.
4. Statutes.
   The supreme court interprets statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result.
5. Administrative Law and Procedure.
   Administrative regulations cannot contradict the statute they are designed to implement.
6. Common Interest Communities.
   Interpreting the superpriority lien for common expense assessments to exclude collection fees and foreclosure costs, pursuant to statute governing liens against units for common expense assessments, does not preclude fees and costs from being incurred, up to cap imposed by regulation governing fees and costs for collection of past due obligations of common interest community unit's owner; regulation simply provided for a cap on fees and costs but did not speak to priority. NRS 116.3116(2); NAC 116.470.
7. Common Interest Communities.
   Superpriority lien granted by statute governing liens against units for common expense assessments does not include an additional amount for collection fees and foreclosure costs incurred by a homeowners' association preceding a foreclosure sale; rather it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure. NRS 116.3116(2).
8. Covenants.
   The rules of construction governing the interpretation of contracts apply to the interpretation of restrictive covenants for real property.
9. Appeal and Error.
   When there is no dispute of fact, a contract's interpretation is a legal question subject to de novo review.
10. Common Interest Communities.
    To extent that homeowners' association's covenants, conditions, and restrictions (CC&Rs) purported to create a six-month superpriority lien that included certain fees and costs, statute governing liens against units for common expense assessments negated effect of the CC&Rs because they

violated the statute's plain language by limiting the prioritized portion to six months when the statute allowed for nine months, and included certain fees and costs not provided for by the statute. NRS 116.3116.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal, we determine whether a superpriority lien for common expense assessments pursuant to NRS 116.3116(2)[2] includes collection fees and foreclosure costs incurred by a homeowners' association (HOA). We conclude that it does not. Additionally, we consider whether an HOA's covenants, conditions, and restrictions (CC&Rs) that purport to create a superpriority lien covering certain fees and costs over six months preceding foreclosure are superseded by the terms of the superpriority lien created by NRS 116.3116(2). We conclude that the superpriority lien in the CC&Rs is superseded by NRS 116.3116(2), thus affirming in part and reversing in part the district court's decision.

FACTS AND PROCEDURAL HISTORY

The property at issue in this case is located in Horizons at Seven Hills Ranch, a common-interest community as defined in NRS Chapter 116, operated and managed by appellant Horizons at Seven Hills Homeowners Association (Horizons). As a common-interest community, Horizons has the ability to collect and charge assessments, and administer and enforce the CC&Rs upon the unit owners, for the purpose of benefiting the community. *See* NRS 116.3115.

Horizons recorded its Declaration of CC&Rs in July 2005. Later that year, Hawley McIntosh purchased a home located within the common-interest community. In June 2009, McIntosh became delinquent on his first mortgage payments, and his first mortgage lender, OneWest Bank FSB, recorded a notice of default that same month. In August 2009, Horizons recorded a notice of default against McIntosh for nonpayment of association assessments and other costs in the amount of roughly $4,300. Before Horizons could foreclose, OneWest foreclosed on McIntosh's home in June 2010, holding a foreclosure auction on the same day, at which Scott Ludwig pur-

[1]THE HONORABLE RON PARRAGUIRRE, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

[2]In 2015, the Legislature amended NRS 116.3116(5) to include certain fees and costs in superpriority liens. 2015 Nev. Stat., ch. 266, § 1, at 1333. Any discussion in this opinion related to this statute refers to the statute in effect at the time the underlying cause of action arose.

chased the property. Ludwig transferred the property by quitclaim deed to respondent Ikon Holdings, LLC (Ikon) later that year.

Horizons contacted Ikon and explained that Ikon acquired the property subject to Horizon's unextinguished superpriority lien. Horizons demanded roughly $6,000 to extinguish the lien, which, in addition to unpaid assessments, included roughly $2,700 in collection fees and foreclosure costs. In response, Ikon acknowledged that it acquired the property subject to Horizon's superpriority lien, but it disagreed that the lien included nine months rather than six months of unpaid assessments or the collection fees and foreclosure costs that Horizons was seeking to recoup.

When the parties were unable to resolve the matter, Ikon filed the underlying declaratory relief action. In particular, Ikon sought a ruling that, under NRS 116.3116(2), the superpriority portion of an HOA's lien consists of nine months' (or alternatively six months' based on the CC&Rs) worth of assessments and does not include collection fees and foreclosure costs. Horizons opposed the motion, arguing that NRS 116.3116(2)'s superpriority provision necessarily includes nine months of assessments and collection fees and foreclosure costs. The district court granted Ikon partial declaratory relief, reasoning that Horizons' CC&Rs limited its superpriority lien to an amount equal to six months of assessments, which did not offend NRS 116.3116(2)'s superpriority provision providing for nine months of assessments. Horizons now appeals.

On appeal, Horizons contends it is owed nine months of unpaid assessments totaling $1,657.50 and $1,592 in collection fees and foreclosure costs.[3] Although Ikon does not dispute that it owes six months of unpaid HOA dues owed at the time of the foreclosure sale, it does dispute whether Horizons is entitled to an additional three months of HOA dues or the collection fees and foreclosure costs.

DISCUSSION

The superpriority lien under NRS 116.3116(2) does not include fees or collection costs related to foreclosure

Horizons and amicus curiae Community Association Management Executive Officers, Inc., argue that in addition to HOA dues, the superpriority lien[4] includes an additional amount for collection fees and foreclosure costs incurred during the nine months prior to a foreclosure sale. Horizons contends these collection fees and fore-

[3]While Horizons did not foreclose on McIntosh, it expended money preparing for such a foreclosure.

[4]When an HOA forecloses on a property, the pre-2015 amendments of NRS 116.31164(3)(c) and NRS 116.3116(8) allowed for the recoupment of fees and costs. However, because Horizons did not foreclose on the property, NRS 116.31164(3)(c) and NRS 116.3116(8) are not implicated in this decision.

closure costs encompass fees for collecting past due assessments, such as third-party collection agency charges, and "trustee costs and publication costs in advance of a foreclosure sale." Horizons further contends that canons of statutory interpretation dictate that the superpriority lien includes these fees and costs, and that NRS 116.3116(2) must be read in conjunction with NAC 116.470. Ikon, along with amicus curiae Department of Business and Industry, Real Estate Division (NRED), counter that these fees and costs are not collectible under NRS 116.3116(2).

Standard of review

[Headnotes 1-3]

Questions of statutory construction are reviewed de novo. *Ransdell v. Clark Cty.*, 124 Nev. 847, 854, 192 P.3d 756, 761 (2008). When interpreting an ambiguous statute, this court attempts to ascertain the Legislature's intent. *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 681 (2008). To determine the Legislature's intent, we look to "legislative history, reason, and considerations of public policy." *Id.*

NRS 116.3116

NRS 116.3116(1) confers to an HOA a lien on a homeowner's unit for unpaid assessments, construction penalties, and fines levied against the unit. NRS 116.3116(2) establishes the priority of that lien, splitting the lien into two pieces—"a superpriority piece and a subpriority piece." *SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014). The superpriority lien

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

NRS 116.3116(2). *SFR* characterized the superpriority piece as including "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges."[5] 130 Nev. at 745, 334 P.3d at 411.

Horizons argues that based on persuasive caselaw and on rules of statutory construction, NRS 116.3116(2) provides for a look-back

[5]Pursuant to NRS 116.310312(4), "maintenance or abatement" costs include "reasonable inspection fees, notification and collection costs and interest." We note, however, that these are not the type of collection costs relating to foreclosure that are in dispute here.

provision, designed to place it in the same position it would have been over the previous nine months, but for the default. We are not persuaded by this argument.

To support its position, Horizons argues that this court should adopt the holding in *Hudson House Condominium Ass'n, Inc. v. Brooks*, 611 A.2d 862 (Conn. 1992). In *Hudson House*, a condominium association was "foreclos[ing] a statutory lien for delinquent common expense assessments due on a condominium unit owned by the named defendant." *Id*. at 864. The association asserted that pursuant to the superpriority lien,[6] it was owed an amount equal to the common expense assessments, as well as interest, collection costs, and attorney fees. *Id*. at 864, 866. The court concluded that the superpriority lien included interest, collection costs, and attorney fees. It reasoned that a Connecticut statute stating that "a judgment or decree in any action brought under this section shall include costs and reasonable attorney[ ] fees for the prevailing party" authorized these fees and costs to be within the superpriority lien because the court believed this to be the only "reasonable and rational result." *Id*. at 866 (internal quotations omitted).

We disagree with *Hudson House*'s holding for three reasons. First, the court did not conduct a statutory analysis of the superpriority lien language. Neither NRS 116.3116(2) nor the Connecticut statute creating the superpriority lien mention collection fees and foreclosure costs, and the statutes specifically provide that the superpriority lien is limited to "the extent of the assessments for common expenses." NRS 116.3116(2); *see also Hudson House*, 611 A.2d at 863 n.1 (quoting the Connecticut statute: "to the extent of the common expense assessments").

Second, *Hudson House* relied on the policy concern that because common expense assessments are often small, and the prioritized portion of the lien is typically the only collectible portion for an HOA, "it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to a priority." *Id*. at 866. Horizons makes similar arguments: that limiting the superpriority lien to only nine months of unpaid assessments leads to absurd results and renders the statute meaningless because foreclosure will often be economically unfeasible for HOAs. We are not persuaded by this line of reasoning. While we recognize that collection fees and costs may be incurred in a foreclosure, the Legislature has the authority to determine the definition of a superprioity lien and may provide for the recovery of collection fees and costs under different provisions of the statutory scheme. *See, e.g.*, NRS 116.31164(3)(c) (2005) (providing for priority to the selling party on certain fees and costs). But that

[6]The Connecticut statutes in *Hudson House* are identical, for the purposes of this analysis, to the Nevada statutes.

legislative choice does not render the definition of a superpriority lien absurd.

Third, in *Hudson House*, the association brought an action to judicially foreclose on the property, entitling it to a "judgment or decree." 611 A.2d at 864. In effect, the court found that the association was the prevailing party and, on that basis, was entitled to the recovery of the costs and fees under the Connecticut statute.

NAC 116.470

[Headnotes 4, 5]

Horizons further contends that NAC 116.470 must be read in conjunction with NRS 116.3116(2). NAC 116.470 sets a cap of $1,950 that applies in most foreclosure sales. Horizons argues that if NRS 116.3116(2) is interpreted to not include collection fees and foreclosure costs, it will contradict NAC 116.470 by removing the need for a cap. We interpret "statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result." *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (internal quotations omitted). Additionally, "administrative regulations cannot contradict the statute they are designed to implement." *Id*. at 83, 225 P.3d at 1271 (internal quotations omitted).

[Headnote 6]

We conclude that NAC 116.470 and NRS 116.3116(2) can easily be reconciled. Interpreting the superpriority lien to exclude collection fees and foreclosure costs does not preclude fees and costs from being incurred, up to the cap. Such an interpretation of NRS 116.3116(2) only speaks to the priority in which those fees and costs can be collected. NAC 116.470 simply provides for a cap on fees and costs but does not speak to priority.

Legislative history

A review of the legislative history further demonstrates that the Legislature did not intend for collection fees and foreclosure costs incurred to be included in NRS 116.3116(2)'s superpriority lien. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (UCIOA) of 1982, which is codified in the Nevada Revised Statutes as NRS Chapter 116. *See* NRS 116.001. Section 3-116 of the UCIOA is substantially similar to NRS 116.3116. *Compare* UCIOA § 3-116, 7 U.L.A. 374-81 (2008), *with* NRS 116.3116. The 1994 version of section 3-116 of the UCIOA included only "common expense assessments based on the periodic budget" as part of the superpriority lien. UCIOA § 3-116(b), 7 U.L.A. 569 (1994). In 2008, amendments were made to section 3-116 to also include "reasonable attorney[ ] fees and costs incurred by the association in

foreclosing the association's lien" as part of the superpriority lien. UCIOA § 3-116(c), 7 U.L.A. 374-75 (2008). These are exactly the type of collection costs sought by Horizons. However, while a similar amendment to NRS 116.3116 to add collection costs relating to foreclosure to the superpriority lien was considered by the Legislature in both 2009 and 2011, no such amendment was adopted.

Specifically, in 2009, the Legislature amended NRS Chapter 116 by adding a new section, NRS 116.310313, permitting HOAs to charge homeowners collection costs in advance of foreclosure. A.B. 350, 75th Leg. (Nev. 2009); 2009 Nev. Stat., ch. 485, § 1.7, at 2795. However, NRS 116.3116 was not amended at that time to reflect the addition of NRS 116.310313. In 2011, Senate Bill (S.B.) 174 was introduced in an attempt to change NRS 116.3116(1) and (2) by adding language allowing the collection costs permitted under NRS 116.310313 to become part of the HOA's lien and the superpriority lien. S.B. 174, 76th Leg. (Nev. 2011) (as introduced). The bill was amended during the session, removing the collection costs permitted under NRS 116.310313 from NRS 116.3116(1) and adding language that set a dollar limit for the collection costs as part of the superpriority lien under NRS 116.3116(2). S.B. 174, 76th Leg., (Nev. 2011) (first reprint). Although the Senate Judiciary Committee approved the amended bill, the Assembly Judiciary Committee took no action, leaving NRS 116.3116(1) and (2) unchanged. S.B. 174, 76th Leg. (Nev. 2011) (Bill Summary).

Because the "[c]osts of collecting" as set forth in NRS 116.310313 was omitted from NRS 116.3116(2), we must presume the Legislature did not intend for such costs to be included as part of an HOA's superpriority lien.[7] *See Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional."); *see also Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Constr.* § 47:23 (7th ed. 2014) ("The maxim *expressio unius est exclusio alterius* . . . instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.").

Advisory opinions

Horizons urges this court to give deference to an advisory opinion from the Commission for Common Interest Communities and Con-

[7]Bolstering this conclusion, the legislative history regarding the 2015 amendment to the statute indicates on many occasions that the change was a revision, not simply a clarification. *See, e.g.*, S.B. 306, 78th Leg. (Nev. 2015) (as introduced); Hearing on S.B. 306 Before the Senate Judiciary Comm., 78th Leg. (Nev. April 7, 2015) (statement by Senator Aaron D. Ford discussing proposed amendments to the statutory provisions governing HOA liens).

dominium Hotels (CCICCH), in which it determined that "Nevada law authorizes the collection of 'charges for late payment of assessments' as a portion of the super lien amount." 10-01 Op. CCICCH 1, 12-13 (2010). Horizons advocates that this is the correct interpretation of the statute. In contrast, Ikon argues the CCICCH has no legal authority to publish advisory opinions because such authority is strictly reserved by statute for NRED. As such, Ikon asserts this court should follow the advisory opinion issued by NRED in December 2012. *See* 13-01 Op. NRED (2012).

As we noted in *SFR*, NRED "is charged with administering Chapter 116." 130 Nev. at 754, 334 P.3d at 416; *see also* NRS 116.615. That administration includes issuing "advisory opinions as to the applicability or interpretation of . . . [a]ny provision of this chapter." NRS 116.623(1)(a).

Among the questions NRED was asked to address concerning NRS 116.3116 in its December 2012 opinion was whether "the portion of the association's lien which is superior to a unit's first security interest (referred to as the 'super priority lien') contain[s] 'costs of collecting' defined by NRS 116.310313[.]" 13-01 Op. NRED 1 (2012). NRED answered this question in the negative and initially stated that

> [t]he association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

Id. After conducting a thorough analysis of the legislative history behind NRS 116.3116, NRED concluded the "Legislature's actions in the 2009 and 2011 sessions are indicative of its intent not to make costs of collecting part of the lien," and thus, "the association's lien does not include 'costs of collecting' as defined by NRS 116.310313." *Id*. at 7. We find NRED's interpretation of NRS 116.3116, including its legislative history analysis, persuasive.[8]

---

[8]The parties also dispute whether the superpriority lien statute includes late fees, or charges and/or interest. NRED also considered this issue in its advisory opinion and determined that,

> while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102(1)(j) to (n), inclusive, the total amount of the *super priority lien* attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget. *Association budgets do not reflect late charges or interest attributed to an anticipated delinquent owner, so there is no basis to conclude that such charges could be included in the super priority lien or in addition to the assessments*. Such extraneous charges are not included in the association's super priority lien.

13-01 Op. NRED 12 (2012) (third emphasis added). We further note there is no mention in NRS 116.3116, or the other provisions of NRS Chapter 116 to which

[Headnote 7]

Taking into consideration the legislative intent, the statute's text, and statutory construction principles, we conclude the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure.[9]

Horizons' CC&Rs are superseded by NRS 116.3116

Horizons contends that there are two separate liens—a statutory lien under NRS 116.3116 and a contractual lien derived from Horizons' CC&Rs. Horizons argues the contractual lien created in the CC&Rs allows it to have superpriority on collection fees and foreclosure costs, regardless of NRS 116.3116(2). Ikon counters that NRS 116.1206 supersedes the CC&Rs as to costs and fees, capping the superpriority lien to the amount allowed under NRS 116.3116, but argues that the time frame provided in the CC&Rs—six months—overcomes NRS 116.3116(2)'s allowance of nine months of common expense assessments. The district court concluded that there was only one superpriority lien, which included "interest, costs and other fees . . . as long as the prioritized portion of the lien does not exceed an amount equal to [six] months of assessments as noted in Sections 7.8 and 7.9 of the CC&R[s]."

---

that statute refers, that late fees or interest relating to foreclosure collection costs may be included as part of the HOA's superpriority lien. Thus, we must presume the Legislature intentionally excluded late fees and interest from the superpriority lien statute. *See DaimlerChrysler*, 121 Nev. at 548, 119 P.3d at 139 (stating that "omissions of subject matters from statutory provisions are presumed to have been intentional").

[9]In *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, we noted "that the district court erred in limiting the HOA lien amount to nine months of common expense assessments." 132 Nev. 49, 51, 366 P.3d 1105, 1107 (2016). In the context of *Shadow Wood*, we were determining the extent of an HOA lien when a bank foreclosed its first security interest and became the *owner* of the foreclosed property. *Id*. at 61, 366 P.3d at 1113. The superpriority lien included nine months of pre-foreclosure past due common expense assessments. *Id*.; *see also* NRS 116.3116(2) (stating that the superpriority lien is "prior to all security interests," including "[a] first security interest on the unit"). After the bank purchased the property, it failed to pay common expense assessments due (at which time the HOA foreclosed on the property). *Shadow Wood*, 132 Nev. at 61, 366 P.3d at 1113. NRS 116.3116(2)'s nine-month superpriority lien did not affect the amount the bank owed the HOA after the bank foreclosed because the "first security interest" was extinguished, and the superpriority lien does not limit amounts due from a property owner to an HOA. Accordingly, in *Shadow Wood*, the HOA was entitled to recover the superpriority lien amounts accrued for nine months prior to the bank's foreclosure, and it was entitled to assessments, fees, and costs accrued after the bank purchased the property. *Id*.

[Headnotes 8, 9]

"The rules of construction governing the interpretation of contracts apply to the interpretation of restrictive covenants for real property. When there is no dispute of fact, a contract's interpretation is a legal question subject to de novo review." *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004).

Horizons' CC&Rs state, in pertinent part, as follows:

> Section 7.8 . . . The lien of the assessments, including interest and costs, shall be subordinate to the lien of any [f]irst [m]ortgage upon the [u]nit (except to the extent of [a]nnual [a]ssessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien).
>
> Section 7.9 . . . A lien for assessments, including interest, costs, and attorney[ ] fees, as provided for herein, shall be prior to all other liens and encumbrances on a [u]nit, except for: (a) liens and encumbrances [r]ecorded before the [d]eclaration was [r]ecorded; (b) a first [m]ortgage [r]ecorded before the delinquency of the assessment sought to be enforced (except to the extent of [a]nnual [a]ssessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien)[;] and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. . . . Where the [b]eneficiary of a [f]irst [m]ortgage of [r]ecord or other purchaser of a [u]nit obtains title pursuant to a judicial or non-judicial foreclosure . . . the [p]erson who obtains title and his or her successors and assigns shall not be liable for the share of the [c]ommon [e]xpenses or assessments by the [HOA] chargeable to such [u]nit which became due prior to the acquisition of title to such [u]nit by such [p]erson (except to the extent of [a]nnual [a]ssessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien).

This language indicates that a lien is created covering certain fees and costs over six months preceding foreclosure. However, NRS 116.1206(1) provides:

> Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other

> governing document is not required to be amended to conform to those provisions.
>
> (b) *Is superseded by the provisions of this chapter*, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

(Emphasis added.)

[Headnote 10]

While we do not comment on the validity of the CC&Rs' lien in general, to the extent that Horizons' CC&Rs purport to create a six-month superpriority lien that includes certain fees and costs, we conclude that NRS 116.1206(1) negates the effect of those provisions because they violate NRS 116.3116(2)'s plain language by (1) limiting the prioritized portion to six months when the statute allows for nine months, and (2) including certain fees and costs. Accordingly, we conclude that the district court's limitation of the superpriority lien to six months of common expense assessments and its inclusion of certain fees and costs in the superpriority lien was error.

CONCLUSION

For the reasons set forth above, we conclude that a superpriority lien pursuant to NRS 116.3116(2) does not include an additional amount for the collection fees and foreclosure costs that an HOA incurs preceding a foreclosure sale; rather, it is limited to an amount equal to nine months of common expense assessments. We further conclude that, to the extent that Horizons' CC&R provisions can be read as creating a superpriority lien covering certain fees and costs and a six-month time frame, those provisions are superseded by statute and are thus negated. Accordingly, we affirm that portion of the district court's order granting partial declaratory relief in favor of Ikon to the extent that it can be construed as prohibiting Horizons from including fees and costs in its superpriority lien. But we reverse that portion of the district court's order that limited the superpriority lien to six months of common expense assessments and allowed fees and costs to be included if the outstanding monthly assessments did not exceed six months.

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