7510 PERLA DEL MAR AVE TRUST, Appellant, *v.*
BANK OF AMERICA, N.A., Respondent.

No. 75603

February 27, 2020 458 P.3d 348

Appeal from a district court judgment following a bench trial in a quiet title action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Affirmed.

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

Akerman, LLP, and *Ariel E. Stern* and *Jared M. Sechrist*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 743, 334 P.3d 408, 409 (2014), this court held that NRS 116.3116(2) provides a homeowners' association (HOA) with a superpriority lien that, when properly foreclosed upon, extinguishes a first deed of trust. This court subsequently held in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018), that a deed of trust beneficiary can preserve its deed of trust by tendering the superpriority portion of the HOA's lien before the foreclosure sale is held.

In this appeal, we conclude that an offer to pay the superpriority amount in the future, once that amount is determined, does not constitute a tender sufficient to preserve the first deed of trust under *Bank of America*. We further conclude, however, that formal tender is excused when evidence shows that the party entitled to payment had a known policy of rejecting such payments. In light of these conclusions, we consider whether substantial evidence exists to support the district court's finding that the beneficiary's agent was excused from making a formal tender, such that under *Bank of America*, the ensuing foreclosure sale did not extinguish the first deed of trust. We conclude that substantial evidence supports this finding, and we affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

This dispute involves a residence located within two HOAs, Mandolin Phase 3 at Mountain's Edge (Mandolin) and Mountain's Edge Master Association. The property was subject to the Covenants, Conditions, and Restrictions (CC&Rs) of both HOAs. In 2010, the original owner of the residence obtained a loan secured by a deed of trust on the property; that loan was eventually assigned to respondent Bank of America, N.A. (the Bank). By 2012, the original homeowner had become delinquent on his monthly HOA assessments and Nevada Association Services (NAS), Mandolin's agent, began foreclosure proceedings by recording first a lien for delinquent assessments and then a notice of default and election to sell. Thereafter, NAS sent the notice of default and election to sell to the Bank, the original homeowner, and other interested parties. In response, the Bank, through its counsel Miles, Bauer, Bergstorm & Winters, LLP (Miles Bauer), contacted NAS via letter dated March 16, 2012, regarding payment of Mandolin's superpriority lien. Specifically, Rock Jung, an attorney for Miles Bauer, requested that NAS identify the superpriority portion of the lien—i.e., the amount the Bank may rightfully pay to preserve its deed of trust—and offered to pay that sum upon proof of the same. NAS received the letter but did not respond to it.

Instead, NAS, on behalf of Mandolin, proceeded with the foreclosure sale and sold the property to appellant 7510 Perla Del Mar Ave Trust (Perla Trust) in February 2013 for $14,600.

In September 2013, Perla Trust instituted the underlying quiet title action and sought a declaration that it rightfully holds title to the property and that the foreclosure sale extinguished the Bank's deed of trust. The Bank responded, seeking a determination that its deed of trust survived the foreclosure sale. The district court held a two-day bench trial in February 2018. As relevant here, the district court heard testimony concerning Miles Bauer's practice of contacting NAS to satisfy any superpriority lien obligation and the evolution of NAS's business policy regarding its responses to Miles Bauer and its treatment of any tendered payment.

Jung testified that by the time he sent the letter to NAS in the instant action, he had already sent around 1000 nearly identical letters to NAS inquiring about HOA common assessment amounts owed on other properties in order to calculate the superpriority portion of the lien on those properties. Jung and Chris Yergensen, former in-house counsel for NAS, testified that from the time Miles Bauer began sending requests for payoff information until late 2011 or early 2012, NAS responded with a payoff ledger form that provided a breakdown of fees and assessments. Yergensen and Jung further testified that NAS then changed its policy to not respond to Miles Bauer absent the homeowner's written authorization, citing concerns of violating the Fair Debt Collection Practices Act (FDCPA), and that Miles Bauer was aware of this policy. Yergensen testified that sometime around July 2013 NAS again changed its policy to provide the payoff amount to the first deed of trust holder for a $150 fee, relying on a change in state law.

Evidence further established that Jung sent the letter requesting a payoff amount for the Mandolin superpriority lien to NAS in March 2012. NAS did not provide payoff ledgers at that time or otherwise respond to the letter. Moreover, Yergensen testified that NAS's policy would be to have its receptionist reject any check for less than the full lien amount if it was accompanied by a condition. Jung and Susan Moses, custodian of records and paralegal for NAS, both testified to the fact that NAS systematically rejected checks if it was for less than the entirety of the lien amount.

Following the bench trial, the district court ruled in favor of the Bank and held that the Miles Bauer letter, sent on behalf of the Bank, redeemed the superpriority portion of the lien as a matter of law. In the alternative, the district court held "that payment of the superpriority would have been futile because that payment would have been rejected." To reach this result, the district court considered the trial testimony and evidence and observed "that Miles Bauer was ready, willing and able to pay the superpriority portion of the lien as well as additional fees and costs." The district court further ob-

served that NAS understood that Miles Bauer required the payoff ledger to issue a check for its obligation, but that NAS nevertheless "had an ordinary course of business of rejecting payments from Miles Bauer if the payments were only for the superpriority component." Relatedly, the district court rejected NAS's position that the FDCPA prevented NAS from responding to Miles Bauer's request for payoff information and concluded that "[i]t was just an excuse to be able to go forward with the foreclosure sale." Thus, the district court determined that Mandolin foreclosed on only the subpriority portion of its lien and that Perla Trust purchased the property subject to the Bank's first deed of trust.[1]

Thereafter, Perla Trust appealed.[2] We review the district court's factual findings for substantial evidence and its legal conclusions de novo. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

DISCUSSION

Perla Trust maintains that the district court erred by finding that Miles Bauer's letter offering to pay the yet-to-be-determined superpriority portion of the HOA lien constituted valid tender, preserving the Bank's first deed of trust. As an initial matter, we agree with Perla Trust, as it is the generally accepted rule that a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender. *See Southfork Invs. Grp., Inc. v. Williams*, 706 So. 2d 75, 79 (Fla. Dist. Ct. App. 1998) ("To make an effective tender, the debtor must actually attempt to pay the sums due; mere offers to pay, or declarations that the debtor is willing to pay, are not enough."); *Cochran v. Griffith Energy Serv., Inc.*, 993 A.2d 153, 166 (Md. Ct. Spec. App. 2010) ("A tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation *would be immediately satisfied*." (emphasis added) (internal quotation marks omitted)); *Graff v. Burnett*, 414 N.W.2d 271, 276

[1]The district court also considered whether principles of equity required setting aside the foreclosure sale. The district court did not grant the Bank equitable relief; instead, it determined that Perla Trust took title to the property subject to the Bank's deed of trust because the superpriority tender, or rather the excuse thereof, cured the default as to that portion of Mandolin's lien by operation of law. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612-13, 427 P.3d 113, 121 (2018) (recognizing that the legal effect of a superpriority tender is that the HOA sale purchaser takes title subject to the first deed of trust). Because we conclude that the Bank's obligation to tender was excused, we do not address the Bank's alternative argument that the sale should be set aside on equitable grounds.

[2]This case was originally routed to the court of appeals, which reversed and remanded. The Bank then petitioned for review of the decision under NRAP 40B(a), which we granted.

(Neb. 1987) ("To determine whether a proper tender of payment has been made, we have stated that a tender is more than a mere offer to pay. A tender of payment is an offer to perform, coupled with the present ability of immediate performance, which, were it not for the refusal of cooperation by the party to whom tender is made, *would immediately satisfy* the condition or obligation for which the tender is made." (emphasis added)); *McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co.*, 320 P.3d 579, 585 (Or. Ct. App. 2014) ("In order to serve the same function as the production of money[,] . . . a written offer of payment must communicate a present offer of timely payment. The prospect . . . that payment might occur at some point in the future is not sufficient for a court to conclude that there has been a tender . . . ." (citation and internal quotation marks omitted)); *cf.* 74 Am. Jur. 2d *Tender* § 1 (2012) (recognizing the general rule that an offer to pay without actual payment is not a valid tender); 86 C.J.S. *Tender* § 24 (2017) (same). Accordingly, we conclude that the district court erred in determining that Miles Bauer's offer to pay the yet-to-be-determined superpriority constituted a valid tender.

The Bank contends that should we conclude Miles Bauer's letter was insufficient to constitute a valid tender, the Bank's obligation to tender the superpriority amount was nevertheless excused because NAS would have rejected the check. Because NAS had a known policy of rejecting any payment for less than the full lien amount, the district court determined that the Bank's obligation to tender the superpriority portion of the lien was excused, as it would have been rejected. We agree with the Bank and the district court, as this is a generally accepted exception to the above-mentioned rule. *See Schmitt v. Sapp*, 223 P.2d 403, 406-07 (Ariz. 1950) ("An actual tender is unnecessary where it is apparent the other party will not accept it. The law does not require one to do a vain and futile thing." (citation omitted)); *Mark Turner Props., Inc. v. Evans*, 554 S.E.2d 492, 495 (Ga. 2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct*, proclaims that, if tender of the amount due is made, an acceptance of it will be refused." (alteration and internal quotation marks omitted)); *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 350 N.W.2d 1, 5 (Neb. 1984) ("A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made." (internal quotation marks omitted)); *Alfrey v. Richardson*, 231 P.2d 363, 368 (Okla. 1951) (stating that tender was waived where it was clear that "if a strict legal tender had been made, defendant would not have accepted the money"); *Shields v. Harris*, 934 P.2d 653, 655 (Utah Ct. App. 1997) ("If a demand for a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with the tender requirement." (internal quotation marks omitted)); *see also* 74 Am. Jur. 2d *Tender* § 4 (2012) ("A ten-

der of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted."); 86 C.J.S. *Tender* § 5 (2017) (same).

Because the evidence at trial established that at the time relevant to this action, it was NAS's business policy to have its receptionist reject any check for less than the full lien amount, and because the evidence further established that Miles Bauer and the Bank had knowledge of this business practice, we conclude that substantial evidence supports the district court's finding that even if Miles Bauer had tendered a check for the superpriority amount, it would have been rejected.[3] *See Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008) ("Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion."). At trial, Yergensen, Jung, and Moses all provided testimony that NAS had a known business practice to systematically reject any check tendered for less than the full lien amount.[4] *See Jenkins v. Equip. Ctr., Inc.*, 869 P.2d 1000, 1003 (Utah Ct. App. 1994) (explaining that tender is excused "where the lienor claims a larger sum than he or she is entitled to collect"). As a result, the Bank was excused from making a formal tender in this instance because, pursuant to NAS's known policy, even if the Bank had tendered a check for the superpriority portion of the lien, NAS would have rejected it. Thus, we conclude that the district court properly determined that the Bank preserved its interest in the property such that Perla Trust purchased the property subject to the Bank's first deed of trust.

Accordingly, we affirm the district court's judgment.

Pickering, C.J., and Gibbons, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

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[3]In this case, we do not reach the question of whether tender is excused when a person entitled to payment of HOA assessments fails to provide statutorily required notice of the amount due under NRS 116.31162(1)(b)(2)(I) (detailing that the HOA must provide "[t]he amount of the association's lien that is prior to the first security interest on the unit pursuant to subsection 3 of NRS 116.3116 as of the date of the notice" in a notice of default and election to sell and record the same with the county recorder).

[4]On appeal, Perla Trust argues that Miles Bauer's letter was not an unconditional offer because it required NAS to submit to Miles Bauer's reading of NRS 116.3116 (2012) to calculate the superpriority portion of the lien. We previously rejected a similar argument in favor of the plain language of NRS 116.3116(2) (2012), and we likewise reject Perla Trust's characterization of Miles Bauer's letter as impermissibly conditional. *See Bank of Am.*, 134 Nev. at 606, 427 P.3d at 117 (explaining that "[a] plain reading of [NRS 116.3116(2) (2012)] indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments").

ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; AND ERIC STICKELS, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, RESPONDENTS, AND COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RICK RETENTION GROUP, INC., REAL PARTY IN INTEREST.

No. 78301

February 27, 2020 458 P.3d 336

Original petition for a writ of mandamus challenging the denial of a motion for judgment on the pleadings in a business matter.

Petition granted.

[Rehearing denied May 22, 2020]

Holland & Hart LLP and *J. Stephen Peek, Ryan A. Semerad*, and *Jessica E. Whelan*, Las Vegas; *Lipson Neilson P.C.* and *Joseph P. Garin* and *Angela T. Nakamura Ochoa*, Las Vegas, for Petitioners.

Fennemore Craig, P.C., and *James L. Wadhams* and *Christopher H. Byrd*, Las Vegas; *Kolesar & Leatham* and *Brenoch R. Wirthlin*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HARDESTY, J.:

This case requires us to consider whether a corporate director or officer may be held individually liable for breaching his or her fiduciary duty of care through gross negligence. Statutorily, a director or officer is not individually liable for harm resulting from official actions unless the director or officer engages in "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(a)-(b). In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), however, we stated that "[w]ith regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers." As a result, some courts, including the district court here, have allowed claims against individual directors and officers to proceed based only on allegations of gross negligence.

We now clarify that, based on the plain text of the statute, NRS 78.138(7) applies to all claims of individual liability against directors and officers, precluding the imposition of liability for grossly negligent breaches of fiduciary duties. We further conclude that the gross negligence-based allegations in the operative complaint below fail to state an actionable claim under NRS 78.138.

FACTS AND PROCEDURAL HISTORY

Petitioners (collectively, the Directors) formerly served as directors of Lewis & Clark LTC Risk Retention Group, Inc. Lewis & Clark operated as a Nevada risk retention group that insured long-term care facilities and home health providers across the country, but in 2012, the Nevada Division of Insurance filed a receivership action related to Lewis & Clark, and the district court entered a liquidation order. In the liquidation order, the court appointed real party in interest, the Commissioner of Insurance for the State of Nevada, as receiver. In addition, the liquidation order granted the receiver the power to "[p]rosecute any action which may exist on behalf of the policyholders, members, or shareholders of [Lewis & Clark] against any officer of [Lewis & Clark] or any other person."

As receiver of Lewis & Clark, the Commissioner filed the operative complaint against the Directors, amongst others, alleging claims of gross negligence and deepening insolvency. As to the gross negligence claim, the Commissioner claimed that the Directors "fail[ed] to properly inform [themselves] of [the] status of [Lewis & Clark]" and take appropriate corrective action. Regarding the deepening insolvency claim, the Commissioner alleged that the Directors' "inaction severely prolonged the insurance actions of [Lewis & Clark] that led to its initial insolvency and that then also increased its insolvency." The Directors sought to dismiss the claims pursuant to NRCP 12(b)(5), maintaining that the Commissioner failed to state a viable claim. The district court denied the Directors' motion.

Thereafter, the Directors filed an NRCP 12(c) motion for judgment on the pleadings. The Directors argued that, even accepting the Commissioner's allegations as true, gross negligence cannot support a claim for personal liability against the Directors pursuant to NRS 78.138. The district court denied the Directors' motion, relying on *Shoen*.

Following the district court's denial of the Directors' motion for judgment on the pleadings, the Directors filed a motion for reconsideration. The Directors argued that the district court's order improperly relied on *Shoen* and ignored the clear standard required to hold directors individually liable under NRS 78.138(7). The district court denied the Directors' motion for reconsideration and found that the Commissioner stated a claim for breach of the fiduciary duty of care

pursuant to *Shoen*, as well as a claim for deepening insolvency.[1] In doing so, the district court announced and applied a bifurcated approach to evaluate allegations for claims seeking to hold directors and officers individually liable, requiring a showing of at least gross negligence to state a duty-of-care claim or "intentional misconduct, fraud, or a knowing violation of the law to state a duty-of-loyalty claim."

The Directors now petition this court for a writ of mandamus directing the district court to apply the plain text of NRS 78.138 and to grant the motion for judgment on the pleadings.

DISCUSSION

We elect to consider the petition for a writ of mandamus

Because a writ petition seeks extraordinary relief, the consideration of the petition is within our sole discretion. *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 8, 408 P.3d 566, 569 (2018). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "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); *see also* NRS 34.160.

We generally decline to entertain writ petitions challenging the denial of a motion to dismiss. *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). This rule applies equally to orders denying a motion for judgment on the pleadings, as we consider them under the same standard as motions to dismiss. *See, e.g.*, *Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 993-94, 340 P.3d 1264, 1266-67 (2014) (reviewing an order granting an NRCP 12(c) motion under the same standard as an order dismissing a complaint pursuant to NRCP 12(b)(5)). However, we may nevertheless review an order denying a motion to dismiss, and by extension an order denying a motion for judgment on the pleadings, when: "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Anzalone*, 118 Nev. at 147, 42 P.3d at 238.

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[1]Because the Directors do not address the deepening insolvency claim in their petition, and because the district court found that the deepening insolvency claim could only exist as a collateral cause of action, we decline to address the validity of the claim in Nevada.

Here, the district court denied the Directors' motion for reconsideration after determining that our dicta from *Shoen*, and federal cases citing to the same, controlled in this case. The district court found that the Commissioner stated a cause of action for the breach of the fiduciary duty of care. The Directors maintain that the district court misinterpreted and misapplied *Shoen* and argue that the plain language of NRS 78.138 governs this case. Because federal courts in Nevada, as well as the district court in the case at bar, have relied on *Shoen* to imply a bifurcated tract for establishing breaches of the fiduciary duties of care and loyalty—in contravention of NRS 78.138's plain language—the Directors argue that this writ petition presents a purely legal question in need of clarification. We agree.

We are concerned that our language in *Shoen* has misled lower courts about the law surrounding individual liability for directors and officers in Nevada, and that this confusion risks imposing inconsistent results for different litigants. To clarify the governing law in actions against directors or officers for breaches of fiduciary duties, and in the interest of judicial economy, we exercise our discretion to consider this petition for a writ of mandamus.

NRS 78.138 provides the sole mechanism to hold directors and officers individually liable for damages in Nevada

This court reviews questions of statutory construction de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (alteration in original) (internal quotation marks omitted).

NRS 78.138(3) (2017) provides that "[a] director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer *except under circumstances described in subsection 7*."[2] (Emphasis added.) NRS 78.138(7) requires a two-step analysis to impose individual liability on a director or officer. First, the presumptions of the business judgment rule, codified in NRS 78.138, must be rebutted. NRS 78.138(7)(a); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 375, 399 P.3d 334, 342 (2017) ("Nevada's business judgment rule is codified at NRS 78.138 . . . ."). The business judgment rule states that "directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Second, the "director's or officer's act or failure to act" must consti-

[2]Minor revisions to this statute, not relevant here, were made to this statute in 2019. *See* 2019 Nev. Stat., ch. 19, § 3, at 90-91.

tute "a breach of his or her *fiduciary duties*," and that breach must further involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2) (emphasis added). In Nevada, directors and officers owe the fiduciary duties of care and loyalty to the corporation. *See Shoen*, 122 Nev. at 632, 137 P.3d at 1178. As is clear from the plain language of NRS 78.138, the statute provides for the sole circumstance under which a director or officer may be held individually liable for damages stemming from the director's or officer's conduct in an official capacity.

In denying the Directors' motion, the district court relied on our decision in *Shoen*, in which we announced the operative test governing pleading demand futility in shareholder derivative actions. *Id.* at 626-27, 137 P.3d at 1174-75. There, we looked to Delaware law and adopted the test employed by the Supreme Court of Delaware. *Id.* at 641, 137 P.3d at 1184; *see Aronson v. Lewis*, 473 A.2d 805, 814-15 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000). In dicta, we examined the difficulty of establishing interestedness through potential liability and opined that,

> [w]ith regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. And directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law.

Shoen, 122 Nev. at 640, 137 P.3d at 1184 (footnote omitted).

Relying on this dicta, the district court here found that a "director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim, or involve 'intentional misconduct, fraud, or a knowing violation of the law,' to state a duty-of-loyalty claim." (Quoting *Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. 2015) (citing *Shoen*, 122 Nev. at 640, 137 P.3d at 1184).) Pursuant to this standard, the district court reasoned that the Commissioner stated a cause of action for a breach of the fiduciary duty of care. This characterization of *Shoen*, however, conflicts with the plain language of NRS 78.138.

We therefore take this opportunity to clarify *Shoen*. We reject the district court's determination that *Shoen* provided a separate breach-of-the-duty-of-care claim apart from the strictures of NRS 78.138. Thus, we disavow *Shoen* to the extent it implied a bifurcated approach to duty-of-care and duty-of-loyalty claims, and we give effect to the plain meaning of NRS 78.138. Accordingly, we conclude that NRS 78.138(7) provides the sole avenue to hold direc-

tors and officers individually liable for damages arising from official conduct.[3]

The Commissioner failed to plead a cause of action pursuant to NRS 78.138 because allegations of gross negligence do not state a breach of the fiduciary duty of care involving a "knowing violation of law"

Having concluded that the plain language of NRS 78.138(7) governs the case at bar, we next turn to the allegations set forth in the complaint. As NRS 78.138(7) makes clear, in order to state a claim against the Directors individually, the Commissioner must allege facts that when taken as true (1) rebut the business judgment rule, and (2) constitute a breach of a fiduciary duty involving "intentional misconduct, fraud or a knowing violation of law." *See Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (detailing that "this court accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party" when reviewing a motion for judgment on the pleadings); *see also* NRCP 12(c). The parties do not dispute that the pertinent question regarding the second prong is whether allegations of gross negligence constitute a viable claim for breach of the fiduciary duty of care involving a "knowing violation of law." NRS 78.138(7)(b). Given the conjunctive nature of NRS 78.138(7), we assume, without deciding, that the allegations set forth in the complaint rebut the business judgment rule to reach the question before us.[4]

The Commissioner contends that the allegations of gross negligence both rebut the business judgment rule and constitute a breach of the fiduciary duty of care involving a knowing violation of law. The Directors respond that the Commissioner's interpretation of NRS 78.138(7) ignores the plain language of the statute and collapses the requirements of the exculpatory provision into a single

[3]We recognize that federal district courts in Nevada have similarly construed the language in *Shoen* as setting forth a bifurcated approach to duty-of-care and duty-of-loyalty claims. However, in those instances, the error did not impact the outcome of the case because either the operative federal statute explicitly provided for personal liability for gross negligence, *see FDIC v. Jacobs*, No. 3:13-cv-00084-RCJ-VPC, 2014 WL 5822873, at *2, *4 (D. Nev. 2014); *FDIC v. Johnson*, No. 2:12-CV-209-KJD-PAL, 2014 WL 5324057, at *3 (D. Nev. 2014); *FDIC v. Jones*, No. 2:13-cv-168-JAD-GWF, 2014 WL 4699511, at *9 (D. Nev. 2014); *FDIC v. Delaney*, No. 2:13-CV-924-JCM (VCF), 2014 WL 3002005, at *2 (D. Nev. 2014), or because the case concerned demand futility, like in *Shoen*, and the court reproduced the *Shoen* dicta only to demonstrate the difficulty of establishing interestedness through potential liability, *see Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. 2015).

[4]Because the petition concerns NRS 78.138(7)'s second prong, and because that analysis proves dispositive, we make no decision concerning the business judgment rule.

step. Specifically, the Directors maintain that "[k]nowledge necessarily requires a level of *scienter* appreciably higher than that of gross negligence." To support this, the Directors look to *Black's Law Dictionary* (11th ed. 2019) to contrast the legal definitions of "gross negligence"—"reckless disregard of a legal duty"—and "knowledge"—"[a]n awareness or understanding."

This court has not yet defined the meaning of "a knowing violation of law" in the context of Nevada's exculpatory provision for corporate directors and officers. However, the Tenth Circuit Court of Appeals opined on the meaning of a "knowing violation of law" and "intentional misconduct" under NRS 78.138(7)(b). *See In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1232 (10th Cir. 2016). The *ZAGG* court held that the shareholders of a Nevada corporation must assert allegations in their complaint that "establish whether, in light of the Nevada exculpatory statute, the [d]irector [d]efendants faced a substantial risk of liability in [a] derivative action." *Id*. To answer this question, the court considered what NRS 78.138(7)(b)'s terms "knowing violation" and "intentional misconduct" specifically require. *Id*. The court noted that in certain contexts "knowingly" requires only "factual knowledge as distinguished from knowledge of the law." *Id*. (quoting *Bryan v. United States*, 524 U.S. 184, 192 (1998)). However, the *ZAGG* court also considered that courts have "interpreted knowingly and intentionally more expansively, to require knowledge of wrongfulness." *Id*. at 1232-33 (emphasis omitted) (referencing cases from the United States Supreme Court, Eleventh Circuit, Ninth Circuit, Idaho, Indiana, and Massachusetts). The *ZAGG* court ultimately concluded that an expansive definition of "intentional" and "knowing" makes the most sense in the context of an exculpatory statute limiting the liability of corporate directors and officers. *Id*. at 1233. On this point, the court explained that,

> [u]nder the narrower interpretations of *intentional* and *knowing* that do not require knowledge of wrongfulness, a director would not be protected so long as the director knew what his or her actions were—such as signing a document with knowledge of its contents. But that state of mind would be present for virtually any conduct that could lead to the director's liability to the corporation or its stockholders or creditors. The exculpatory statute would be an empty gesture. To give the statute a realistic function, it must protect more than just directors (if any) who did not know what their actions were; it should protect directors who knew what they did but not that it was wrong.

Id.

We agree with and adopt the Tenth Circuit's definition of "intentional" and "knowing," as enunciated in *ZAGG*, for determin-

ing whether a "director's or officer's act or failure to act constituted a breach of his or her fiduciary duties . . . involv[ing] intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). Accordingly, we conclude that the claimant must establish that the director or officer had knowledge that the alleged conduct was wrongful in order to show a "knowing violation of law" or "intentional misconduct" pursuant to NRS 78.138(7)(b).

Considering whether the Commissioner here sufficiently pleaded that the Directors knew their conduct to be wrongful, we conclude that the Commissioner did not. Instead, the complaint focuses solely on gross negligence and alleges facts that purport to rebut the business judgment rule.[5] Because knowledge of wrongdoing, as required by NRS 78.138(7)(b), is an appreciably higher standard than gross negligence—defined by *Black's Law Dictionary* (11th ed. 2019) as "reckless disregard of a legal duty"—we conclude that the Directors are entitled to judgment as a matter of law and the district court erred in denying the Directors' motion for judgment on the pleadings. *See Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004) (explaining that "judgment on the pleadings under NRCP 12(c) is appropriate only when material facts are not in dispute and the movant is entitled to judgment as a matter of law").

CONCLUSION

As the Directors are entitled to judgment as a matter of law on the Commissioner's complaint, we grant the Directors' petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the motion for judgment on the pleadings and enter a new order granting that motion instead. We leave it to the discretion of the trial court whether to grant the Commissioner leave to amend the complaint.

Pickering, C.J., and Gibbons, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

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[5]For example, paragraph 104 of the complaint alleges, "[o]n information and belief, at this time the Board knew that reliance on information presented to it by, or at the direction of, Uni-Ter and U.S. RE could not be relied on . . . ." Paragraph 105 goes on to allege, "[o]n information and belief, despite this knowledge of the Board regarding the wholly inadequate and inaccurate information provided by Uni-Ter, the Board's *gross negligence* is manifest in the fact that, the Board failed to exercise even a *slight degree of care* . . . ." (Emphasis added.)

9352 CRANESBILL TRUST; TEAL PETALS ST. TRUST; AND IYAD HADDAD, APPELLANTS, *v.* WELLS FARGO BANK, N.A., RESPONDENT.

No. 76017

March 5, 2020 459 P.3d 227

Appeal from a district court summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Affirmed in part, vacated in part, and remanded.

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

Snell & Wilmer, LLP, and *Kelly H. Dove*, Las Vegas; *Snell & Wilmer, LLP*, and *Andrew M. Jacobs*, Tucson, Arizona, for Respondent.

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

OPINION

By the Court, PICKERING, C.J.:

This is a homeowners' association (HOA) lien foreclosure dispute between the holder of the first deed of trust on the property and the assignee of the buyer at the lien foreclosure sale. After receiving the HOA's notice of delinquency, the homeowner made several partial payments to the HOA. The homeowner did not specify how she wanted the HOA to apply the payments—whether to the superpriority or subpriority portion of the lien. If applied 100% to the superpriority portion, the homeowner's payments were enough to cure the default as to that portion of the lien, rendering the sale void as to the holder of the first deed of trust.

The case came before the district court on the parties' cross-motions for summary judgment. The district court held that, because the homeowner's payments exceeded the defaulted superpriority lien amount, that default was cured such that the foreclosure sale did not extinguish the first deed of trust. In so holding, the district court rejected the buyer's assignee's argument that only the first deed of trust holder, not the homeowner, can cure a superpriority lien default. While we agree that a homeowner can cure a superpriority default, the parties did not develop and the district court therefore did not decide whether the homeowner's partial payments in fact cured

the superpriority lien default. Proper allocation of partial payments on an overdue debt requires examination of the actions and express or presumed intent of the debtor and creditor and an assessment of the competing equities involved. While we affirm the district court's decision denying summary judgment to the buyer's assignee on the record presented, we vacate its grant of summary judgment to the holder of the first deed of trust and remand for further proceedings consistent with this opinion on the proper allocation of the partial payments the homeowner made.

I.

The former owner of 9352 Cranesbill Court (the Property) fell behind on her payments to the governing HOA for community assessments. The HOA initiated foreclosure proceedings, recording a delinquent assessment lien, a notice of default, and a notice of the foreclosure sale. The superpriority portion of the HOA's lien totaled $534, representing three months of assessments at $56 per month and six months of assessments at $61 per month. *Cf. Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) (holding that, under NRS 116.3116(2) (2012), "the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid [common expense] assessments").[1] After the HOA filed its notice of delinquent assessments and before the foreclosure sale, the homeowner made payments to the HOA totaling $798.50. Despite these payments, the amount owed at the time of the foreclosure sale had grown to $3,932.58. 9352 Cranesbill Trust bought the Property at the foreclosure sale for $4,900, and then deeded it to Teal Petals St. Trust.

Litigation ensued between the holder of the first deed of trust, respondent Wells Fargo Bank, N.A., and Teal Petals and its assignors (collectively, Teal Petals or appellants), contesting whether the sale extinguished the first deed of trust on the Property. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that foreclosure of the superpriority portion of an HOA's lien extinguishes a first deed of trust). The district court granted summary judgment to Wells Fargo and denied summary judgment to Teal Petals. The district court rejected Teal Petals' argument that only the holder of the first deed of trust, not the homeowner, could pay off a defaulted superpriority lien. The district court further held that, because the homeowner's payments exceeded the superpriority lien amount, the default as to that portion of the lien was cured and the foreclosure sale did not extinguish Wells Fargo's first deed of trust. *Cf. Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121

[1]All references to NRS Chapter 116 are to the pre-2015 amendments.

(recognizing that payment of the defaulted superpriority portion of an HOA's lien cures the default as to that portion of the lien such that an ensuing foreclosure sale does not extinguish the first deed of trust). This appeal followed.

II.

Teal Petals argues that the homeowner's payments cannot cure the default on the superpriority portion of the HOA's lien and, because the superpriority portion of the lien was in default when the foreclosure sale occurred, the sale extinguished Wells Fargo's first deed of trust on the Property. Teal Petals further argues that even if a homeowner's payments can cure a superpriority default, the default was not so cured in this case because there is no evidence that the homeowner or the HOA allocated the payments to the superpriority portion of the lien. Wells Fargo responds that the district court correctly determined that a homeowner, equally with the first deed of trust holder, can cure a superpriority lien default.

We review the grant or denial of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party." *Butler v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007).

A.

The district court determined that NRS Chapter 116 "does not limit who can satisfy the [default on] the superpriority portion of the lien," such that a homeowner's payments can cure a superpriority default. Appellants assert that this is an error of law because the superpriority lien statute, NRS 116.3116(2), requires the first deed of trust holder to cure any superpriority default. Wells Fargo responds that the district court correctly found that the statute is not so limited. We agree with the district court and Wells Fargo.

Appellants rely on comments and reports from the Joint Editorial Board for Uniform Real Property Acts to argue that only the first deed of trust holder can cure a superpriority default. The Board drafted the uniform act that Nevada based its HOA foreclosure statutes on, *see SFR*, 130 Nev. at 744, 334 P.3d at 410, and has commented that the HOA foreclosure scheme was a "specially devised mechanism," *id*., to "strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious neces-

sity for protecting the priority of the security interests of lenders," Unif. Common Interest Ownership Act (1982) (UCIOA) § 3-116 cmt. 1, 7 pt. 2 U.L.A. 124;[2] *see also SFR*, 130 Nev. at 748-49, 334 P.3d at 412-13 (quoting the UCIOA commentary). The Board recognized that, as a practical matter, the first deed of trust holder would "most likely pay the [unpaid] assessments demanded by the association rather than have the association foreclose on the unit." UCIOA § 3-116 cmt. 1; *see* Report of the Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act* 4 (2013). While this comment demonstrates the Board's *expectation* that the first deed of trust holder would cure any superpriority default, appellants provide no binding legal authority or statutory language that *requires* the first deed of trust holder to do so or *prohibits* a homeowner from curing what is, after all, the homeowner's HOA lien default. Equally with the first deed of trust holder, the homeowner has a significant incentive to cure the superpriority default: Even if the homeowner lacks the means to cure the entire default, she can preserve the deed of trust by curing the superpriority default, meaning the property can still satisfy the debt the homeowner owes the holder of the first deed of trust.

The statutes codified in NRS Chapter 116 do not support that only the first deed of trust holder, not the homeowner, can cure a superpriority lien default. *See, e.g.*, NRS 116.3116 (addressing the creation, perfection, priority, and extinguishing/curing of HOA liens); NRS 116.31163-.31168 (providing the requirements to foreclose on HOA liens). In fact, NRS Chapter 116 *obligates* the homeowner to pay her HOA association fees or assessments. *See* NRS 116.3102(1)(b) (permitting HOAs to collect assessments for common area expenses from homeowners); NRS 116.3116(1) (giving the HOA a lien for any unpaid assessments). As the person primarily obligated to pay the HOA fees, the homeowner has the legal ability to pay the superpriority portion of the lien, directly or through payments made to and by the first deed of trust holder. *See* NRS 116.3116(3) (2013) (allowing a first deed of trust holder to pay HOA assessments on behalf of the homeowner). The reference in the 2015 amendment to NRS 116.31164 to "the holder of the security interest" curing a superpriority default does not change this commonsense reading of the statutory scheme. While the first deed of trust holder can pay off a superpriority lien default, so, too, can the homeowner. *See* 2015 Nev. Stat., ch. 266, § 5, at 1340-41.

Teal Petals' contrary argument fails to take into account the contractual relationship between the homeowner and the first deed of

[2]Because NRS Chapter 116 is based on the 1982 version of the UCIOA, we rely on the comments to that version to resolve the issues presented herein.

trust holder. This contract requires the homeowner to remain current on any assessment that, if left unpaid, would cause a lien to be placed on the property secured by the deed of trust: "Borrower shall promptly discharge any lien which has priority over [the first deed of trust] . . . ." The district court correctly rejected Teal Petals' contention that the homeowner could not cure the superpriority lien default.

B.

Appellants argue that even if a homeowner can cure a superpriority default, the homeowner's payments in this case did not do so because the payments were less than the entire delinquent lien amount. They further argue that Wells Fargo produced no evidence that the HOA applied the homeowner's payments to the superpriority portion of the lien. Wells Fargo asserts that the district court correctly determined that, because the amount of the payments exceeded the amount of the superpriority default, the payments cured the superpriority default. These arguments implicate unresolved issues of law and fact that require us to vacate and remand for further development in the district court.

Although not cited by the parties, *Able Electric, Inc. v. Kaufman*, 104 Nev. 29, 752 P.2d 218 (1988), addresses some of the rules that courts follow in deciding how to allocate partial payments on overdue debts. In general, "[w]hen a debtor partially satisfies a judgment, that debtor has the right to make an appropriation of such payment to the particular obligations outstanding." *Id.* at 30-31, 32, 752 P.2d at 219, 220. The debtor must direct that appropriation "at the time the payment is made." *Id.* at 32, 752 P.2d at 220. If the debtor does not direct how to apply the payment to her account, the creditor may determine how to allocate the payment. *Id.* at 32, 752 P.2d at 220. But, in that circumstance, once the creditor applies the partial payment, "the creditor may not thereafter change the application to another debt." *Id.* Furthermore, "[t]he creditor's right to appropriate the payments received terminates at the time a controversy regarding such application arises." *Id.*

If neither the debtor nor the creditor makes a specific application of the payment, then it falls to the court to determine how to apply the payment. *Id.* "In directing the application of a payment, the district court should be guided by the basic principles of justice and equity so that a fair result can be achieved." *Id.*; *see also* 70 C.J.S. Payment § 53 (2019) (recognizing a court's ability to allocate a payment and suggesting that the court should make the allocation "in view of all of the circumstances, as is most in accord with justice and equity and will best protect and maintain the rights of both the debtor and creditor"). In applying this rule in *Able Elec-*

tric, this court determined that "equity and justice [would] be best served by a disposition that is most favorable to the creditor at the time the appropriation is made," based on the assumption that the debtor desired to pay all of the debts making up the judgment lien in that case.[3] 104 Nev. at 33, 752 P.2d at 220. Other jurisdictions have stated a legal preference for paying the earliest matured debts. *See* 70 C.J.S. Payment § 54-55 (2019) (stating that the preference should resolve the matter unless "the [creditor and debtor] have agreed to a different application, or where a different application is required on equitable grounds, or where a statute so requires") (footnote omitted; citing supporting authority); *see also* 5 Miller & Starr, Cal. Real Estate § 13.90 (4th ed. 2019) (noting that, under the California Civil Code, courts apply unallocated payments to "the obligation earliest in date of maturity" after interest and principal currently due). The resolution of this issue may vary depending on whether the district court considers the unpaid HOA assessments and other costs the homeowner is required to pay to the HOA, such as the costs of foreclosure, to be on a running account, and therefore a single debt, or whether it considers there to be multiple accounts.[4] *Compare* 60 Am. Jur. 2d *Payment* § 72 (2019) (addressing a single running account), *with Able Elec.*, 104 Nev. at 33, 752 P.2d at 220 (addressing multiple accounts).

These issues deserve full development and briefing in district court. *See Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 216, 163 P.3d 405, 407 (2007) (treating issues regarding intent as questions of fact); *see also Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). While we affirm the district court's legal determination that the homeowner, equally with the first deed of trust holder, can cure a superpriority lien default, we vacate and remand for the parties to develop and the district court to determine the proper allocation of the homeowner's payments under the principles and authorities just discussed.

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[3]That assumption may not apply in NRS Chapter 116 payment allocation cases, since it seems likely that a homeowner would prefer to cure the default on the superpriority lien before satisfying any other debts owed to an HOA to avoid a superpriority lien foreclosure and the consequent loss of security to satisfy the obligation secured by the first deed of trust.

[4]If considered multiple accounts, and "neither the debtor nor the creditor has exercised his power with respect to the application of a payment as between two or more matured debts, the payment is applied to debts to which the creditor could have applied it with just regard to the interest of third persons, the debtor and the creditor." Restatement (Second) of Contracts § 260(1) (2019). In that case, a payment is generally allocated first "to a debt that the debtor is under a duty to a third person to pay immediately." *Id.* at § 260(2)(a).

C.

Teal Petals' remaining arguments fail. Assuming for the sake of argument that Teal Petals qualifies as a bona fide purchaser for value, that status would not override the void sale that results when a foreclosure sale proceeds in the face of a cured default. *See Bank of Am.*, 134 Nev. at 612, 427 P.3d at 121 (holding that a party's status as a bona fide purchaser "is irrelevant when a defect in the foreclosure proceeding renders the sale void," which is the case when the sale proceeds as to the first deed of trust despite the superpriority default having been cured). We also decline to address Wells Fargo's arguments that the sale should be set aside on equitable grounds because the sale was commercially unreasonable. Although the district court orally stated at the summary judgment hearing that it "[did not] find that the sale was commercially unreasonable," the order includes no such language. A court's oral pronouncement is "ineffective for any purpose," *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987), and this court will not address issues that the district court did not directly resolve, *see Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 592 n.6, 262 P.3d 699, 704 n.6 (2011) (declining to address a legal issue that the district court did not reach).

III.

The homeowner has the ability to cure a default as to the superpriority portion of an HOA lien. Allocating partial payments by a homeowner to her HOA depends on the express or implied intent and actions of the homeowner and the HOA and, if indeterminate, an assessment of the competing equities involved. We therefore affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

Parraguirre and Cadish, JJ., concur.

JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM, APPELLANTS, *v.* STEVE W. SANSON; AND VETERANS IN POLITICS INTERNATIONAL, INC., RESPONDENTS.

No. 73838

JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM, APPELLANTS, *v.* LOUIS C. SCHNEIDER; AND LAW OFFICES OF LOUIS C. SCHNEIDER, LLC, RESPONDENTS.

No. 75834

March 5, 2020 458 P.3d 1062

Consolidated appeals from district court orders granting special motions to dismiss in a tort action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied April 24, 2020]

[En banc reconsideration denied September 14, 2020]

Willick Law Group and *Marshal S. Willick*, Las Vegas, for Appellants.

McLetchie Law and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Respondents Steve W. Sanson and Veterans in Politics International, Inc.

Joseph W. Houston, Las Vegas, for Respondents Louis C. Schneider and Law Offices of Louis C. Schneider, LLC.

Before the Supreme Court, GIBBONS, HARDESTY and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

Nevada's anti-SLAPP statutes allow defendants to file a special motion to dismiss lawsuits initiated to chill free speech. In this appeal, we consider whether statements sent to a listserv of email subscribers criticizing an attorney's courtroom conduct and practices are protected as good-faith communications under Nevada's anti-SLAPP statutes. At issue are respondent Steve Sanson's allegedly defamatory statements regarding appellant Jennifer Abrams' conduct at and following a family court proceeding against opposing counsel, respondent Louis Schneider. We hold that such statements are protected and conclude that Sanson showed by a preponderance of the evidence that his statements were good-faith communications in furtherance of the right to free speech regarding a matter

of public concern, except for his private telephone statements made to nonparty David Schoen. We further conclude that Abrams did not demonstrate with prima facie evidence a probability of prevailing on her claims. Therefore, we affirm in part and reverse in part the district court's orders granting Sanson's and Schneider's special motions to dismiss.

FACTS

Jennifer Abrams and Louis Schneider were opposing counsel in a family law case. Schneider allegedly gave a video of a closed-court hearing in that case to Steve Sanson, president of Veterans in Politics International, Inc. (VIPI). Sanson then published a series of articles on VIPI's website concerning the judiciary and Abrams' courtroom conduct and practices. The articles were also sent to VIPI's email subscribers and published through various social media outlets.

The first article, "Nevada Attorney attacks a Clark County Family Court Judge in Open Court," included the full video of the court hearing that involved an exchange between Abrams and Judge Jennifer L. Elliott. The article also included quotations from the hearing, such as Judge Elliott noting "undue influence" and "[t]here are enough ethical problems[,] don't add to the problem." Sanson stated that "[i]f there is an ethical problem or the law has been broken by an attorney the judge is mandated by law to report it to the Nevada State Bar," that there are "no boundaries in our courtroom," and that Abrams "crosse[d] the line."

The second article, "District Court Judge Bullied by Family Attorney Jennifer Abrams," republished the video of the hearing after Sanson temporarily removed it following an order issued by Judge Elliott. The article reported on what had taken place and stated that Abrams "bullied" Judge Elliott, that her behavior was "disrespectful and obstructionist" as well as "embarrassing," and that obtaining Judge Elliott's order appeared to be an "attempt by Abrams to hide her behavior from the rest of the legal community and the public."

In the third article, "Law Frowns on Nevada Attorney Jennifer Abrams' 'Seal-Happy' Practices," Sanson criticized Abrams' practice of moving to seal records in her cases. Sanson stated that Abrams "appears" to be "seal happy"; seals her cases in contravention to "openness and transparency"; "appears" to have "sealed [cases] to protect her own reputation, rather than to serve a compelling client privacy or safety interest"; engages in "judicial browbeating"; is an "over-zealous, disrespectful lawyer[ ] who obstruct[s] the judicial process"; and has obtained an "overbroad, unsubstantiated order" that is "specifically disallowed by law."

The fourth article, "Lawyers acting badly in a Clark County Family Court," included a link to a similarly titled video on YouTube of

a court hearing involving Abrams. Sanson stated that Abrams was "acting badly."

The fifth article, "Clark County Family Court Judge willfully deceives a young child from the bench and it is on the record," included a link to the "Seal-Happy" article about Abrams as an "unrelated story" of "how Judges and Lawyers seal cases to cover their own bad behaviors." The article in general criticized Judge Rena Hughes for misleading an unrepresented child in family court. Sanson later posted three videos on YouTube depicting the Abrams & Mayo Law Firm's representation of a client in another divorce action.

In a subsequent telephone conversation initiated by David J. Schoen, an employee of the Abrams & Mayo Law Firm, during which Schoen asked Sanson to remove the videos or blur his face, Sanson allegedly made several unflattering comments about Abrams. These statements allegedly included "words to [the] effect" that Abrams was "unethical and a criminal," that Abrams "doesn't follow the law," that Abrams was "breaking the law by sealing her cases," and that Abrams "started this war."

Abrams and the Abrams & Mayo Law Firm (hereinafter collectively, Abrams) subsequently filed a complaint against Sanson and VIPI (hereinafter collectively, Sanson), and against Schneider and the Law Offices of Louis C. Schneider, LLC (hereinafter collectively, Schneider), based on these articles and statements, alleging defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, false light, business disparagement, civil conspiracy, and concert of action.[1]

Sanson and Schneider filed separate anti-SLAPP special motions to dismiss pursuant to NRS 41.660. The district court granted Sanson's special motion to dismiss, finding that he met his initial burden because (1) the statements concerned issues of public concern relating to an attorney or professional's performance of a job or the public's interests in observing justice; (2) the statements were made in a public forum on a publicly accessible website, and republishing them by email did not remove them from a public forum; and (3) the statements were either true or statements of opinion incapable of being false. The district court further found that Abrams failed to meet her burden to provide prima facie evidence of a probability of prevailing on her claims. The district court thereafter granted Schneider's special motion to dismiss, finding that Schneider did not directly make any of the statements at issue but was being held liable for statements made by Sanson, which were protected. Abrams appeals.

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[1]Abrams' RICO, copyright infringement, harassment, and injunctive relief claims were voluntarily dismissed and are not at issue.

DISCUSSION

We review a district court's grant or denial of an anti-SLAPP motion to dismiss de novo. *Coker v. Sassone*, 135 Nev. 8, 15, 432 P.3d 746, 751 (2019). A special motion to dismiss under Nevada's anti-SLAPP statute should be granted where the defendant shows by a preponderance of the evidence that the claim is based upon a good-faith communication in furtherance of the right to petition or the right to free speech regarding a matter of public concern, NRS 41.600(3)(a), and the plaintiff cannot show with "prima facie evidence a probability of prevailing on the claim," NRS 41.660(3)(b). *Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 267 (2017). A good-faith communication in furtherance of the right to free speech regarding a matter of public concern includes any communication that is (1) "made in direct connection with an issue of public interest," (2) "in a place open to the public or in a public forum," and (3) "which is truthful or is made without knowledge of its falsehood." NRS 41.637(4).

Statements about an attorney's courtroom conduct and practice of sealing cases directly connect to an issue of public interest

Abrams first argues that the statements at issue are not protected under Nevada's anti-SLAPP statutes because they are not directly connected with an issue of public interest. We disagree.

In *Shapiro v. Welt*, we adopted California's guiding principles in determining whether an issue is of public interest:

> (1) ''public interest'' does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

133 Nev. at 39-40, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)). We also previously noted that public interest is "broadly" defined. *Coker*, 135 Nev. at 14, 432 P.3d at 751. Applying these principles, we hold that the statements at issue directly connect to an issue of public interest.

Sanson's statements depict and criticize Abrams' behavior in court and towards Judge Elliott, which directly connects to the public's interest in an attorney's courtroom conduct. The public has an interest in an attorney's courtroom conduct that is not mere curiosity, as it serves as a warning to both potential and current clients looking to hire or retain the lawyer. *See, e.g.*, *Choyce v. SF Bay Area Indep. Media Ctr.*, No. 13-CV-01842-JST, 2013 WL 6234628, at *8 (N.D. Cal. Dec. 2, 2013) (finding that statements that an attorney had embezzled funds from clients would concern potential clients for reasons "beyond mere curiosity"); *Piping Rock*, 946 F. Supp. 2d at 966, 969 (finding statements alleging "dishonest, fraudulent, and potentially criminal business practices" addressed matters of public interest because they served to warn consumers to not do business with the plaintiffs); *Davis v. Avvo, Inc.*, No. C11-1571RSM, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012) (finding that a website allowing consumers to provide reviews of individual doctors or lawyers related to public participation, because it could "be helpful to [the general public] in choosing a doctor, dentist, or lawyer"); *Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 508 (Ct. App. 2004) (concluding that statements warning consumers not to use plaintiffs' brokerage services were directly connected to an issue of public concern).

We reject Abrams' arguments that the manner in which an attorney represents clients in family law matters is not of public interest and only impacts a small, specific audience. An attorney's behavior, especially toward judges and in judicial proceedings, implicates "[t]he operations of the courts" and is a "matter of utmost public concern." *See Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 249 (1996) (internal quotation marks omitted). Abrams' contention that the conduct of family court proceedings does not concern the general public is mistaken. Sanson's statements criticizing Abrams for allegedly acting badly in court and misbehaving towards a judge concern the public interest in attorney courtroom conduct. The statements also focus on her courtroom behavior rather than on a private controversy and rely on publicly available information rather than on private information. We therefore hold that Sanson's statements made about Abrams' courtroom conduct are "in direct connection with an issue of public interest" for purposes of Nevada's anti-SLAPP statutes.

Sanson's statements also criticize Abrams' practice of moving to seal cases. They express the opinion that Abrams' desire to seal cases is in contravention of law and antithetical to openness and transparency. Matters of judicial transparency go beyond mere curiosity. We have held "that Nevada citizens have a right to know what transpires in public and official legal proceedings." *Adelson v. Harris*, 133 Nev. 512, 515, 402 P.3d 665, 667 (2017) (quoting *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001)); *see also Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 860, 221

P.3d 1240, 1248 (2009) ("Public access inherently promotes public scrutiny of the judicial process, which enhances both the fairness of criminal proceedings and the public confidence in the criminal justice system."). Statements about judicial transparency also concern a substantial number of taxpayers who fund the court, all residents affected by judicial rulings, and individuals who participate in the judicial process. Sanson's statements criticizing Abrams for asking to seal cases and obtaining Judge Elliott's prohibition order relate to the public interest in judicial transparency and concern Abrams' public conduct rather than private matters. Sanson's statements are therefore "in direct connection with an issue of public interest" and satisfy the first element of protected good-faith communications.

An email listserv may constitute a public forum

Abrams next argues that Sanson's statements were not made in a public forum. While the parties do not dispute that the internet is a public forum, Abrams argues that because Sanson simultaneously transmitted the communications via email to VIPI's subscribers, the anti-SLAPP motions should have been denied. She contends that sending articles to private email addresses does not constitute a communication in a public forum, and that republishing the communications by email took the communications out of the ambit of a public forum. We think otherwise.

To enjoy the protection of Nevada's anti-SLAPP statutes, statements must be communicated "in a place open to the public or in a public forum." NRS 41.637(4); *Shapiro*, 133 Nev. at 39, 389 P.3d at 268. Unlike a single email exchange between two private parties or a communication sent to a small number of people in a private email chain, the communications at issue here were sent to about 50,000 subscribers in a modern manner akin to a radio or television broadcast or newsletter. *See, e.g.*, *Am. Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 448 (2014) (holding that individual subscribers who received transmissions constituted "the public" when the same contemporaneously perceptible images and sounds were communicated to them as a large group of people); *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205, 210-11 (Ct. App. 2000) (finding that a newsletter distributed to 3000 recipients constituted a public forum, because it was a "vehicle for communicating a message about public matters to a large and interested community"). Emails sent to a listserv of subscribers likewise provide a medium through which public matters are disseminated. The mere fact that emails reach a person's private inbox does not take the communication out of the ambit of a public forum, especially when the communications are also posted on the internet. We hold that an email listserv may constitute a public forum for purposes of the anti-SLAPP

statutes and that emails to the listserv here were communicated in a public forum, satisfying the second element of a protected good-faith communication.

A private telephone conversation does not constitute a public forum

Part of Abrams' claims arise from statements Sanson made to Schoen during a private telephone conversation. We conclude that those statements do not fall within the scope of the anti-SLAPP statutes. Statements made in a private telephone conversation between two people are not statements made "in a place open to the public or in a public forum." *See Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998) (recognizing the private nature of telephone conversations). The district court therefore erred in finding Sanson's telephone statements protected.[2] Because we hold that those statements are not protected, we need not include them in the rest of our analysis, and accordingly our references to Sanson's statements throughout do not include those made during the telephone call.

Sanson's statements were either truthful or statements of opinion incapable of being false

Finally, to be protected under the anti-SLAPP statutes, Sanson had to show that his statements were "good-faith" communications—that is, that the statements were either "truthful or made without knowledge of [their] falsehood." NRS 41.637; *see also Shapiro*, 133 Nev. at 39, 389 P.3d at 267-68. Because "there is no such thing as a false idea," *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) (internal quotation marks omitted), statements of opinion are statements made without knowledge of their falsehood under Nevada's anti-SLAPP statutes. The district court concluded that Sanson's statements were either true or opinions. We agree.

Some of the statements at issue involve videos of courtroom proceedings. These statements are true, as they involve visual recordings of actual court proceedings. *See, e.g.*, *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 619, 895 P.2d 1269, 1272 (1995) (noting that a

[2]Sanson and Schneider have pending motions to dismiss under NRCP 12(b)(5). Those motions would be the proper avenue to determine whether claims based on the telephone statements should be dismissed for reasons apart from the protection afforded by the anti-SLAPP statutes, including whether making statements to an employee of the plaintiff law firm constituted "publication to a third person," as required for a defamation claim, *see Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002) (internal quotation marks omitted), and whether the statements are not actionable because Schoen initiated the call, *see* Restatement (Second) of Torts § 577, cmt. e (Am. Law Inst. 1977).

videotape at issue was not "false" because it was an accurate portrayal of what had happened), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). Sanson's statements in the first article that selectively quote from a court proceeding are also protected because he includes the full court video in the same article, thereby allowing average readers to evaluate the veracity of the statements based on their source. *See, e.g.*, *Adelson*, 133 Nev. at 517, 402 P.3d at 669 (noting that a hyperlink included next to an allegedly defamatory statement serves as a "footnote for purposes of attribution in defamation law" and "permits the reader to verify an electronic article's claims" (internal quotation marks omitted)).

A majority of the statements at issue, however, involve Sanson's opinions, which, as opinions, are not knowingly false. They involve Sanson's personal views and criticisms of Abrams' courtroom behavior, especially towards judges and in seeking to seal cases. As opinions about public matters stated in public fora, they constitute good-faith communications under Nevada's anti-SLAPP statutes.

Abrams' argument that some statements are false assertions of fact that impute malfeasance, such as calling Abrams an "obstructionist," does not show that the statements lose anti-SLAPP protection, because our analysis does not single out individual words in Sanson's statements. In *Rosen v. Tarkanian*, we held that "in determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." 135 Nev. 436, 437, 453 P.3d 1220, 1222 (2019). In other words, the relevant inquiry is "whether a preponderance of the evidence demonstrates that the gist of the story, or the portion of the story that carries the sting of the [statement], is true," and not on the "literal truth of each word or detail used in a statement." *Id*. at 440-41, 453 P.3d at 1224 (alteration in original) (internal quotation marks omitted). Furthermore, in determining good faith, we consider "all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion." *Id*. at 439, 453 P.3d at 1223. Here, the "gist and sting" of the communications—as demonstrated by Sanson's declaration, emails to Judge Elliott and Abrams, and articles—are that Sanson believes Abrams misbehaves in court and employs tactics that hinder public access to courts. These constitute Sanson's opinions that, as mentioned above, are not knowingly false and thus satisfy the third element of protected good-faith communications.

We therefore determine that Sanson showed that his statements were either truthful or made without knowledge of their falsity. As Sanson also showed that his statements concerned matters of public concern and were made in a public forum, we conclude that he met his burden under the first prong of the anti-SLAPP analysis.

Abrams did not prove with prima facie evidence a probability of prevailing on her claims

Because Sanson satisfied prong one of the anti-SLAPP analysis, we must evaluate Abrams' showing under prong two: whether her claims had minimal merit.[3] *See* NRS 41.665(2) (stating that a plaintiff's burden under prong two is the same as a plaintiff's burden under California's anti-SLAPP law); *Navellier v. Sletten*, 52 P.3d 703, 712-13 (Cal. 2002) (establishing the "minimal merit" burden for a plaintiff). In assessing whether Abrams' claims arising from protected communications have minimal merit, we must review each challenged claim independently and assess Abrams' probability of prevailing.[4] *See Baral v. Schnitt*, 376 P.3d 604, 613-14 (Cal. 2016). A complaint should not be dismissed in its entirety where it contains claims arising from both protected and unprotected communications. *See id.* This analysis serves to ensure that the anti-SLAPP statutes protect against frivolous lawsuits designed to impede protected public activities without striking legally sufficient claims. *See Navellier*, 52 P.3d at 711.

Reviewing Abrams' probability of prevailing on each of her claims arising from protected good-faith communications, we conclude that she has not shown minimal merit. Abrams' defamation claim lacked minimal merit because Sanson's statements were opinions that therefore could not be defamatory. *See Pegasus*, 118 Nev. at 715, 718, 57 P.3d at 88, 90 (excluding statements of opinion from defamation). Abrams did not show that her intentional infliction of emotional distress (IIED) claim had minimal merit because she did not show extreme and outrageous conduct beyond the bounds of decency. *See Olivero v. Lowe*, 116 Nev. 395, 398, 995 P.2d 1023, 1025 (2000) (stating IIED claim elements); *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998) (considering "extreme

[3]We need not review the likelihood of prevailing on the claims based on the Schoen statements because those statements do not satisfy the first prong and are not protected.

[4]We take this opportunity to clarify our disposition in *Rosen* where we summarily directed the complaint to be dismissed in its entirety. *See* 135 Nev. at 443 n.3, 453 P.3d at 1226 n.3. All of the claims in that case arose from protected good-faith communications and were not supported by a prima facie probability of prevailing. In assessing the merits of a special motion to dismiss pursuant to NRS 41.660, each challenged claim should be reviewed independently. *See Baral v. Schnitt*, 376 P.3d 604, 616 (Cal. 2016) (providing that the review should focus on the particular allegations, their basis in protected communications, and their probability of prevailing, rather than the form of the complaint); *see also Okorie v. L.A. Unified Sch. Dist.*, 222 Cal. Rptr. 3d 475, 487, 493-96 (Ct. App. 2017) (observing that the motion to dismiss may challenge specific portions or the entirety of a complaint and proceeding to review the merits of each challenged claim).

and outrageous conduct" as that which is beyond the bounds of decency). Sanson's use of a vitriolic tone was insufficient to support such a claim. *See Candelore v. Clark Cty. Sanitation Dist.*, 975 F.2d 588, 591 (9th Cir. 1992) (considering claim for IIED under Nevada law and observing that "[l]iability for emotional distress will not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities'" (quoting Restatement (Second) of Torts § 46 cmt. d (1965))). As Abrams' IIED claim lacked minimal merit and she did not demonstrate negligence, her claim for negligent infliction of emotional distress also lacked minimal merit. *See Shoen v. Amerco, Inc*., 111 Nev. 735, 748, 896 P.2d 469, 477 (1995) (allowing for negligent infliction of emotional distress if the acts arising under intentional infliction of emotional distress were committed negligently). Abrams did not show minimal merit supporting her claim for false light invasion of privacy because she failed to show that she was placed in a false light that was highly offensive or that Sanson's statements were made with knowledge or disregard to their falsity. *See* Restatement (Second) of Torts § 652E (1977).[5] Abrams did not show minimal merit supporting her business disparagement claim because she did not show that Sanson's statements were false or provide evidence of economic loss that was attributable to the disparaging remarks. *See Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc*., 125 Nev. 374, 385-87, 213 P.3d 496, 504-05 (2009) (stating the elements for business disparagement and explaining that the claim requires economic loss caused by injurious falsehoods targeting the plaintiff's business). Abrams did not show minimal merit supporting her claim for civil conspiracy because she did not show an intent to commit an unlawful objective. *See Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014) (defining civil conspiracy). Lastly, Abrams did not show minimal merit supporting her claim for concert of action because she did not show any tortious act or that Sanson and Schneider agreed to conduct an inherently dangerous activity or an activity that poses a substantial risk of harm to others. *See GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001). We therefore hold that Abrams failed to meet her burden under the second prong of the anti-SLAPP analysis.

CONCLUSION

We conclude that the district court correctly determined that Sanson's articles and widely disseminated emails fell within the protec-

[5]In light of the United States Supreme Court's reversal in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019), we reassert our recognition of the cause of action for the false light invasion of privacy as set forth in the Restatement. *Cf. Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826, 844-46, 407 P.3d 717, 735-36 (2017), *rev'd*, 139 S. Ct. 1485 (2019).

tions of Nevada's anti-SLAPP statutes. Because Sanson's statements made about an attorney's courtroom conduct and practices directly connect to an issue of public interest, an email listserv may constitute a public forum, and the statements are either true or opinions that cannot be false, Sanson met his burden under the first prong of the anti-SLAPP analysis. We also conclude that the district court did not err in finding Abrams did not demonstrate with prima facie evidence a probability of prevailing on her claims that are based on those statements. However, we conclude that the district court erred as to Sanson's statements to Schoen because private telephone conversations are not statements made in a place open to the public or in a public forum. Therefore, we affirm in part,[6] reverse in part, and remand for further proceedings consistent with this opinion.[7]

Gibbons and Hardesty, JJ., concur.

KENNETH BERBERICH, Appellant, *v.* BANK OF AMERICA, N.A.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Respondents.

No. 76457

March 26, 2020 460 P.3d 440

Appeal from a district court order granting a motion to dismiss a quiet title action under the statute of limitations. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

The Law Office of Mike Beede, PLLC, and *Michael N. Beede* and *James W. Fox*, Henderson, for Appellant.

Akerman LLP and *Ariel E. Stern, Natalie L. Winslow*, and *Scott R. Lachman*, Las Vegas, for Respondents.

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[6]Because Abrams seeks to hold Schneider liable solely for Sanson's statements, we also conclude that the district court properly granted Schneider's special motion to dismiss, except as to the telephone statements.

[7]Abrams also argues that the district court should have considered (1) improper motive and (2) whether the statements were false and defamatory *before* applying an anti-SLAPP analysis. She asserts that the district court should have granted limited discovery under NRS 41.660(4) to determine the underlying motives and relationship between Sanson and Schneider. We have considered these arguments and reject them. Our anti-SLAPP statutes have no such preliminary requirement that a district court consider motive, falsity, and defamatory nature. NRS 41.660(4) also conditions discovery "[u]pon a showing by a party that information necessary to meet" the plaintiff's burden "is in the possession of another party or a third party." Because information about the underlying motive and relationship would not have assisted with any of the claims, discovery was not warranted.

Kim Gilbert Ebron and *Jacqueline A. Gilbert* and *Karen L. Hanks*, Las Vegas, for Amicus Curiae SFR Investments Pool 1, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Appellant Kenneth Berberich purchased property at a homeowners' association foreclosure sale. Nearly six and a half years later, Berberich filed a quiet title action, seeking a judicial declaration that the foreclosure extinguished the deed of trust that secured the prior homeowner's mortgage. In this appeal, we consider whether the action was barred by NRS 11.080 because Berberich had been in possession of the property for more than five years before commencing the action to quiet title to the property. We conclude that the limitations period in NRS 11.080 does not run against an owner who is in undisputed possession of the land. As the complaint does not establish whether, or when, possession was disturbed here, the district court erred in dismissing Berberich's complaint under NRCP 12(b)(5). We therefore reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In 2009, Connie Fernandez borrowed $197,359 from Bank of America, N.A. (BANA) to purchase a home (the property) in a neighborhood governed by the Via Valencia/Via Ventura Homeowners Association (the HOA). BANA secured the loan with a deed of trust recorded against the property. Fernandez thereafter stopped paying the HOA assessments, and the HOA recorded a notice of default in November 2010.

BANA's loan servicer requested a breakdown of the delinquent assessments on the property. The HOA's agent provided that breakdown, which showed that Fernandez owed $300 in HOA assessments, among other charges and fees. The loan servicer tendered $300 in satisfaction of the delinquent assessments, but the HOA rejected the tender and continued with the foreclosure sale. Berberich purchased the property at the foreclosure sale in August 2011 for $4,101.

In January 2018, nearly six and a half years after the foreclosure sale, Berberich filed a quiet title action against Fernandez, BANA, and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively BANA), seeking a judicial declaration that the HOA foreclosure extinguished the deed of trust and an injunction prohibiting the defendants from attempting to foreclose on the deed of trust. BANA moved to dismiss under NRCP 12(b)(5), arguing Berberich's

complaint was untimely under NRS 11.080. Relying on *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A. (Gray Eagle)*, 133 Nev. 21, 388 P.3d 226 (2017), BANA asserted that the limitation period in NRS 11.080 began to run when Berberich purchased the property in 2011 and therefore Berberich's complaint was time-barred. Berberich opposed the motion and filed a countermotion for summary judgment. There, he alleged that NRS 11.080 did not bar his quiet title action because, by its plain language, it does not apply to a party in possession of the real property. The district court granted BANA's motion to dismiss and denied Berberich's countermotion for summary judgment. Berberich appeals.[1]

DISCUSSION

The district court may dismiss an action under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted when the action is barred by the statute of limitations. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998). We review an order doing so de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (stating the standard of review for an order granting a motion to dismiss under NRCP 12(b)(5)).

We have previously stated that NRS 11.080 provides a five-year statute of limitations that governs quiet title actions.[2] *Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 257, 416 P.3d 233, 237 (2018); *Gray Eagle*, 133 Nev. at 27, 388 P.3d at 232; *see also Kerr v. Church*, 74 Nev. 264, 272-73, 329 P.2d 277, 281 (1958) (indicating that NRS 11.080 applies to actions to quiet title). The issue here is when that limitations period is triggered. As such, the dispositive issue in this appeal turns on the interpretation of NRS 11.080. When interpreting a statute, "we first consider and give effect to the statute's plain meaning because that is the best indicator of the Legislature's intent." *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018). In considering the statute's plain meaning, we must keep in mind the surplusage canon: "'If possible, every word and every provision' in a statute 'is to be given effect[. . . .] None should be ignored [or] given an interpretation that causes it to duplicate another provision or to have no consequence.'" *Wilson v. Happy Creek, Inc.*, 135 Nev. 301, 308, 448 P.3d 1106, 1112 (2019) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (second alteration in original)).

NRS 11.080 provides in relevant part that "[n]o action for the recovery of real property, or for the recovery of the possession there-

[1]Although Fernandez was a defendant below, only BANA and MERS are respondents on appeal.

[2]The parties agree that NRS 11.080 creates a statute of limitations that applies to quiet title actions.

of . . . , shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof." The statute is focused on ownership or possession of real property. *See S. End Mining Co. v. Tinney*, 22 Nev. 19, 35-36, 35 P. 89, 94 (1894) (interpreting the word "seized" as used in the phrase "seized or possessed" in a statute similar to NRS 11.080 and concluding that "seized" must "mean[ ] something different from simple possession of a claim," and "[i]f so, it must mean . . . an ownership in fee, for this is the only other kind of ownership known to the law"). Addressing NRS 11.080 recently, we said that it "provides for a five-year statute of limitations for a quiet title action *beginning* from the time the 'plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question.'" *Gray Eagle*, 133 Nev. at 27, 388 P.3d at 232. Now taking a closer look at the statute's plain language, we clarify that the limitations period provided by NRS 11.080 only starts to run when the plaintiff has been deprived of ownership or possession of the property.

The statute talks about an "action for the *recovery* of real property" or "for the *recovery* of the possession thereof." NRS 11.080 (emphases added). Around the time the statute was enacted, the word "recovery" generally meant "the restoration or vindication of a right existing in a person . . . or the obtaining . . . of some right or property which has been taken or withheld from him."[3] *Recovery*, *Black's Law Dictionary* (2d ed. 1891). A person does not need to recover something unless it has first been taken away. In the same vein, the statute uses the past tense with respect to the limitations period: that the plaintiff "*was* seized or possessed" of the property within five years before commencing the action. NRS 11.080 (emphasis added). The past tense in that part of the statute reinforces the perspective that the plaintiff is no longer seized or in possession of the property. Thus, considering the statutory text as a whole, we conclude the limitations period in NRS 11.080 does not run against a plaintiff seeking to quiet title while still seized or possessed of the property.[4] *See Kerr*, 74 Nev. at 272-73, 329 P.2d at 281 (indicating in dicta that NRS 11.080 did not apply where the plaintiff was in joint possession of the property "up to the very time when he com-

[3]That definition remains the same today. *Recovery*, *Black's Law Dictionary* (11th ed. 2019) (defining "recovery" as "[t]he regaining or restoration of something lost or taken away").

[4]A number of other jurisdictions have held that *no* statute of limitation bars an action to quiet title where the plaintiff is in undisturbed ownership or possession. *See, e.g.*, *Cook v. Town of Pinetop-Lakeside*, 303 P.3d 67, 70 (Ariz. Ct. App. 2013) (stating that "statute of limitations does not run against a plaintiff bringing a quiet title action who is in undisturbed possession of his property"); *Bangerter v. Petty*, 225 P.3d 874, 877-79 & n.8 (Utah 2009) (so holding and listing cases from other jurisdictions).

menced his action" to set aside a deed based on fraud and failure of consideration).

Consistent with this understanding of NRS 11.080, the limitations period is triggered when the plaintiff is ejected from the property or has had the validity or legality of his or her ownership or possession of the property called into question. *See, e.g.*, *Salazar v. Thomas*, 186 Cal. Rptr. 3d 689, 695 (Ct. App. 2015) (discussing the general rule in California, which has a statute almost identical to NRS 11.080, *see* Cal. Civ. Proc. Code § 318, that "whether a statute of limitations bars an action to quiet title may turn on whether the plaintiff is in *undisturbed* possession of the land" (quoting *Mayer v. L&B Real Estate*, 185 P.3d 43, 46 (Cal. 2008))). "[M]ere notice of an adverse claim is not enough to commence the owner's statute of limitations." *Id.* at 696; *see also Crestmar Owners Ass'n v. Stapakis*, 69 Cal. Rptr. 3d 231, 234 (Ct. App. 2007) ("[T]he statute of limitations for an action to quiet title does not begin to run until someone presses an adverse claim against the person holding the property."). Thus, for example, a notice of default issued on a deed of trust has been found insufficient to dispute an owner's possession because it does "not call into question the validity of [the owner's] control of the property" or "indirectly question [the owner's] control of the property by asserting [someone else] was entitled to possess the [property]." *Salazar*, 186 Cal. Rptr. 3d at 698.

Here, the district court understandably relied on *Gray Eagle* to conclude that the limitations period in NRS 11.080 began to run against Berberich when he acquired the subject property at the foreclosure sale. But in doing so, the district court did not consider the fact that the statute of limitations ran from the time Berberich's ownership or possession of the property was disputed. As we clarify today, that is the crucial inquiry. We therefore reverse the district court's order granting BANA's motion to dismiss.[5]

CONCLUSION

NRS 11.080 generally does not bar a property owner who is in possession of the property from bringing a claim for quiet title. But the limitations period does begin to run against a property owner once the owner has notice of disturbed possession. Here, the facts alleged in the complaint do not establish whether, or when, Berberich received notice of disturbed possession. We therefore reverse the district court's dismissal order and remand for further proceedings consistent with this opinion.

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

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[5]In light of our decision, we do not reach the parties' other arguments.