JAQUELINE FAUSTO, AN INDIVIDUAL, APPELLANT, *v.* RICARDO SANCHEZ-FLORES, AN INDIVIDUAL; AND VERENICE RUTH FLORES, AN INDIVIDUAL, RESPONDENTS.

No. 80074

March 11, 2021 482 P.3d 677

Appeal from a district court order dismissing a tort action on statute of limitations grounds. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

[Rehearing denied April 12, 2021]

[En banc reconsideration denied June 25, 2021]

Hutchison & Steffen, LLC, and *Jason D. Guinasso, Joseph R. Ganley*, and *Alexander R. Velto*, Reno, for Appellant.

The Wright Law Group and *John Henry Wright*, Las Vegas, for Respondents.

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

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we consider whether the two-year limitations period of NRS 11.190(4)(e) for commencing actions to recover for personal injuries or wrongful death is subject to equitable tolling. We conclude that it is, and thus, equitable tolling may apply in such cases when the plaintiff demonstrates reasonable diligence in pursuing his or her claims and extraordinary circumstances that prevented him or her from timely filing the complaint. Under this standard, we further conclude that appellant Jaqueline Fausto failed to demonstrate that her circumstances warrant equitable tolling of NRS 11.190(4)(e), and we thus affirm the district court's dismissal of her complaint.

FACTS AND PROCEDURAL HISTORY

On July 2, 2019, Fausto filed a civil torts complaint alleging that on December 30, 2016, after an evening out with respondents Ricardo Sanchez-Flores and his then-wife Verenice Ruth Flores (collectively, Sanchez-Flores) to celebrate a professional accomplishment, Ricardo took advantage of Fausto's intoxicated state to sexually assault her. Fausto further alleged that Verenice was aware of the

sexual assault but drove her home without revealing her knowledge. Fausto stated that the day after the assault occurred, she went to the doctor to complete a rape kit and, days later, she reported the crime to the police. Four months after she reported the assault, the police collected the unwashed clothes that she had been wearing on the night of the alleged assault. Fausto asserted it was not until February 2, 2019, that she was notified that the rape kit and unwashed clothing had been processed by the lab and that Ricardo's DNA was found on her clothing. A criminal complaint was filed against Ricardo thereafter.

Because Fausto's civil complaint was filed two and a half years after the alleged sexual assault occurred, Sanchez-Flores filed an NRCP 12(b)(5) motion to dismiss based on NRS 11.190(4)(e), which imposes a two-year limitations period for personal injury and wrongful death claims. In opposition, Fausto argued that the two-year statute of limitations should be tolled because she could not have brought her claims before she received the rape kit results.

The district court granted Sanchez-Flores's motion, finding that Fausto's complaint was time-barred because she filed it over six months after the two-year statute of limitations had expired. The district court further found that equitable tolling of the statute of limitations did not apply because Fausto knew of the underlying facts of her tort claims during the limitations period and was not prevented from obtaining other information necessary to her claims despite the delayed processing of her rape kit. This appeal followed.

DISCUSSION

Fausto argues that the district court erred in finding that equitable tolling was not warranted. She asks this court to clarify that NRS 11.190(4)(e) is subject to equitable tolling and to adopt the federal standard for determining when equitable tolling applies. Fausto asserts that the federal standard would provide Nevada district courts with a standard more generally workable than the one we applied in *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (adopting equitable tolling in the employment discrimination context), but regardless, the limitations period for her tort claims should have been tolled under either standard.

We generally review a dismissal for failure to state a claim pursuant to NRCP 12(b)(5) de novo, treating all alleged facts in the complaint as true and drawing all inferences in favor of the complainant. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). However, when the district court is presented with and does not exclude matters outside the pleadings in making its decision, "the motion must be treated as one for summary judgment." NRCP 12(d). Because the parties submitted exhibits containing matters outside the pleadings and the district court did

not exclude those exhibits, we treat the dismissal order as an order granting summary judgment, which we also review de novo. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012). Summary judgment is proper if "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id*. Neither party disputes the facts in the record, nor does either party maintain that there are genuine issues of material fact precluding summary judgment.[1] Instead, each party presents legal arguments on the basis of the facts in the record as to whether Fausto's tort claims are entitled to equitable tolling.

NRS 11.190(4)(e) is subject to equitable tolling

NRS 11.190(4)(e) provides a two-year limitations period for "an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." The two-year period for filing suit under NRS 11.190(4)(e) begins to run "when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Fausto does not dispute on appeal that she filed her complaint after the limitations period expired. Rather, she contends that the limitations period should be equitably tolled because she was unable to obtain evidence necessary to her claims during the limitations period.

We have not previously determined whether NRS 11.190(4)(e) may be equitably tolled. The doctrine of equitable tolling is a nonstatutory remedy that permits a court to suspend a limitations period and allow an otherwise untimely action to proceed when justice requires it. *See* 51 Am. Jur. 2d *Limitation of Actions* § 153 (2021 update). A statute of limitations such as NRS 11.190(4)(e) is primarily intended "to '[prevent] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Petersen*, 106 Nev. at 273, 792 P.2d at 19 (alteration in original) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Because the main purpose of a statute of limitations "is to encourage the plaintiff to pursu[e] his rights diligently, . . . when

[1]While Fausto argues that the district court should have denied Sanchez-Flores's motion to dismiss to allow for discovery, she relies solely on her purported need for the results of the DNA test to identify Ricardo as the alleged assailant. But, by her own admission, she already knew that he was her attacker. Thus, in this case, additional discovery has no bearing on whether NRS 11.190(4)(e) should be tolled to render Fausto's claims timely.

an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose." *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014) (internal quotation marks omitted). Accordingly, it is "presume[d] that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014); *see also United States v. Kwai Fun Wong*, 575 U.S. 402, 407 (2015) ("[W]e recognize[ ] that time bars in suits between *private* parties are presumptively subject to equitable tolling."); *see also* 54 C.J.S. *Limitations of Actions* § 132 (2021 update) ("Limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute.").

When determining whether a statute is subject to equitable tolling, "the inquiry begins with the understanding that [the Legislature] legislate[s] against a background of common-law adjudicatory principles." *Lozano*, 572 U.S. at 10 (second alteration in original) (internal quotation marks omitted). We first adopted the doctrine of equitable tolling in the context of employment discrimination claims in *Copeland*. 99 Nev. at 826, 673 P.2d at 492. Notably, we left open the possibility of applying equitable tolling in other contexts. *Id.* Since *Copeland*, this court has applied the equitable tolling doctrine to other statutes of limitations. For example, in *State, Department of Taxation v. Masco Builder Cabinet Group*, this court affirmed a district court's decision to equitably toll the deadline under NRS 372.635 for a taxpayer refund claim. 127 Nev. 730, 738-40, 265 P.3d 666, 671-73 (2011). Similarly, in *City of North Las Vegas v. State, Local Government Employee-Management Relations Board*, this court affirmed a district court's decision to equitably toll NRS 288.110(4)'s six-month deadline for filing a complaint asserting prohibited labor practices against a local government agency. 127 Nev. 631, 641, 261 P.3d 1071, 1077 (2011). And in *O'Lane v. Spinney*, we recognized that the doctrine of equitable tolling could pertain to the deadline for enforcing judgments under NRS 11.190(1). 110 Nev. 496, 501, 874 P.2d 754, 757 (1994).

Based on our evolving expansion of the equitable tolling doctrine to other similar statutes of limitations and the presumption that the Legislature legislates with common law principles like equitable tolling in mind, we see no reason to reject its application to NRS 11.190(4)(e). *See Saint Francis Mem'l Hosp. v. State Dep't of Pub. Health*, 467 P.3d 1033, 1037 (Cal. 2020) ("Courts draw authority to toll a filing deadline from their inherent equitable powers—not from what the Legislature has declared in any particular statute."). Therefore, we elect to expand our application of the equitable tolling doctrine and hold that NRS 11.190(4)(e) is subject to equitable tolling.

The standard for equitable tolling as it relates to NRS 11.190(4)(e)

Having concluded that NRS 11.190(4)(e) is subject to equitable tolling, we turn our attention to the appropriate standard for its application to the limitations period in this statute. In *Copeland*, this court set forth nonexclusive factors to consider when determining whether equitable tolling is appropriate:

> the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case.

99 Nev. at 826, 673 P.2d at 492. Fausto points out that several of these factors—primarily the plaintiff's reliance on statements by an administrative agency and the employer's deception—do not readily apply to nonadministrative-agency cases. For this reason, Fausto urges this court to adopt the federal standard for equitable tolling, claiming that the federal standard is more broadly applicable than the factors set forth in *Copeland*. However, while Fausto correctly asserts that some of the *Copeland* factors are specific to the context of that case, other factors—diligence of the claimant and any "equitable considerations appropriate in the particular case"—are generally applicable to tort-based claims barred by NRS 11.190(4)(e). Moreover, consistent with the federal equitable tolling doctrine and other jurisdictions' equitable tolling jurisprudence, we have required plaintiffs to at least demonstrate that, despite their exercise of diligence, extraordinary circumstances beyond their control prevented them from timely filing their claims. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (stating that under the federal standard a claimant seeking equitable tolling must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way" (internal quotation marks omitted)); *see also Weaver v. Firestone*, 155 So. 3d 952, 957-58 (Ala. 2013) (stating that "equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are unavoidable even with the exercise of diligence" (internal quotation marks omitted)).

For example, we have explained that the focus of equitable tolling is "whether there was *excusable delay* by the plaintiff." *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077 (emphasis added) (internal quotation marks omitted). And we have indicated that equi-

table tolling applies when the claimant has demonstrated diligence. *See Masco*, 127 Nev. at 739, 265 P.3d at 672. Accordingly, having already recognized these factors in our own equitable tolling jurisprudence, we do not find it necessary to adopt the federal standard and instead direct courts to consider the relevant *Copeland* factors when determining whether to equitably toll NRS 11.190(4)(e). Thus, when a plaintiff seeks to equitably toll the limitations period in NRS 11.190(4)(e), the plaintiff must demonstrate that he or she acted diligently in pursuing his or her claim and that extraordinary circumstances beyond his or her control caused his or her claim to be filed outside the limitations period.[2]

Fausto failed to meet the relevant equitable tolling factors under Copeland

We now must determine whether Fausto has demonstrated that her circumstances warrant the application of equitable tolling to render her claims timely. Fausto argues that NRS 11.190(4)(e) should be equitably tolled because the State's delay in processing her rape kit meant that she lacked the necessary evidence to file her complaint before the statute of limitations ran. Fausto asserts she could not confirm that Ricardo sexually assaulted her without the rape kit results.

Sanchez-Flores, however, argues that equitable tolling is inapplicable because Fausto knew of the facts underlying her claims and did not need the rape kit results to assert her claims before the limitations period ended. We agree and conclude that Fausto failed to demonstrate that equitable tolling is warranted in this case.

Diligence

First, the record shows that Fausto did not act diligently in bringing her claims. Fausto reported the facts of the sexual assault to the police in January 2017 yet did not seek counsel or assert her claims until two and a half years later. Though she contends that she needed the results of the rape kit test to prove her claims, she fails to demonstrate how she proactively pursued the rape kit results or that it was impossible for her to assert her civil claims absent those results. She made no inquiry into the status of the DNA results, and she made no attempt to file a complaint pending receipt of the test results. *Cf.*

[2]While *Copeland* also included the plaintiff's knowledge of the facts as a factor, this factor relates more to the discovery-rule exception than it does to equitable tolling. *See Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (explaining that "[t]he general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought," but that the discovery rule is an exception to this general rule for accrual and that when applied, it tolls the statute of limitations period "until the injured party discovers or reasonably should have discovered facts supporting a cause of action").

City of N. Las Vegas, 127 Nev. at 640-41, 261 P.3d at 1077 (determining that the claimant exercised diligence where he asserted his claims less than two months after discovering the facts underlying the claims). Therefore, we conclude that Fausto has failed to show that she acted in a diligent manner.[3]

Extraordinary circumstances

Moreover, Fausto has failed to demonstrate extraordinary circumstances that prevented her from filing her complaint. We reject Fausto's contention that without the rape kit results, "there was nothing to support [her] testimony." Fausto was not required to have DNA evidence before filing her civil complaint, and she could have amended her complaint, if necessary, after receiving the rape kit results. *See* NRCP 8; NRCP 15. Although Fausto now argues that sexual assault victims assume that they are wrong about having been assaulted when they do not get rape kit results back and that she needed the results to confirm Ricardo had sexually assaulted her, Fausto did not allege below that she had doubts about her sexual assault because of the delay in processing the rape kit.[4] Rather, the record shows that

[3]Fausto's arguments below and on appeal seem to conflate the discovery rule with the equitable tolling doctrine. *Compare Petersen*, 106 Nev. at 274, 792 P.2d at 20 ("Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action."), *with Nicole B. v. Sch. Dist. of Phila.*, 237 A.3d 986, 995 (Pa. 2020) ("[T]he doctrine of equitable tolling [extends] a statute of limitations when a party, through no fault of its own, is unable to assert its right in a timely manner." (second alteration in original) (internal quotation marks omitted)). The district court rejected Fausto's contention that the discovery rule applied and that she could not discover the facts of her claims within the limitations period. Fausto does not challenge this determination or dispute the district court's finding on the accrual date of her claims. Thus, the application of the discovery rule is not before us.

[4]We acknowledge that the State's severe backlog of processing rape kits has caused serious delays in the prosecution of these cases, which in part led to the passage of A.B. 142 during the 2019 legislative session. *See* 2019 Nev. Stat., ch. 263, § 2, at 1498-99 (eliminating the statute of limitations period for the criminal prosecution of sexual assault crimes where there is DNA evidence); *see also* Hearing on A.B. 142 Before the Senate Comm. on Judiciary, 80th Leg. (Nev., May 3, 2019) (statement of Assemblywoman Lisa Krasner acknowledging that in 2015 over 8,000 rape kits were untested). In light of these delays and the psychological trauma that sexual assault victims experience, we recognize that there may be circumstances under which a sexual assault victim who alleges that he or she was unable to confirm the identity of the assailant may meet the requirements for equitable tolling. *See, e.g.*, *Weaver v. Firestone*, 155 So. 3d 952, 962 (Ala. 2013) (explaining that a reasonably diligent plaintiff should timely file a Doe complaint when possible, but recognizing that " 'where the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his identity, the plaintiff should not be penalized' " (emphasis omitted) (quoting *Bernson v. Browning-Ferris Indus. of Cal., Inc.*, 873 P.2d 613, 619 (Cal. 1994))). However, in this case, Fausto's allegation that she did not know that Ricardo assaulted her is belied by her own complaint, which indicates that she told Verenice, Ricardo's wife, that she knew that he had assaulted her that night.

she completed a rape kit the day after the alleged assault, filed two police reports within the following days, and notably, told Verenice in a text-message exchange four months later that she knew that Ricardo had sexually assaulted her that night. Thus, Fausto knew of the facts underlying her claims, and therefore, the lack of test results did not preclude her from filing her complaint. *Cf. City of N. Las Vegas*, 127 Nev. at 636, 640, 261 P.3d at 1074-75, 1077 (holding that equitable tolling was appropriate where the plaintiff did not know of his employer's disparate treatment of another employee until approximately two months prior to filing his complaint). Accordingly, we conclude that extraordinary circumstances did not prevent Fausto from timely asserting her claims against Sanchez-Flores.

CONCLUSION

We hold that the doctrine of equitable tolling may apply to NRS 11.190(4)(e) where the plaintiff demonstrates diligence in pursuing his or her claims and that some extraordinary circumstance prevented the plaintiff from bringing a timely action. Applying that standard here, we conclude that Fausto failed to demonstrate diligence or that an equitable circumstance prevented her from asserting her claims during the limitations period. As a result, the district court correctly determined that equitable tolling was not warranted and that Fausto's claims were time-barred under NRS 11.190(4)(e). Accordingly, we conclude that the district court did not err by dismissing Fausto's complaint, and we thus affirm the district court's order.

Parraguirre and Cadish, JJ., concur.

ROMAN HILDT, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE RICHARD SCOTTI, District Judge, Respondents, and CITY OF HENDERSON, Real Party in Interest.

No. 79605

March 25, 2021 483 P.3d 526

Original petition for a writ of mandamus or, alternatively, a writ of habeas corpus in a criminal matter concerning the right to a jury trial.

Petition granted.

Kimberly A. Nelson, Las Vegas; *Aisen Gill & Associates LLP* and *Michael N. Aisen* and *Adam L. Gill*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Nicholas Vaskov*, City Attorney, *Marc M. Schifalacqua*, Senior Assistant City Attorney, and *Elaine F. Mather*, Assistant City Attorney, Henderson, for Real Party in Interest.

Steven B. Wolfson, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Amicus Curiae Clark County District Attorney.

Bradford R. Jerbic, City Attorney, and *Carlene M. Helbert*, Deputy City Attorney, Las Vegas, for Amicus Curiae City of Las Vegas.

Micaela C. Moore, City Attorney, and *Deep Goswami*, Chief Deputy City Attorney, North Las Vegas, for Amicus Curiae City of North Las Vegas.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, C.J.:

Petitioner Roman Hildt maintains that both the municipal court and the district court erred by denying him the right to a jury trial for his misdemeanor battery constituting domestic violence charge. Approximately three weeks after the district court affirmed his conviction on appeal, and the day before Hildt filed the instant writ petition, we decided the same issue in *Andersen v. Eighth Judicial District Court*, therein announcing a new constitutional rule of criminal procedure: persons charged with a misdemeanor domestic battery

offense are entitled to a jury trial. 135 Nev. 321, 324, 448 P.3d 1120, 1124 (2019). In light of this new rule, Hildt seeks a writ of mandamus ordering that his conviction be vacated and that he receive a jury trial. Thus, this original writ petition requires us to determine whether Hildt's misdemeanor conviction became final, such that the rule announced in *Andersen* cannot be retroactively applied to him.

Pursuant to our retroactivity framework in *Colwell v. State*, 118 Nev. 807, 820-21, 59 P.3d 463, 472 (2002), we apply new constitutional rules of criminal procedure to all cases in which the conviction of the individual seeking application of the rule is not yet final. Because we decided *Andersen* before Hildt's time for filing a petition for a writ of certiorari to the United States Supreme Court expired, Hildt's misdemeanor conviction was not final, and thus the new rule in *Andersen* applies to his case. Accordingly, we grant Hildt's petition for a writ of mandamus.[1]

FACTS AND PROCEDURAL HISTORY

Real party in interest the City of Henderson filed a criminal complaint against Hildt, alleging one count of first-offense battery constituting domestic violence—a misdemeanor pursuant to NRS 200.485(1)(a). Hildt filed a motion requesting a jury trial in the Henderson municipal court. Hildt acknowledged that Nevada law did not recognize the right to a jury trial in misdemeanor domestic battery cases, but he requested that the municipal court stay his case pending the outcome of *Andersen*, which was being considered by this court. The municipal court denied the motion. The matter proceeded to a bench trial, where the municipal court found Hildt guilty of the charged offense. Thereafter, the municipal court sentenced Hildt but stayed the execution of his sentence pending the outcome of Hildt's appeal to the district court.

On appeal to the district court, Hildt claimed that the municipal court erred by denying his jury trial request. The district court denied Hildt's appeal and affirmed his conviction on August 21, 2019. Remittitur issued on September 5, 2019. One week later, on September 12, 2019, this court decided *Andersen*. Hildt filed this original writ petition the following day.

DISCUSSION

Pursuant to the Nevada Constitution, we have the "power to issue writs of *mandamus* . . . ." Nev. Const. art. 6, § 4. "The power to issue such writs is part of this court's original jurisdiction; it is not merely auxiliary to our appellate jurisdiction." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 133, 994 P.2d 692, 696 (2000). A

[1]Hildt alternatively seeks a writ of habeas corpus. In light of this opinion, the request for habeas relief is denied.

writ of mandamus may issue "to compel the performance of an act which the law requires as a duty resulting from an office or where the discretion has been manifestly abused or exercised arbitrarily or capriciously." *Andersen*, 135 Nev. at 322, 448 P.3d at 1122 (internal quotation marks omitted); *see also* NRS 34.160. A writ will not be issued when the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

Generally, we decline to consider writ petitions that request review of a district court decision rendered while acting in its appellate capacity, in recognition that doing so "would undermine the finality of the district court's appellate jurisdiction." *Hedland*, 116 Nev. at 134, 994 P.2d at 696; *see also* Nev. Const. art. 6, § 6 (granting district courts "final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law"). Nevertheless, we will entertain such petitions where "the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner." *Hedland*, 116 Nev. at 134, 994 P.2d at 696. We will also exercise our discretion "where the petition present[s] a significant issue of statewide concern that would otherwise escape our review." *Amezcua v. Eighth Judicial Dist. Court*, 130 Nev. 45, 48, 319 P.3d 602, 603-04 (2014), *overruled in part by Andersen*, 135 Nev. at 323-24, 448 P.3d at 1123-24.

Our decision in *Andersen* overruled this court's prior precedent and requires municipal courts to provide a jury trial to any defendant charged with misdemeanor battery constituting domestic violence. 135 Nev. at 324, 448 P.3d at 1124; *see Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 680, 476 P.3d 1194, 1197 (2020) (stating that "mandamus is available . . . where the law is overridden"). Hildt argues that *Andersen* applies retroactively to his case, and, as a result, he was erroneously denied the right to a jury trial on his misdemeanor battery constituting domestic violence charge. The retroactive effect of *Andersen* to Hildt's case implicates an issue of first impression concerning the finality of misdemeanor convictions with respect to our retroactivity jurisprudence—an issue of statewide concern that if not addressed in the context of a writ petition would escape this court's review. Further, Hildt has no other remedy to enforce his right to a jury trial because a litigant may only challenge a district court's appellate decision by way of a writ petition invoking our original jurisdiction. *See Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 257, 71 P.3d 495, 496 (2003) (explaining that the district court's "final appellate jurisdiction over cases arising in" lower tribunals restricts a party's request for relief from this court to writ petitions). For these reasons, we exercise our discretion to consider this petition for a writ of mandamus.

Retroactive application of Andersen

Hildt argues that the municipal court and district court erred by denying him a jury trial because, as this court recognized in *Andersen*, the penalties for first-offense domestic battery make it a serious offense, such that the constitutional right to a jury trial attaches. He contends that the rule announced in *Andersen* applies to his case because his conviction was not final at the time *Andersen* was issued. In response, the City claims that Hildt's conviction was final at the time we issued the opinion.

We apply new constitutional rules of criminal procedure retroactively to all cases where the conviction of the individual seeking application of the rule is not yet final when the rule is announced. *Colwell*, 118 Nev. at 820-21, 59 P.3d at 472. A constitutional rule is new if "the decision announcing it overrules precedent" or rejects either an arguably sanctioned practice by this court or one consistently utilized by lower courts. *Id*. at 819-20, 59 P.3d at 472. Although our prior caselaw concluded that first-offense domestic battery was not a serious offense to which the right to a jury trial attached, in *Andersen* we recognized that intervening legislative changes to the offense now render it serious and subject to the jury-trial right. *See Amezcua*, 130 Nev. at 51, 319 P.3d at 606; *Andersen*, 135 Nev. at 323, 448 P.3d at 1123; NRS 202.360(1)(a). Therefore, *Andersen* announced a new constitutional rule of criminal procedure.

Having concluded that *Andersen* announced a new rule, we consider whether Hildt's conviction was final at the time *Andersen* was decided. *Colwell*, 118 Nev. at 820, 59 P.3d at 472. For purposes of the retroactivity analysis, we have said that a conviction is "final" when "judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired." *Id*. Hildt argues that his conviction was not final because he still had time to file a petition for writ of certiorari with the United States Supreme Court at the time *Andersen* was issued. The City counters that Hildt did not have a right to file that petition and thus his conviction was final after the district court denied his appeal, before *Andersen* was decided.

However, the City provides no explanation or authority outside of United States Supreme Court Rule 13.1 to support its position that misdemeanants may not file certiorari petitions to challenge their misdemeanor convictions. United States Supreme Court Rule 13.1, which sets forth a 90-day time period for filing a "petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort," does not preclude a misdemeanant from filing a petition for review of his judgment of conviction. *See also Talley v. California*, 362 U.S. 60, 61-62 (1960) (granting a misdemeanant's petition for a writ of certiorari to review

a superior court judgment affirming his misdemeanor conviction, where the misdemeanant raised constitutional contentions and the superior court was "the highest state court available" to him). Furthermore, although *Colwell* concerned a felony conviction, 118 Nev. at 811, 59 P.3d at 466, neither it nor *Teague v. Lane*, 489 U.S. 288 (1989), upon which we relied in *Colwell*, *see* 118 Nev. at 818-19, 59 P.3d at 471-72, indicated that misdemeanor convictions should be treated differently with respect to finality. Thus, we conclude that, like felony convictions, a misdemeanor conviction becomes final once the availability of direct appeal to the state courts has been exhausted and a timely filed petition for a writ of certiorari to the Supreme Court has been denied or the time for filing the petition has elapsed.

Hildt timely appealed his misdemeanor conviction to the district court, which affirmed the conviction and denied his appeal by order on August 21, 2019. Because district courts have final appellate jurisdiction over all cases arising in municipal court, *see* Nev. Const. art. 6, § 6; *Sparks v. Bare*, 132 Nev. 426, 430, 373 P.3d 864, 866-67 (2016), no further appeal was available to Hildt. Thus, Hildt had 90 days from entry of the district court's order to file a petition for writ of certiorari to the Supreme Court. As *Andersen* was decided before that time period expired, Hildt's conviction was not final and the rule in *Andersen* applies to his conviction. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Hildt's appeal and to proceed in a manner consistent with this opinion.[2]

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

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[2]In its answer, the City requests that, if this court determines that *Andersen* retroactively applies to Hildt's case, we also address whether it may legally conduct jury trials in domestic battery matters. We decline to reach this issue, as it seeks advisory relief not properly before us in this matter. *See* NRAP 21(a) (detailing this court's requirements for writ petitions); *see also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017) (explaining that "in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate").

LISA GUZMAN, on Behalf of Herself and All Others Similarly Situated, Appellant, *v.* ROBERT L. JOHNSON; MIGUEL PENELLA; JOHN HSU; ARLENE MANOS; H. VAN SINCLAIR; ANDOR M. LASZLO; SCOTT ROYSTER; DAYTON JUDD; JOHN ZIEGELMAN; AMC NETWORK, INC.; DIGITAL ENTERTAINMENT HOLDINGS, LLC; and RIVER MERGER SUB, INC., Respondents.

No. 79818

March 25, 2021 483 P.3d 531

Appeal from a final judgment dismissing a shareholder complaint in a business matter. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

Pickering, J., dissented in part.

Monteverde & Associates PC and *Juan E. Monteverde*, New York, New York; *Albright Stoddard Warnick & Albright* and *G. Mark Albright* and *Jorge L. Alvarez*, Las Vegas; *Kahn Swick & Foti, LLC*, and *Michael J. Palestina*, New Orleans, Louisiana, for Appellant.

Brownstein Hyatt Farber Schreck, LLP, and *Kirk B. Lenhard* and *Maximilien D. Fetaz*, Las Vegas; *Sullivan & Cromwell LLP* and *John L. Hardiman* and *Charles E. Moulins*, New York, New York, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

A shareholder who sues a corporate director individually for breach of fiduciary duty must, under NRS 78.138(7), rebut the business judgment rule and demonstrate that the alleged breach involved intentional misconduct, fraud, or a knowing violation of the law. In the instant case, appellant Lisa Guzman filed a shareholder complaint against the individual directors of a corporation and its controlling stockholder, alleging breach of fiduciary duty and seeking damages from a merger. The district court dismissed Guzman's complaint for failure to state a claim upon which relief can be granted. Guzman now appeals, contending that she rebutted the business judgment rule by alleging in her complaint that the individual directors were interested parties in the transaction, citing *Foster v. Arata*, 74 Nev. 143, 325 P.2d 759 (1958).

In resolving this contention, we consider whether NRS 78.138(7) supplants the "inherent fairness" standard adopted in *Foster*. Under that standard, the mere allegation that a director was an interested party in the transaction rebuts the business judgment rule as a matter of law and shifts the burden to the director to prove the inherent fairness of the transaction. We conclude that NRS 78.138(7) precludes such a standard.

As we recently explained in *Chur v. Eighth Judicial District Court*, NRS 78.138(7) supplies "the *sole avenue* to hold directors and officers individually liable for damages arising from official conduct." 136 Nev. 68, 72-73, 458 P.3d 336, 340 (2020) (emphasis added). We now clarify that NRS 78.138 and *Chur* control, foreclosing the inherent fairness standard that previously allowed a shareholder to automatically rebut the business judgment rule and shift the burden of proof to the director. Further, because Guzman failed to rebut the business judgment rule and allege particularized facts demonstrating the requisite breach of fiduciary duty, we affirm the district court's dismissal of her complaint.

FACTS AND PROCEDURAL HISTORY

In August 2016, RLJ Entertainment, Inc. (RLJE) entered into an investment agreement with respondent Digital Entertainment Holdings, LLC, a subsidiary of respondent AMC Networks, Inc. Under the investment agreement, AMC, through Digital, loaned RLJE $65 million, and RLJE gave AMC the option of owning at least 50.1 percent of RLJE's outstanding common stock, enabling AMC to become RLJE's controlling stockholder. The investment agreement prohibited RLJE from considering any other acquisition proposal (the "No-Shop Provision"). The agreement also gave AMC the right to designate two directors to RLJE's board and, upon the exercise of the warrants in full, AMC had the right to designate a majority of RLJE's board. A majority of the shareholders voted in favor of the investment agreement.

In February 2018, AMC sent RLJE a letter offering to purchase the outstanding shares of common stock for $4.25 per share. In that letter, AMC stated that it would "not sell [its] stake in RLJE or be part of any other process." AMC also urged the board to form an independent special committee to review the proposal, with help from the special committee's own legal and financial advisors. In response to AMC's proposal, RLJE's board formed a special committee consisting of two of its directors, respondent Andor M. Laszlo and respondent Scott Royster (the Special Committee).[1] The Special Committee asked RLJE's board to provide it with authority to

[1]Laszlo and Royster contracted to receive up to $100,000 in compensation for their service on the Special Committee.

consider and solicit offers from third parties. AMC expressed that it would not support any other transaction and that any attempt at soliciting other offers would be futile considering AMC's majority ownership and the No-Shop Provision in the investment agreement. RLJE's board thereafter denied the Special Committee's request.

Over roughly 50 days, the Special Committee negotiated the merger. The Special Committee rejected AMC's first proposal of $4.25 per share as insufficient. AMC increased its offer to $4.92 per share, but the Special Committee rejected that as well, concluding it still materially undervalued RLJE's common stock. The Special Committee told AMC that it would be unlikely to consider a price of less than $6.00 per share. AMC revised its offer to $5.95 per share, but the Special Committee held to a minimum negotiating price of $6.00 per share. AMC agreed to increase its offer to $6.00. The Special Committee countered that it would be prepared to accept a price of $6.25 per share, and AMC agreed.

As of October 3, 2018, AMC beneficially owned approximately 51.9 percent of RLJE's outstanding stock and had notified RLJE it would vote all of its shares in favor of the merger. The merger proxy statement, mailed to stockholders on or about October 5, 2018, disclosed a contribution agreement between AMC and the chair of RLJE's board of directors, respondent Robert L. Johnson, and stated that the Special Committee, and its financial advisor, determined the merger was fair and in the best interests of RLJE and the RLJE stockholders. The merger was approved at an October 31 stockholder meeting. AMC thereby acquired RLJE.

One day before the shareholder vote approved the merger, Guzman filed a class action against RLJE directors Johnson, Miguel Penella, John Hsu, Arlene Manos, H. Van Sinclair, Laszlo, Royster, Dayton Judd, and John Ziegelman (collectively, when possible, the individual directors), AMC, and AMC's subsidiaries Digital and River Merger Sub, Inc.,[2] alleging that they breached their fiduciary duties to her and the other minority stockholders in connection with the transaction. Guzman argued that because AMC owned a majority of RLJE's stock, AMC owed a fiduciary duty to ensure the sale was fair and RLJE could not realistically contest the sale. Guzman further claimed that AMC secured RLJE chair Johnson's support before making its first share-price offer, asserting that he had already negotiated the terms of his continuing employment with, and equity in, the post-merger company. Guzman acknowledged the two members of the Special Committee, Laszlo and Royster, "had no commercial, financial or business affiliations or relationships with any of AMC, [ ] Johnson or any of their respective affiliates." But Guzman

[2]We note that although Guzman also named Digital and River in her complaint, she focuses her arguments on the individual directors and AMC. Accordingly, we do not discuss Digital and River further.

argued the Special Committee had no power to consider or solicit offers from third parties because AMC told the Special Committee it would not consider any such offers and that exploring alternatives to the merger was futile.

The individual directors and AMC moved to dismiss under NRCP 12(b)(5), arguing that Guzman failed to rebut the business judgment rule under NRS 78.138. Guzman countered that she sufficiently pleaded facts to rebut the business judgment rule by arguing the fiduciaries here were interested parties to the transaction, citing *Foster v. Arata*, 74 Nev. 143, 325 P.2d 759 (1958), and *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 n.61, 137 P.3d 1171, 1184 n.61 (2006), *disavowed on other grounds by Chur*, 136 Nev. at 72, 458 P.3d at 340. She argued that under *Foster* and *Shoen* the burden shifted to the individual directors to show they acted in good faith when negotiating and approving the merger. Guzman additionally argued that NRS 78.138 did not protect AMC as a controlling stockholder.

During a hearing on the motion, the district court asked Guzman what allegations in her complaint supported her claim that the Special Committee was not disinterested in the transaction. Guzman responded that "they were at risk of being ousted and that's not a good footing." Guzman then conceded, however, that she had no specific allegations implicating the Special Committee. The district court concluded that Guzman failed to state adequate facts in her complaint showing the Special Committee was not disinterested. Therefore, the court determined that the business judgment rule applied because RLJE had given the Special Committee full authority to determine whether to merge with AMC. The district court dismissed the action against all of the individual directors as well as AMC, finding that while "AMC is not a board member . . . [Guzman is] attacking the transaction." The district court gave leave to amend, but Guzman instead requested entry of judgment and now appeals.

DISCUSSION

Guzman contends that the district court erred by applying NRS 78.138 to the individual directors and AMC, and that pursuant to *Foster*, she rebutted the business judgment rule as a matter of law and shifted the burden of proof to the individual directors by alleging that they were "interested fiduciaries" in the merger. Guzman argues in the alternative that she presented sufficient allegations against the individual directors and AMC to withstand the motion to dismiss.

A breach of a fiduciary duty gives rise to liability for damages resulting from the breach. *See Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009). In *Chur*, we explained that a litigant who sues directors or officers of a corporation individually for breach of fiduciary duty must satisfy both requirements of NRS 78.138(7)

(2017), which provides the sole method for holding individual directors liable for corporate decisions. 136 Nev. at 72-73, 458 P.3d at 340-41.[3] That statute, enacted in 1991,[4] requires the claimant to (1) rebut the business judgment rule and (2) demonstrate a breach of fiduciary duty involving intentional misconduct, fraud, or another knowing violation of the law. NRS 78.138(7).

Here, Guzman filed suit against the individual directors and AMC for breach of fiduciary duty regarding the merger. We first address whether Guzman met the requirements of NRS 78.138(7) as to her claims against the individual directors before turning to Guzman's claim against AMC.

Standard of review

We review de novo an order granting an NRCP 12(b)(5) motion to dismiss. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal, with the facts alleged in the complaint presumed true and all inferences drawn in favor of the complainant. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. Because Guzman alleged fraud in her breach of fiduciary duty claim, however, she "must satisfy the heightened pleading requirement of NRCP 9(b)." *See In re Amerco Derivative Litig.*, 127 Nev. 196, 223, 252 P.3d 681, 700 (2011); *see also* NRCP 9(b) (providing that allegations of fraud must be pleaded with particularity).

We also review legal conclusions, including questions of statutory construction, de novo. *Id.*; *see Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). We do not look beyond a statute's language if its plain meaning is clear on its face, *see Zohar*, 130 Nev. at 737, 334 P.3d at 405, and we will give effect to its plain meaning, *see Chur*, 136 Nev. at 72, 458 P.3d at 340.

The inherent fairness standard is precluded by NRS 78.138

As a threshold matter, Guzman argues that when a stockholder challenges an interested fiduciary's corporate dealings, the business judgment rule is rebutted as a matter of law and the burden shifts to the interested fiduciary to prove good faith and the inherent fairness of the challenged transaction. Guzman asserts this court adopted this "inherent fairness" standard in *Foster* and reaffirmed its application to NRS 78.138 in *Shoen*. Guzman contends that she therefore rebutted NRS 78.138's business judgment rule as a matter of law

[3]We draw from the 2017 version of the statute unless otherwise noted. *See* 2017 Nev. Stat., ch. 559, § 4, at 3998-99.

[4]*See* 1991 Nev. Stat., ch. 442, §§ 1-4, at 1184-85.

when she alleged the individual directors were interested fiduciaries as a result of their conduct during the merger. Thus, Guzman asserts that her allegations shifted the burden to the individual directors to prove the inherent fairness of the transaction.

The business judgment rule is codified, in relevant part, in NRS 78.138(3). *See Chur*, 136 Nev. at 71, 458 P.3d at 340.[5] That statute provides a presumption of good faith, stating 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). Generally, the business judgment rule protects directors and officers from individual liability and limits judicial interference with corporate decisions when those decisions are made in good faith. *See Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 376, 399 P.3d 334, 342 (2017) (citing 18B Am. Jur. 2d *Corporations* § 1451 (2016)).

In arguing that she rebutted the business judgment rule, Guzman relies on the following language in *Foster*:

> A director is a fiduciary. * * * So is a dominant or controlling stockholder or group of stockholders. * * * Their powers are powers in trust. * * * Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged *the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness* from the viewpoint of the corporation and those interested therein.

74 Nev. at 155, 325 P.2d at 765 (quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (emphasis added)).

We have never expressly overruled *Foster*'s inherent fairness standard, and we cited it favorably in *Shoen*, where we noted in dicta that "when an interested fiduciary's transactions with the corporation are challenged, the fiduciary must show good faith and the transaction's fairness." 122 Nev. at 640 n.61, 137 P.3d at 1184 n.61. However, NRS 78.138(7) plainly requires the plaintiff to *both* rebut the business judgment rule's presumption of good faith *and* show a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of the law. The statute's language is straightforward and must be given effect. *See Chur*, 136 Nev. at 72, 458 P.3d at 340; *Zohar*, 130 Nev. at 737, 334 P.3d at 405.

Our recent decision in *Chur* guides our analysis here.[6] There, the district court relied on dicta from *Shoen* to impose a gross negligence standard to claims for breach of fiduciary duty. *Chur*, 136 Nev. at 72, 458 P.3d at 340. We rejected the notion that *Shoen* pro-

[5]The statute's good-faith presumption was added in 1999. *See* 1999 Nev. Stat., ch. 357, § 67, at 1580.

[6]We note the parties did not have the benefit of *Chur* when they argued before the district court.

vides a method of determining director or officer liability outside the plain language of NRS 78.138 and disavowed *Shoen* to the extent it suggested an alternate rule. *Id.* Importantly, we held that "NRS 78.138(7) provides the *sole avenue* to hold directors and officers individually liable for damages arising from official conduct." *Id.* at 72-73, 458 P.3d at 340 (emphasis added).

Applying the same rationale, we now conclude that the inherent fairness standard cannot be utilized to rebut the business judgment rule and shift the burden of proof to the individual directors. Such a standard would contravene the express provisions of NRS 78.138(7) and render meaningless the statute's requirement that the plaintiff must establish a breach involving intentional misconduct, fraud, or a knowing violation of law. By confusing and blurring the plaintiff's burden under NRS 78.138(7), adhering to the inherent fairness standard would also frustrate the purpose of NRS Chapter 78, which is "for the laws governing domestic corporations to be clear and comprehensible." NRS 78.012(1). While a plaintiff may rebut the business judgment rule's presumption of good faith by, for instance, showing that the fiduciary had a personal interest in the transaction, *see, e.g.*, *Wynn Resorts*, 133 Nev. at 377, 399 P.3d at 343, we abrogate *Foster* and *Shoen* to the extent they conflict with the plain language of NRS 78.138(7) and our decision in *Chur*.[7]

Accordingly, we reject Guzman's contention that she rebutted the business judgment rule as a matter of law and shifted the burden to the individual directors to prove the inherent fairness of the transaction by merely alleging that they had an interest in the merger. We therefore next consider whether Guzman pleaded facts that, if true, would rebut the business judgment rule and show the requisite breach of fiduciary duty under NRS 78.138(7).

Guzman's claims for breach of fiduciary duty against the individual directors fail under NRS 78.138(7)

To state actionable claims against the individual directors, Guzman was required to allege facts that, if true, would show a breach of fiduciary duty and satisfy the two elements of NRS 78.138(7). A claim for breach of fiduciary duty customarily has three elements: (1) existence of a fiduciary duty, (2) breach of the duty, and (3) damages as a result of the breach. *See Guilfoyle v. Olde Mon-*

[7]In light of our decision, we do not consider Guzman's arguments regarding whether the individual directors proved inherent fairness. We also disagree with Guzman's contention that under the 2017 version of NRS 78.138, the fact-finder must decide, at trial, whether the plaintiff rebutted the business judgment rule. We have long held that dismissal is appropriate where, as here, the plaintiff fails to allege facts that state a claim upon which relief can be granted. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Further, in 2019, the Legislature removed the statutory language upon which Guzman relies after noting it was confusing and inaccurate. *See* Minutes of Assembly Committee on Judiciary on A.B. 207 at 10, 80th Leg. (Nev., Feb. 28, 2019).

mouth Stock Transfer Co., 130 Nev. 801, 812-13, 335 P.3d 190, 198 (2014) (providing the elements of aiding and abetting a breach of fiduciary duty); 121 Am. Jur. Trials 129 *Fiduciary Fraud* § 4 (2020) (providing the elements of fiduciary fraud).

Guzman filed breach of fiduciary duty claims against all of the individual directors, most of whom were not on the Special Committee. As to the individual directors who were not on the Special Committee and did not negotiate or approve the merger, Guzman failed to allege facts showing that those individual directors' interests actually affected the transaction. Guzman also failed to allege specific facts showing those directors engaged in any *intentional* misconduct, fraud, or knowing violation of the law in regard to the merger. Accordingly, the district court properly dismissed the complaint against those individual directors.

As to Special Committee members Laszlo and Royster, Guzman alleged that they acted to protect themselves from being ousted from RLJE's board, improperly revised RLJE's long-term revenue projections downward, and chose not to include a "majority of the minority provision" in the merger agreement. Guzman further averred that Royster's principal source of income stemmed from RLJE, that Laszlo and Royster had too few shares to be incentivized to negotiate a higher price, that they were enriched more by serving on the Special Committee than they would have been by negotiating a higher sale price, and that Laszlo and Royster lacked power to negotiate the sale. Yet, Laszlo and Royster agreed to be removed from the board of directors as part of the merger agreement, and Guzman acknowledged in her complaint that Laszlo and Royster negotiated with AMC for a higher sales price. Critically, Guzman's allegations fail to support her claim that Laszlo and Royster were motivated by self-interest to undersell the stock.[8] Indeed, Guzman admitted to the district court that she based her interested-fiduciary argument solely on her speculation that Laszlo and Royster were at risk of being ousted from the board.

We therefore agree with the district court that Guzman's claims against Laszlo and Royster fall short of the demanding standard set forth in NRCP 9(b) and NRS 78.138(7). Specifically, Guzman's speculation that Laszlo and Royster were at risk of being ousted from the board, without providing particularized supporting facts, was insufficient to show they were motivated by self-interest so as to rebut the business judgment rule's presumption that they acted in good faith. Even assuming, for the sake of argument, that Guzman alleged facts rebutting the business judgment rule, her complaint does not state facts to show that the alleged breach by Laszlo and Royster involved intentional misconduct, fraud, or a knowing vio-

[8]Guzman admits in her complaint that when the merger was announced in July 2018, RLJE's common stock hit a 52-week high of $5.08 per share, which is lower than the ultimate sale price of $6.25 per share.

lation of the law. Accordingly, the district court properly dismissed the claims against Laszlo and Royster.

The district court properly dismissed Guzman's claim against AMC

Guzman additionally argues that the district court erred by dismissing her breach of fiduciary duty claim against AMC because, as the controlling stockholder, AMC breached its fiduciary duties to the minority stockholders. As we explained in *Cohen v. Mirage Resorts, Inc.*, "[a] dissenting shareholder who wishes to attack the validity of the merger or seek monetary damages based upon improper actions during the merger process *must allege wrongful conduct that goes to the approval of the merger*." 119 Nev. 1, 13, 62 P.3d 720, 728 (2003) (emphasis added). We further explained that minority shareholders may challenge the merger process where it was procedurally deficient or approved based upon materially incorrect information. *Id.* at 11, 62 P.3d at 727. Pertinent here, a minority shareholder may allege that the merger was accomplished through the wrongdoing of majority shareholders "and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty." *Id.* at 11, 62 P.3d at 727.

Fraud-based challenges to the validity of a merger usually encompass a lack of fair dealing or lack of fair price, or both. *Id.* Such claims may "involve allegations that majority shareholders breached their limited fiduciary duties to minority shareholders." *Id.* at 12, 62 P.3d at 727. More specifically, lack-of-fair-dealing claims against majority shareholders arise where the board fails to make an independent, informed decision to approve the merger or where the majority shareholders approve a merger at the minority's expense. *Id.* Lack-of-fair-price claims allege that "the price per share was deliberately undervalued" or the majority shareholders were negligent. *Id.* at 12, 62 P.3d at 728.

Having carefully reviewed the allegations against AMC in Guzman's complaint, we agree that dismissal was proper. Critically, Guzman failed to allege particularized facts to demonstrate a lack of fair dealing or lack of fair price.[9] Guzman repeatedly points out that AMC was the majority shareholder, would not allow RLJE to receive offers from other buyers, and owned the majority of RLJE's debt. Guzman argues that the mere existence of these facts demonstrates a breach of fiduciary duty. However, these facts go to AMC's

[9]Guzman superficially argues on appeal that, outside the context of NRS 78.138, *Foster* required AMC to prove the inherent fairness of the merger. We decline to reach this argument because Guzman failed to allege sufficient facts to withstand the motion to dismiss. Moreover, Guzman fails to cogently argue the inherent fairness standard in relation to her claim against AMC. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider arguments that are not adequately briefed, not supported by relevant authority, and not cogently presented).

contractual rights rising from the investment agreement, which RLJE's shareholders approved well before the proposed merger. Significantly, Guzman fails to show how AMC used these contractual legal rights to force a merger or, more importantly, how AMC improperly influenced the decision to the minority shareholders' detriment. This is especially apparent considering that AMC recused itself from the decision-making process, the Special Committee had authority to evaluate and decline AMC's proposal and negotiate the price, and the final stock price of the sale was substantially above AMC's initial offer and was higher than the 52-week high stock price.

Guzman's attempt to ascribe a nefarious aura to AMC's agreement with Johnson also falls short of alleging particularized facts. The agreement transferred Johnson's interest in RLJE to an interest in the post-merger company and guaranteed Johnson employment in the post-merger company. However, Johnson did not have a majority interest in RLJE, was not on the Special Committee, and had no part in deciding whether to proceed with the merger with AMC. Therefore, Guzman failed to allege particularized facts demonstrating that AMC acted fraudulently or unlawfully.[10] Accordingly, we conclude the district court properly dismissed the claim against AMC.[11]

CONCLUSION

We reiterate that a shareholder seeking damages against individual directors and officers must proceed under NRS 78.138(7). Thus, we abrogate *Foster v. Arata*, 74 Nev. 143, 325 P.2d 759 (1958), and *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 n.61, 137 P.3d 1171, 1184 n.61 (2006), to the extent those cases adopted a standard that conflicts with NRS 78.138(7) and *Chur v. Eighth Judicial District Court*, 136 Nev. 68, 458 P.3d 336 (2020). Further, we conclude

[10]While the dissent contends that the complaint's allegations were sufficient as to AMC and Johnson under NRCP 12(b)(5) and the inherent fairness standard, we reiterate that fraud requires particularized allegations of fact, NRCP 9(b), and that the inherent fairness standard does not prevent the district court from first determining whether a complaint states a claim. Moreover, we note that Guzman's allegations against AMC and Johnson comprise fewer than two pages in an almost 60-page complaint. And here, where Guzman did not provide additional evidence, the district court constrained its focus to the four corners of the complaint. *Cf. Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (explaining "courts primarily focus on the allegations in the complaint" but may consider matters incorporated by reference or integral to the claim on a motion to dismiss when a complaint includes exhibits).

[11]The district court stated that it dismissed the claim against AMC because Guzman's allegations focused on the merger. To the extent the district court's reasoning was erroneous, we affirm because the district court reached the correct result. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

that the district court did not err by dismissing Guzman's claims. Accordingly, we affirm the district court.

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

Pickering, J., concurring in part and dissenting in part:

This is an appeal from an order granting a motion to dismiss for failure to state a claim upon which relief can be granted. Although the majority relies on NRCP 9(b), the respondents brought the motion to dismiss under NRCP 12(b)(5) and, neither in district court nor on appeal, cited or sought review under the particularized pleading standards of NRCP 9(b).[1] The plaintiff-friendly standard that *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008), establishes for NRCP 12(b)(5) motions thus controls. This standard requires that the court accept "all factual allegations in [the] complaint as true [and] draw all inferences in [Guzman's] favor." *Id.* at 228, 181 P.3d at 672. We may affirm the dismissal order "only if it appears beyond a doubt that [Guzman] could prove no set of facts, which, if true, would entitle [her] to relief." *Id.*

Generous though these standards are, I agree with my colleagues in affirming the dismissal of Guzman's claims against RLJE's individual directors (except Johnson). However, I would affirm the individual directors' dismissal based *solely* on the failure of the complaint to include allegations sufficient to overcome exculpatory provisions in NRS 78.138(7). This statute provides, in relevant part, that the director of a Nevada corporation "*is not individually liable* to the corporation or its stockholders . . . *for any damages as a result of any act or failure to act in his or her capacity as a director . . . unless . . . [i]t is proven that* (1) [t]he director's . . . act or failure to act constituted a breach of his or her fiduciary duties as a director . . . ***and*** (2) *[s]uch breach involved intentional misconduct, fraud or a knowing violation of law*." (emphases added). The merger is a fait accompli, so at this point Guzman's complaint as against the RLJE directors only seeks damages from them. Yet, similar to *Chur v. Eighth Judicial District Court*, 136 Nev. 68, 458 P.3d 336 (2020), the complaint in this case focused on the defendant directors' duty and breach and did not allege, even generally, the "intentional misconduct, fraud or . . . knowing violation of law" that NRS 78.138(7) requires to hold directors of a Nevada corporation individually liable for damages.

The same analysis does not apply to the controlling shareholder, AMC, or Robert Johnson, RLJE's founder, board chair, and substantial stockholder, who allegedly negotiated his post-merger eq-

[1]While NRCP 9(b) requires particularity in alleging fraud or mistake, it provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

uity position with AMC before AMC delivered its cash-out merger proposal to RLJE. A majority shareholder owes minority shareholders fiduciary duties distinct from the fiduciary duties directors owe. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11-12, 62 P.3d 720, 727-28 (2003); *Foster v. Arata*, 74 Nev. 143, 155, 325 P.2d 759, 765 (1958). And, while NRS 78.138(7) addresses the business judgment rule as applied to a corporation acting through its directors and absolves them of liability for damages for breaches of fiduciary duty not involving "intentional misconduct, fraud, or . . . knowing violation of law," NRS 78.138 says nothing about the duties a majority shareholder owes the minority shareholders. Though superseded as to directors by NRS 78.138—and perhaps due for refinement as to majority shareholders—*Foster v. Arata* states the general rule correctly: A majority shareholder is a fiduciary whose "dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the . . . [majority] stockholder not only to prove the good faith of the transaction but also to show its inherent fairness." 74 Nev. at 155, 325 P.2d at 765 (quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939)); *see also Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014) (establishing the conditions required for a controller buyout to receive business-judgment rather than an entire-fairness review—including approval by the uncoerced, informed vote of a majority of the minority stockholders—a condition neither met nor argued to have been met here), *overruled on other grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

Cohen v. Mirage Resorts, Inc. adds detail to the fiduciary duty *Foster* imposes on majority shareholders in the merger context. As *Cohen* notes, minority shareholder claims against a controlling shareholder commonly allege "(1) lack of fair dealing or (2) lack of fair price." *Cohen*, 119 Nev. at 11, 62 P.3d at 727. "Cases involving fair dealing frequently contain claims that directors, officers, or majority shareholders had conflicts of interest or were improperly compensated or influenced in return for their approval of the merger . . . . *These cases also frequently involve the timing of the merger, merger negotiations, how the merger was structured, and the approval process*." *Id.* at 12, 62 P.3d at 727-28 (emphasis added) (footnote omitted) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711-12 (Del. 1983)). "Lack of fair price may involve similar allegations plus claims that the price per share was deliberately undervalued, but it can also include negligent conduct." *Id.* at 12, 62 P.3d at 728 (citing *Weinberger*, 457 A.2d at 711).[2]

Applying this law to the facts alleged in Guzman's complaint, the district court erred, I submit, in dismissing Guzman's claims

[2]Respondents do not address Guzman's appraisal rights under NRS Chapter 92A, if any, beyond passing reference in a footnote in their answering brief.

for damages against AMC and Johnson. The complaint alleges that, before presenting the cash-out merger proposal to the board, AMC and Johnson negotiated his post-merger equity position with the newly private corporation on terms not available to anyone else. The complaint also alleges that, while AMC asked in its proposal that the board appoint a special committee, AMC did *not* include a request that the transaction be structured to include a provision for approval by a majority of the minority—a key fairness feature in transactions such as these. *See M&F Worldwide Corp.*, 88 A.3d at 644. Then, even though the law firm advising the special committee recommended that it adopt a majority-of-the-minority provision in structuring the approval process, the committee without explanation rejected this advice. Also rejected, at the insistence of one of AMC's board representatives, was the recommendation that a market check be performed on RLJE. Granted, AMC's earlier loan to RLJE included a no-shop provision, but this does not change the fact that the process whereby the merger was negotiated and approved omitted, at AMC's insistence, another key fairness feature. This omission is of special concern given that, after AMC delivered its proposal, the special committee undertook to revise RLJE's five-year base case financial forecasts *downward* despite management's public statements two weeks earlier consistent with the preexisting forecasts. And, although the majority suggests only two pages of the 60-page complaint address AMC and Johnson, this is inaccurate—the complaint states two counts, one against the individual directors, and the second against the controlling shareholders and allegations concerning the latter and their agents take up more than half of the complaint's 60 pages.

Based on the allegations noted above, and others, I would reverse the district court's order of dismissal against AMC and Johnson and allow Guzman to proceed to discovery. While I agree that a transaction such as this could be structured so as to receive business-judgment rather than entire- or inherent-fairness review, *see M&F Worldwide Corp.*, 88 A.3d at 644, the merger proposal in this case included none of the features justifying such deference besides creating a special committee, whose decisions respecting the safeguards the transaction needed to include were allegedly influenced—adversely to the minority shareholders—by AMC. Reviewed on an entire- or inherent-fairness standard, Guzman's complaint is sufficient to state claims against AMC and Johnson upon which relief could be granted. For these reasons, while I concur with my colleagues in affirming the dismissal, based on NRS 78.138(7), of the RLJE directors other than Johnson, I otherwise respectfully dissent.

LYNITA SUE NELSON, Individually and in Her Capacity as Investment Trustee of the LYNITA S. NELSON NEVADA TRUST DATED MAY 30, 2001, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE FRANK P. SULLIVAN, District Judge, Respondents, and ERIC L. NELSON, Individually and in His Capacity as Investment Trustee of the ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001; and MATT KLABACKA, Distribution Trustee of the ERIC L. NELSON NEVADA TRUST DATED MAY 30, 2001, Real Parties in Interest.

No. 81564

April 1, 2021 484 P.3d 270

Original petition for a writ of mandamus challenging a district court order denying a request for a joint preliminary injunction in a divorce case.

Petition granted.

The Dickerson Karacsonyi Law Group and *Robert P. Dickerson* and *Josef M. Karacsonyi*, Las Vegas, for Petitioner.

Solomon Dwiggins & Freer, Ltd., and *Mark A. Solomon* and *Jeffrey P. Luszeck*, Las Vegas, for Real Party in Interest Matt Klabacka.

Dawson & Lordahl, PLLC, and *Michelle Hauser*, Las Vegas, for Real Party in Interest Eric L. Nelson.

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

OPINION

By the Court, Silver, J.:

Under EDCR 5.518(a)(1), the court clerk will issue a joint preliminary injunction (JPI) "[u]pon the request of any party at any time prior to the entry of a decree of divorce or final judgment" to enjoin the parties from transferring or selling community property "or any property that is the subject of a claim of community interest." In this writ proceeding, Lynita S. Nelson and Eric L. Nelson dispute whether EDCR 5.518 required the district court, on remand from an earlier appeal in this case and upon Lynita's request, to reinstate a JPI over the parties' respective spendthrift trusts. Based on the rule's plain language, we conclude EDCR 5.518 required the district court to impose the requested JPI here.

FACTS AND PROCEDURAL HISTORY

During their marriage, Lynita and Eric created two irrevocable self-settled spendthrift trusts: the LSN Trust and the ELN Trust. The trusts were initially funded with separate property, but significant transfers of property and loans between the trusts occurred during the marriage. When Eric eventually filed for divorce, he requested, and the district court issued, a JPI.

In its decree of divorce, the district court made various findings regarding the trust property, and both parties appealed. We resolved those appeals in *Klabacka v. Nelson*, 133 Nev. 164, 394 P.3d 940 (2017), wherein we vacated the parts of the divorce decree regarding awards against the trusts and ordered the district court to properly trace the trusts' assets to determine whether they contained community property. On remand, Lynita moved under EDCR 5.518[1] to reinstate the JPI.

The district court granted Lynita's motion in part, imposing a JPI over two trust properties. Lynita moved for reconsideration, arguing that the JPI should cover all property listed in the divorce decree because it was subject to a claim of community interest. The district court denied Lynita's request to expand the JPI, finding that the ELN Trust was not a party to the action, that the court was not required to place a JPI over a nonparty's property, and that a JPI was only warranted as to the two properties over which the ELN and LSN Trusts had held an ownership interest in at some point during the proceedings.

Lynita appealed the district court's decision, which we dismissed for lack of jurisdiction. *See Nelson v. Nelson*, 136 Nev. 335, 336, 466 P.3d 1249, 1250-51 (2020). Lynita now petitions for writ relief. Matt Klabacka, the ELN Trust distribution trustee, responds, and Eric joins Klabacka's response (collectively, Eric).

DISCUSSION

Lynita seeks a writ of mandamus directing the district court to impose a JPI under EDCR 5.518 over all property subject to a claim of community property interest. Lynita previously appealed this issue, and we determined that a writ petition would be proper here. *Nelson*, 136 Nev. at 339, 466 P.3d at 1252-53 (providing that "a writ petition would be the appropriate vehicle to seek review" in this case). Moreover, the scope of EDCR 5.518 is an issue of first impression, and we therefore elect to consider Lynita's petition for a writ of mandamus.

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[1]The parties refer interchangeably to EDCR 5.517 and EDCR 5.518 in their briefs. EDCR 5.517 was the operative rule during the action in this case but was renamed EDCR 5.518 in 2019. *See In re Proposed Amendments to the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT No. 0545 (Order Amending the Rules of Practice for the Eighth Judicial District Court, Nov. 27, 2019). Because the content of the rule remains the same, we refer to the current rule, EDCR 5.518.

Whether trusts may be parties under EDCR 5.518

The threshold issue before this court is whether EDCR 5.518's scope includes the parties' trusts.[2] Lynita argues both trusts are parties to this action and, moreover, that trusts may be parties to an action under EDCR 5.518. Eric concedes the ELN Trust was joined as a necessary party,[3] but he counters that only "persons" such as husbands and wives may be parties under that rule and that a JPI is improper over property in a spendthrift trust, which is neither separate nor community property.[4]

"[R]ules of statutory construction apply to court rules." *Weddell v. Stewart*, 127 Nev. 645, 651, 261 P.3d 1080, 1084 (2011). In construing statutes, when the language of a statute is plain and unambiguous, we "give that language its ordinary meaning and [do] not go beyond it." *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

As pertinent here, EDCR 5.518(a)(1) states "[u]pon the request of *any party* . . . a preliminary injunction will be issued by the clerk against *the parties* to the action enjoining them and their officers, agents, servants, employees, or a person in active concert or participation with them." (Emphases added.) A "party" is "a party personally, if unrepresented, or that party's counsel of record, if represented." EDCR 5.102(j). And "'[p]erson' must include and apply to corporations, firms, associations and *all other entities*, as well as natural persons." EDCR 1.12(f) (emphasis added). Going further, "'person' means a natural person, any form of business or social organization and *any other nongovernmental legal entity including*, but not limited to, a corporation, partnership, association, *trust* or unincorporated organization." NRS 0.039 (emphases added). Finally, a trust may also be a party to a lawsuit through its trustee—as this court has previously recognized. *See Causey v. Carpenters S. Nev. Vacation Tr.*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979).

Here, the record shows Eric and Lynita stipulated and agreed that the ELN and LSN Trusts be joined as necessary parties in the

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[2]Eric only contests the JPI as related to the ELN trust, yet we nevertheless address both trusts because Lynita addressed both trusts and "all property subject to a claim of community property interest" in her petition.

[3]Accordingly, we need not address Lynita's related judicial estoppel argument.

[4]Eric makes three other arguments that we decline to address. Eric argues that Lynita improperly asks for the finality of an NRCP 65 injunction, contrary to the scope of a JPI under EDCR 5.518. However, we need not consider that argument, as Lynita only asks for a JPI within the limits of EDCR 5.518. Eric next argues that the Wyoming Downs property cannot be subject to a JPI. Because this is an issue of fact for the district court to determine in the first instance, we do not consider the Wyoming Downs property at this time. Finally, we do not consider Eric's due process arguments, as he failed to raise them below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

case,[5] the record includes documents filed by each trust's trustees, the district court's decisions name the trustees as parties, the district court's orders direct the trusts to take various actions, and both trusts are named as parties to the action below and to this writ petition through their respective trustees. And a plain reading of the rules shows that a trust may be a "party" under EDCR 5.518. Therefore, we conclude that the ELN and LSN Trusts are parties to this action and the district court's finding to the contrary was erroneous. We also conclude that EDCR 5.518 applies to trusts.

Whether a joint preliminary injunction is proper here under EDCR 5.518

Lynita next argues that EDCR 5.518 is mandatory and the district court was required to issue a JPI upon her request. Eric counters that Lynita must first present a prima facie case that community property exists before the district court must impose a JPI and, moreover, EDCR 5.518 does not require a district court to reinstate a JPI after a divorce decree, even if the case is ultimately remanded. Eric further asserts that the district court did not abuse its discretion under the particular facts of this case.

Regarding Lynita's argument that EDCR 5.518 is mandatory, we have already resolved this issue in *Nelson v. Nelson*, where we explained that EDCR 5.518 requires the court clerk to issue an injunction upon a party's request. 136 Nev. at 338, 466 P.3d at 1252. We therefore do not consider the arguments on this point further.[6] Eric nevertheless argues that because the trusts were funded by separate property, Lynita was required to make a prima facie showing that community property existed within the trusts before the district court was required to impose a JPI.[7]

First, EDCR 5.518 has no language indicating that a party must make a prima facie showing that a community interest exists before the party may obtain a JPI. Rather, the rule mandates that a clerk impose a JPI upon the request of any party on "any property that is

[5]Because Eric and Lynita stipulated below that the trusts were parties to the action, we are unpersuaded by Eric's arguments regarding NRS 125.050 and EDCR 5.85, the earlier version of EDCR 5.518.

[6]In light of our decision, we need not address Eric's additional arguments that the district court may modify or dissolve a JPI or that there were sufficient assets to offset any potential deficiencies. However, we note that while the district court is required to impose a JPI over property with a claim of community interest upon a party's request, the court can modify or dissolve the JPI at any time if the court determines the property should not fall under that JPI. *See* EDCR 5.518(d).

[7]Eric also argues that Lynita cannot have a community interest in the trust property because, as a beneficiary to a spendthrift trust, he does not own the trust property. Our review of the prior appeal in this matter shows Eric already raised this argument in that case, and we concluded it was without merit. *Klabacka*, 133 Nev. at 182 n.9, 394 P.3d at 954 n.9.

the subject of a *claim* of community interest." *See* EDCR 5.518(a)(1) (emphasis added). Therefore, so long as there is a claim of community interest, a JPI must be imposed upon a party's request.

Second, we recognized in *Klabacka v. Nelson* that the LSN and ELN Trusts were initially funded with separate property. 133 Nev. at 171, 394 P.3d at 947. However, we also recognized assets within the trusts may contain community property and remanded the case so that the district court could conduct proper tracing of the trust assets to determine whether any community property was transferred into or commingled within the trusts. *Id.* at 173, 394 P.3d at 948. Therefore, contrary to Eric's assertions, we did not determine that all assets in the trusts were separate property. Rather, our mandate in *Klabacka*, that the district court trace trust assets, demonstrates that at the time of the divorce decree, the LSN and ELN Trusts may have included property with a claim of community interest to which the JPI should extend. Accordingly, the district court must impose a JPI over all trust property with a claim of community interest.[8]

Finally, Eric argues that EDCR 5.518 does not require the district court to reinstate a prior JPI after a final judgment is entered, even if the case is ultimately remanded.[9] We disagree. In *Klabacka*, we vacated portions of the divorce decree and remanded to the district court for further proceedings. 133 Nev. at 165, 394 P.3d at 943. Vacate means "[t]o nullify or cancel; make void; invalidate." *Vacate*, *Black's Law Dictionary* (11th ed. 2019). And where issues remain for the district court to decide, there is no final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (describing a "final judgment" as "one that disposes of the issues presented in the case, . . . and leaves nothing for the future consideration of the court" (internal quotation omitted)). Therefore, once a decree or judgment is vacated and remanded, even only in part, there is no longer a final judgment. Accordingly, EDCR 5.518 applies on remand.

CONCLUSION

Based on EDCR 5.518's plain language, trusts may be parties to a divorce action and EDCR 5.518 is mandatory, does not require the requesting party to first make a prima facie showing of community interest, and applies on remand. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus

[8]Eric additionally argues that a JPI is inequitable in this case where Lynita has already disposed of the majority of assets within her trust, namely the Palmyra residence. However, in line with our foregoing analysis, a JPI is still applicable over any remaining property subject to a claim of community interest. Furthermore, it is for the district court, not the appellate court, to determine whether any trust property at issue is separate or community property while conducting the tracing.

[9]Although Eric failed to raise this argument in the lower court, we address it because we direct the district court to impose a JPI on remand.

instructing the district court to vacate its order to the extent it found that the LSN and ELN Trusts were not parties to this action and to impose a JPI over all trust property that remains subject to a claim of community interest, until the district court makes a determination as to any community property.

PARRAGUIRRE and STIGLICH, JJ., concur.

ANTHONY S. NOONAN IRA, LLC; LOU NOONAN; AND JAMES M. ALLRED IRA, LLC, APPELLANTS, *v.* U.S. BANK NATIONAL ASSOCIATION EE; AND NATIONSTAR MORTGAGE, LLC, RESPONDENTS.

No. 78624

April 15, 2021 485 P.3d 206

Appeal from a district court summary judgment in an action to quiet title to real property. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Affirmed.

SILVER, J., with whom CADISH, J., agreed, dissented.

Shumway Van and *Michael C. Van* and *Garrett R. Chase*, Las Vegas, for Appellants.

Akerman LLP and *Ariel E. Stern, Melanie D. Morgan*, and *Scott R. Lachman*, Las Vegas, for Respondents.

Before the Supreme Court, EN BANC.

OPINION[1]

By the Court, STIGLICH, J.:

INTRODUCTION

At issue in this appeal is the construction of NRS 116.3116(2) (2009),[2] commonly referred to as Nevada's "superpriority lien" statute. As relevant here, the statute gives a homeowners association's (HOA) lien priority over a first deed of trust with respect to the HOA's "assessments for common expenses based on the periodic budget adopted by the [HOA] . . . which would have become due *in the absence of acceleration* during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2) (emphasis added). Here, respondents' predecessor attempted to

[1]A panel of this court originally issued an opinion resolving this matter. *See Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE*, 136 Nev., Adv. Op. 41, 466 P.3d 1276 (2020). On January 25, 2021, we granted respondents U.S. Bank National Association and Nationstar Mortgage's petition for en banc reconsideration of that decision. Having reconsidered the matter, we vacate the panel's July 9, 2020, opinion and issue this opinion in its place. Relatedly, on February 8, 2021, appellants Anthony S. Noonan IRA, LLC, Lou Noonan, and James M. Allred IRA, LLC, filed a motion requesting that this matter be scheduled for oral argument. That motion is denied.

[2]This was the applicable version of the statute during this case's pertinent time frame and is the version addressed by this opinion.

satisfy the HOA's superpriority lien by tendering a check equaling 9 months' worth of assessments. But the HOA had imposed a yearly assessment, such that the entire yearly assessment became due "during the 9 months immediately preceding" when the HOA took action to enforce its lien. The district court granted summary judgment for respondents, evidently reasoning that the HOA's imposition of an annual assessment "accelerat[ed]" the assessments' due date, such that respondents were not required to tender more than 9 months of assessments to satisfy the superpriority portion of the HOA's lien. We agree with the district court's construction of NRS 116.3116(2) and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

The HOA in this case charged annual assessments of $216, which became due every January. When the homeowners did not pay their 2011 assessment, the HOA recorded a notice of lien for delinquent assessments in April 2011.[3] The predecessor of respondents U.S. Bank National Association and Nationstar Mortgage (collectively, U.S. Bank), the beneficiary of the first deed of trust on the property, requested the superpriority amount from the HOA's foreclosure agent. After receiving a ledger of assessments and payments from the foreclosure agent, U.S. Bank's predecessor tendered $162 to the foreclosure agent in August 2011. The tendered amount represented 9 months out of 12 months of assessments based on the $216 yearly assessment amount.[4] Despite the tender, the HOA continued with the foreclosure sale, and in 2014, appellants Anthony S. Noonan IRA, LLC, Lou Noonan, and James M. Allred IRA, LLC (collectively, Noonan), purchased the property at the HOA's foreclosure sale for $50,100.

Noonan then filed a complaint against U.S. Bank, seeking to quiet title to the property. After initially denying U.S. Bank's motion for summary judgment and its subsequent motion for reconsideration, the district court granted U.S. Bank's renewed motion for summary judgment. The district court concluded that the tender of the equivalent of 9 months' worth of the annual assessment amount cured the default on the superpriority portion of the HOA's lien because Nevada law limited the superpriority portion of an HOA's lien to 9 months' worth of assessments. And, because the tender cured the superpriority default, the district court concluded that the

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[3]We have previously held that under the version of NRS 116.3116 applicable here, the HOA's notice of lien for delinquent assessments institutes an action to enforce an NRS 116.3116 lien. *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 25-26, 388 P.3d 226, 231 (2017).

[4]We have previously held that a valid superpriority tender is effective to prevent an HOA's foreclosure from extinguishing a first deed of trust. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018).

foreclosure sale did not extinguish U.S. Bank's first deed of trust. Consequently, the district court found that Noonan took title to the property subject to U.S. Bank's deed of trust.

DISCUSSION

Noonan argues that the district court erred by concluding the tender by U.S. Bank's predecessor satisfied the superpriority portion of the HOA's lien, contending the district court erroneously construed NRS 116.3116(2) and thereby miscalculated the amount U.S. Bank's predecessor had to tender. "This court reviews a district court's grant of summary judgment and its statutory construction determinations de novo." *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857, 265 P.3d 688, 690 (2011).

NRS 116.3116(2) provides that the superpriority portion of an HOA's lien consists of "assessments for common expenses . . . which would have become due *in the absence of acceleration* during the 9 months immediately preceding institution of an action to enforce the lien." (Emphasis added.) Noonan argues that this provision gives the HOA's *entire* annual assessment superpriority status because that assessment became due in the 9 months preceding the notice of delinquent assessment. In particular, Noonan argues that because NRS 116.3115(1) (2009) permitted the HOA to impose assessments "at least annually," and because the HOA did so in this case, there was no "acceleration" because the assessments were due in their entirety on an annual basis.

We are not persuaded by Noonan's proffered construction of NRS 116.3116(2), as it renders the phrase "in the absence of acceleration" meaningless. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("[S]tatutory interpretation should not render any part of a statute meaningless . . . ."). [5] While an HOA's imposition of an annual assessment may, in the abstract, not be an "acceleration," Noonan does not explain what "in the absence of acceleration" means if the statute did not presuppose the imposition of monthly assessments and account for the possibility of an annual assessment. In this respect, the commentary to the Uniform Common Interest Ownership Act of 1982, 7 U.L.A., part II (2009) (amended 1994, 2008) (UCIOA), upon which the Legislature based NRS 116.3116(2), supports the conclusion that NRS 116.3116(2) presupposes the imposition of monthly assessments. *Cf. SFR Invs. Pool 1,*

[5]Additionally, and although it did not occur in this case, Noonan's proffered construction could have absurd results. *Cf. Leven*, 123 Nev. at 405, 168 P.3d at 716 ("[A] statute's language should not be read to produce absurd or unreasonable results." (internal quotation omitted)). For example, if an HOA imposes an annual assessment in January and does not mail its notice of lien for delinquent assessment until November (i.e., more than 9 months after the annual assessment became due), no portion of the HOA's lien would have superpriority status.

LLC v. U.S. Bank, N.A., 130 Nev. 742, 744, 334 P.3d 408, 410 (2014) (relying on the UCIOA's commentary to interpret NRS 116.3116), *superseded by statute on other grounds as stated in Saticoy Bay LLC 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 444 P.3d 428 (2019). The commentary explains that the purpose of the 9-month[6] superpriority lien provision is to "strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." UCIOA § 3-116 cmt. 1, 7 U.L.A., part II 121-24 (2009). In furtherance of this purpose, we conclude that NRS 116.3116(2)'s use of "in the absence of acceleration" accounts for the situation that occurred here, where the HOA imposed an annual assessment but a secured lender paid 9 months' worth of assessments.

Accordingly, when an HOA imposes an annual assessment all at once, there has been an "acceleration" under NRS 116.3116(2). Thus, even when an HOA imposes an annual assessment, the superpriority portion of the HOA's lien can be satisfied by tendering 9 months' worth of assessments.[7] Because U.S. Bank's predecessor made such a tender in this case, the district court correctly determined that the HOA's foreclosure sale did not extinguish the first deed of trust and that Noonan took title to the property subject to that deed of trust.[8] We therefore affirm the summary judgment in favor of U.S. Bank.

Hardesty, C.J., and Parraguirre, Pickering, and Herndon, JJ., concur.

Silver, J., with whom Cadish, J., agrees, dissenting:

The statutory language of NRS 116.3116(2) (2009) is plain and unambiguous. In providing that the amounts subject to superpriority status are those that "would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien," it is clear that, if a yearly assessment becomes due in the 9 months preceding the notice of delinquent assessments, the entirety of the assessment is subject to superpriority status. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v.*

[6]The UCIOA refers to a 6-month superpriority lien. *See* UCIOA § 3-116 cmt. 1, 7 U.L.A., part II 121-24 (2009).

[7]NRS 116.3116(2) also provides that maintenance and nuisance-abatement charges are afforded superpriority status. *See* NRS 116.3115. We clarify that if an HOA imposes such charges, those charges must also be paid to satisfy the superpriority portion of the HOA's lien.

[8]Noonan raises other arguments on appeal in support of reversal. To the extent that those arguments are not belied by the record or were not recently rejected in *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 136 Nev. 728, 731-32, 478 P.3d 376, 379 (2020), we are not persuaded that reversal is warranted.

JPMorgan Chase Bank, N.A. (Gray Eagle), 133 Nev. 21, 26, 388 P.3d 226, 231 (2017) ("[A] party has instituted proceedings to enforce the lien . . . when it provides the notice of delinquent assessment." (internal quotation marks omitted)). In that sense, the 9-month limitation mentioned in the statute speaks only to *which* assessments are subject to superpriority status—the assessments that become due, absent acceleration, in the 9 months preceding the institution of the lien enforcement action. And the yearly assessment at issue in this case was not an acceleration; Nevada law permits yearly assessments, and the parties agree that assessments were always due on a yearly basis. *See* NRS 116.3115(1) (2009) (providing that "assessments must be made *at least annually*, based on a budget adopted at least annually" (emphasis added)); *Acceleration*, *Black's Law Dictionary* (10th ed. 2014) (defining "acceleration" as "[t]he act or process of quickening or shortening the duration of something, such as payments").

While parties and this court often refer to the superpriority lien as being equal to 9 months' worth of assessments, *see, e.g.*, *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018); *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 371, 373 P.3d 66, 72 (2016), in those cases the court is referring to assessments assessed monthly, rather than yearly, such that those cases are factually distinguishable from the present one. And any reliance on secondary sources or public policy to conclude that the entirety of the yearly assessment amount does not have superpriority status is unwarranted when the statute at issue is unambiguous, as it is here. *See JED Prop., LLC v. Coastline RE Holdings NV Corp.*, 131 Nev. 91, 94, 343 P.3d 1239, 1241 (2015) ("We do not look to other sources . . . unless a statutory ambiguity requires us to look beyond the statute's language to determine the legislative intent."); *see also 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 78-79, 459 P.3d 227, 230 (2020) (applying a foreclosure statute's plain language despite comments to the Uniform Common Interest Ownership Act suggesting a contrary interpretation). Because I conclude that the entirety of the yearly assessment at issue in this case is subject to superpriority status, I dissent.