TYLER JAMES BOLDEN, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 85099-COA

October 19, 2023 538 P.3d 1161

Appeal from a judgment of conviction, entered pursuant to a guilty plea, of attempted lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

Affirmed in part, vacated in part, and remanded.

[Rehearing denied November 27, 2023]

JoNell Thomas, Special Public Defender, and *Melinda Simpkins* and *Robert Arroyo*, Chief Deputy Special Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Westbrook, J.:

At his sentencing, appellant Tyler James Bolden objected to the imposition of extradition restitution as well as the cost of a psychosexual evaluation on the basis that he lacked the ability to pay. Over his objection, the district court ordered Bolden to pay both the restitution and the full evaluation cost but waived the $25 administrative assessment fee required under NRS 176.062(1).

In this appeal, we consider whether and to what extent the district court must make an investigative inquiry into a defendant's ability to pay extradition restitution under NRS 179.225(2) before ordering the defendant to pay that restitution. We also consider whether NRS 176.139(7) requires the district court to make a similar inquiry prior to requiring the defendant to pay the psychosexual evaluation cost.

We conclude that the plain language of NRS 179.225(2) requires the district court to inquire, prior to sentencing, into the defendant's ability to pay extradition restitution in light of any existing obligations for child support, victim restitution, or administrative assessments. NRS 179.225(2)(a)-(c). The district court's statutory duty is satisfied by asking the defendant whether they have any such obligations that would be impacted by the imposition of extradition

restitution and by determining whether the defendant is able to pay such obligations or, alternatively, if extradition restitution would prevent the defendant from satisfying those obligations.

In contrast, we conclude that the plain language of NRS 176.139(7) does not require the district court, sua sponte, to conduct a similar investigative inquiry before requiring a defendant to pay for the cost of a psychosexual evaluation. Rather, it is incumbent upon the defendant to object to the psychosexual evaluation cost based on their inability to pay, and the defendant bears the burden to substantiate that inability to pay before the court can reduce or waive the psychosexual evaluation cost. However, once a defendant has done so, the court must make findings on the record as to the extent of the defendant's ability to pay and must impose the cost of the psychosexual evaluation only to that extent.

In this case, because the district court did not undertake an investigative inquiry prior to ordering Bolden to pay extradition restitution under NRS 179.225(2) or address Bolden's alleged inability to pay the psychosexual evaluation cost following his timely and substantiated objection, we affirm the judgment of conviction, vacate the sentence as to restitution and the cost of the psychosexual evaluation, and remand for resentencing.

PROCEDURAL AND FACTUAL HISTORY

After being extradited from Michigan to Nevada, Bolden entered into negotiations with the State to plead guilty to one count of attempted lewdness with a child under the age of 14 years. His negotiation included an agreement to pay extradition restitution, if any was ordered, and an agreement to undergo a psychosexual evaluation pursuant to NRS 176.139.

At the sentencing hearing, the State requested that the court impose restitution for extradition expenses in the amount of $3525, as well as the cost of Bolden's psychosexual evaluation in the amount of $1689.30. Bolden objected to both the extradition restitution and psychosexual evaluation cost and claimed that he did not have the ability to pay either amount. Bolden specifically referenced NRS 179.225 in support of his assertion that the extradition restitution should be waived. The district court reviewed NRS 179.225 and stated that it "read that statute only to say that the Administrative Assessment fee can be [waived.]" After sentencing Bolden to a term of 42 to 144 months in prison, the district court did "not find a basis to waive the extradition cost" and imposed both the extradition restitution and psychosexual evaluation cost in full but waived the $25 administrative assessment required under NRS 176.062(1). Bolden now appeals, challenging the imposition of the restitution for his extradition expenses and the cost of his psychosexual evaluation.

ANALYSIS

In this appeal, we address the following issues: (1) whether and to what extent NRS 179.225(2) requires the district court to conduct an investigative inquiry into the defendant's ability to pay before ordering the defendant to pay extradition restitution, and (2) whether NRS 176.139(7) imposes a similar investigative requirement on the district court to inquire as to the defendant's ability to pay the cost of a psychosexual evaluation before ordering the defendant to pay that cost.

The decision to impose restitution under NRS 176.033(3), including extradition restitution pursuant to NRS 179.225, is a sentencing determination. *Martinez v. State*, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999).[1] The district court has broad discretion when sentencing a defendant, and "in the absence of a showing of abuse of such discretion, we will not disturb the sentence." *Parrish v. State*, 116 Nev. 982, 988-89, 12 P.3d 953, 957 (2000) (quoting *Deveroux v. State*, 96 Nev. 388, 390, 610 P.2d 722, 724 (1980)). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

Imposition of extradition restitution

Bolden first contends that the district court abused its discretion when it imposed extradition restitution without first investigating his ability to pay under NRS 179.225(2).[2] To evaluate this argument, we must engage in statutory interpretation, which, like other questions of law, we review de novo. *See Doolin v. State, Dep't of Corr.*, 134 Nev. 809, 811, 440 P.3d 53, 55 (Ct. App. 2018). "The goal of statutory interpretation is to give effect to the Legislature's intent." *Id.* (internal quotation marks omitted). To determine the Legislature's intent, we begin by looking at the statute's plain language. *Id.* In doing so, we "interpret a rule or statute in harmony with other rules or statutes." *Id.* (internal quotation marks omitted).

Here, the relevant language is contained in subsections (2) and (3) of NRS 179.225:

> 2. If a person is returned to this State pursuant to this chapter or chapter 178 of NRS and is convicted of, or pleads guilty,

[1]We note that although *Martinez* addressed restitution to victims of crime under NRS 176.033(3) (formerly codified as NRS 176.033(1)(c), *see* 2019 Nev. Stat., ch. 633, § 10.5, at 4382), the same statute provides for both restitution to victims of crime as well as restitution to the State of Nevada or other governmental entity for extradition expenses.

[2]NRS 179.225 addresses only extradition restitution. Accordingly, unless specifically noted otherwise, our discussion herein applies only to extradition restitution and not to any other type of restitution.

> guilty but mentally ill or nolo contendere to, the criminal charge for which the person was returned or a lesser criminal charge, the court shall conduct an investigation of the financial status of the person to determine the ability to make restitution. In conducting the investigation, the court shall determine if the person is able to pay any existing obligations for:
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> (a) Child support;
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> (b) Restitution to victims of crimes; and
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> (c) Any administrative assessment required to be paid pursuant to NRS 62E.270, 176.059, 176.0611, 176.0613, 176.062 and 176.0623.
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> 3. If the court determines that the person is financially able to pay the obligations described in subsection 2, it shall, in addition to any other sentence it may impose, order the person to make restitution for the expenses incurred by the Office of the Attorney General or other governmental entity in returning the person to this State. The court shall not order the person to make restitution if payment of restitution will prevent the person from paying any existing obligations described in subsection 2. Any amount of restitution remaining unpaid constitutes a civil liability arising upon the date of the completion of the sentence.

Under the plain language of NRS 179.225(2), the district court is required to undertake an investigative inquiry in all extradition cases that result in a conviction. *See Thomas v. State*, 88 Nev. 382, 384, 498 P.2d 1314, 1315 (1972) (recognizing that "shall" is generally construed as mandatory). The subject matter of that inquiry is mandated by statute: the court "shall" inquire into "the financial status of the person to determine the ability to make restitution." NRS 179.225(2). In doing so, the district court "shall" inquire if the defendant has the ability to pay any existing obligations for child support, victim restitution, or administrative assessments as listed in NRS 179.225(2)(a)-(c).

The purpose of the investigative inquiry is not to determine whether the defendant has the present ability to pay extradition restitution in a general sense. Rather, the second sentence of NRS 179.225(2) narrows the scope of that inquiry to require *only* an investigation into the defendant's ability to pay existing obligations within the three categories listed in NRS 179.225(2)(a)-(c): child support, victim restitution, and administrative assessments.

This limited investigatory purpose is further supported by the text of NRS 179.225(3), which mandates two alternative outcomes, depending on the defendant's ability to pay for the specific obligations listed in subsection 2. If the court determines that the defendant is "financially able to pay the obligations described in

subsection 2," then extradition restitution "shall" be ordered. *See Thomas*, 88 Nev. at 384, 498 P.2d at 1315. On the other hand, the court "shall not" order the defendant to pay extradition restitution "if payment of restitution will prevent the person from paying" the existing obligations listed in subsection 2. NRS 179.225(3).

Because the consequences set forth in subsection 3 relate only to the defendant's ability to pay for the three categories of obligations listed in subsection 2, it follows that the scope of the court's investigative inquiry in extradition restitution cases is limited to ascertaining the defendant's ability to pay for the enumerated obligations. *See City of Henderson v. Amado*, 133 Nev. 257, 259, 396 P.3d 798, 800 (2017) (explaining that appellate courts construe statutes "as a whole," while reading statutes "in a manner that makes the words and phrases essential and the provisions consequential"); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

Although the plain language of NRS 179.225(2) is not ambiguous, and thus it is not necessary to resort to legislative history, we nevertheless note that the legislative history supports our construction of the statute. *See Gilman v. Clark Cty. Sch. Dist.*, 139 Nev. 61, 67, 527 P.3d 624, 629 (Ct. App. 2023). When NRS 179.225(2) was enacted, the Legislature intended the obligations listed in NRS 179.225(2) to be prioritized over extradition restitution in this situation. Hearing on A.B. 465 Before the S. Judiciary Comm., 67th Leg. (Nev., May 14, 1993).[3] The legislative history of NRS 179.225 indicates that the purpose of the statute was to ensure that existing obligations for child support, victim restitution, and administrative assessments were paid; this further comports with the plain language of NRS 179.225(3), which exclusively concerns the payment of existing obligations and prohibits the district court outright from imposing extradition restitution if doing so would prevent the satisfaction of those obligations.

Therefore, when conducting an investigation under NRS 179.225(2), the district court is required to ascertain whether the defendant has any existing obligations listed in NRS 179.225(2)(a)-(c) and, if so, determine if the imposition of extradition restitution would impact the defendant's ability to satisfy those obligations. The court is not required to independently investigate whether the

[3]We also recognize that the importance of prioritizing victim restitution was reaffirmed by the passage of Marsy's Law, which entitles crime victims "to have all monetary payments, money and property collected from any person who has been ordered to make restitution be first applied to pay the amounts ordered as restitution to the victim." *See* Nev. Const. art. 1, § 8A(1)(p).

defendant has the ability to pay restitution generally outside the parameters of those existing obligations.[4]

Notably, NRS 179.225(2) is silent regarding *how* the district court must conduct this investigation. Because the plain language of the statute does not include any specific procedural requirements, the particular manner in which the district court undertakes this investigation remains in the court's discretion. Thus, the district court may satisfy its statutory duty by asking the defendant brief questions on the record to ascertain whether the defendant has any existing obligations listed in NRS 179.225(2)(a)-(c), their ability to pay such obligations, and whether ordering extradition restitution would prevent the defendant from paying such obligations.[5] The district court's finding regarding a defendant's ability to pay is a factual determination entitled to deference on appeal. *See, e.g.*, *Sunseri v. State*, 137 Nev. 562, 564, 495 P.3d 127, 131 (2021) ("[T]his court gives deference to the district court's factual findings as long as they are supported by the record.").

The State argues on appeal that the district court did not abuse its discretion in imposing the extradition restitution in this case because Bolden agreed to pay this restitution in his plea agreement. While the plea agreement states that Bolden will be ordered to reimburse the State of Nevada for any expenses related to his extradition, the State fails to demonstrate that this plea provision absolved the district court of its duty to ensure that Bolden would

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[4]We note that when determining restitution to a crime victim, the district court is not required to consider the defendant's ability to pay. *See Martinez*, 115 Nev. at 13, 974 P.2d at 135 (concluding that "there is no requirement that the district court consider a defendant's ability to pay in determining at sentencing the amount of restitution" to a battery victim (citing NRS 176.015)). Unlike restitution to a crime victim, which does not require consideration of a defendant's ability to pay in the procedures outlined in NRS 176.015, *see id*., the inquiry outlined in NRS 179.225(2) *does* expressly require the district court to consider the defendant's ability to pay before imposing extradition restitution to the extent that it impacts the defendant's ability to pay the existing obligations enumerated in the statute. Nothing in this opinion should be construed as restricting the district court's discretion beyond what is already provided by law in determining the priority of payments. *See, e.g.*, Nev. Const. art. 1, § 8A(1)(p) (prioritizing payments to satisfy victim restitution); NRS 209.463(3), (4) (detailing the priority in which deductions from inmates' wages must be applied).

[5]We note that both the child support obligations enumerated in NRS 179.225(2)(a) and the "administrative assessments required *to be paid*" enumerated in NRS 179.225(2)(c) (emphasis added) contemplate prospective payments. Accordingly, the statute clearly indicates that the district court should consider not just *pre*existing obligations, but also those being imposed contemporaneously in the case before the court. *See Ford v. State*, 127 Nev. 608, 622 n.8, 262 P.3d 1123, 1132 n.8 (2011) (stating the supreme court has "long adhere[d] to the doctrine of *noscitur a sociis* (words are known by—acquire meaning from—the company they keep)").

be able to pay the obligations listed in NRS 179.225(2). Further, requiring the district court to impose extradition restitution without considering the obligations in NRS 179.225(2)(a)-(c) would subvert the legislative intent of the statute to prioritize the existing obligations over extradition restitution. *See* Hearing on A.B. 465 Before the S. Judiciary Comm., 67th Leg. (Nev., May 14, 1993).

Bolden contends that when the district court waived the $25 administrative assessment, it was precluded from imposing extradition restitution under NRS 179.225(3) because the waiver constituted a finding that Bolden lacked the ability to pay extradition restitution. However, the record does not reflect that the district court made any express finding regarding Bolden's ability to pay restitution.

In this case, because the record does not reflect that the district court investigated whether Bolden had any existing obligations under NRS 179.225(2)(a)-(c) that would be impacted by an award of extradition restitution, we cannot determine if the court was required to impose or prohibited from imposing restitution under NRS 179.225(3).[6] Because the district court imposed extradition restitution without conducting the investigative inquiry required under NRS 179.225(2), we conclude that the district court abused its discretion.

On remand, we direct the district court to comply with the mandatory provisions of NRS 179.225. The court shall inquire whether Bolden has existing obligations for child support, victim restitution, or administrative assessments. If Bolden has existing obligations, then the court must make a determination on the record as to whether he is able to pay such obligations or, alternatively, if extradition restitution would prevent Bolden from satisfying those obligations; NRS 179.225(3) either requires the court to impose or prohibits the court from imposing extradition restitution based on the outcome of that determination.

Imposition of the psychosexual evaluation cost

We next turn to Bolden's second contention, that the district court erred when it imposed the cost of Bolden's psychosexual evaluation without first conducting an inquiry into his ability to pay or making factual findings regarding his inability to pay. While we find

[6]A presentence investigation report can provide information regarding a defendant's existing obligations. *See* NRS 176A.200 ("The Division shall inquire into the circumstances of the offense, criminal record, social history and present condition of the defendant."); NRS 176.145(1) (requiring the report to contain information regarding the defendant's financial condition, the financial loss to the victim, and whether the defendant has an obligation for the support of a child). However, the district court still must investigate and determine whether the information in the presentence investigation report is accurate as of the time of sentencing.

that the district court abused its discretion by failing to account for Bolden's inability to pay under these circumstances, we disagree with Bolden's claim that the district court is, sua sponte, required to conduct an investigative inquiry, similar to that required by NRS 179.225(2), before imposing the cost of a psychosexual evaluation.

NRS 176.139(7) states, "If a psychosexual evaluation is conducted pursuant to this section, the court shall . . . [o]rder the defendant, to the extent of the defendant's financial ability, to pay for the cost of the psychosexual evaluation." Unlike NRS 179.225(2), which expressly provides that the district court must undertake an investigative inquiry to determine the defendant's ability to pay when determining extradition restitution, NRS 176.139(7) states only that the court shall order the defendant to pay the cost of the psychosexual evaluation "to the extent of the defendant's financial ability." On its face, the plain language of NRS 176.139(7) does not require the district court to initiate any investigative inquiry. *Ramos v. State*, 137 Nev. 721, 722, 499 P.3d 1178, 1180 (2021) (stating that when interpreting a statute, the appellate courts first look to the statute's plain language to determine its meaning and will enforce it as written if the language is clear and unambiguous); c*f.* NRS 179.225(2).

"Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another." *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012). Additionally, "Nevada law also provides that omissions of subject matters from statutory provisions are presumed to have been intentional." *Dep't of Tax'n v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005).[7] Because NRS 179.225(2) contains an express obligation that the district court must conduct an inquiry into the defendant's ability to pay before imposing extradition restitution, the omission of similar language from NRS 176.139(7) is presumed intentional.[8] *Id.* Therefore, we decline to read an investigative obligation into NRS 176.139(7) where the statute does not expressly require it. *See Abid v. Abid*, 133 Nev. 770, 773, 406 P.3d 476, 479 (2017) (declining to read a suppression remedy into a statute, "especially when our Legislature has proven in the criminal context that it knows how to write one").

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[7]*See also* J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. Toronto L.J. 286, 298 (1936):

> [I]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation.

[8]We note that the pertinent portion of NRS 179.225 was enacted in 1993, *see* 1993 Nev. Stat., ch. 331, § 3, at 935-36; and the pertinent portion of NRS 176.139 was enacted in 1997, *see* 1997 Nev. Stat., ch. 449, § 3, at 1638.

Because NRS 176.139(7) does not require the court to initiate an investigative inquiry into the defendant's ability to pay prior to ordering the defendant to pay the cost of a psychosexual evaluation, it is incumbent upon the defendant to object to the imposition of the cost. *See Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018) ("The failure to preserve an error . . . forfeits the right to assert it on appeal."). If the defendant objects to the psychosexual evaluation cost based on an inability to pay that amount, then the defendant must also provide substantiation of their inability to pay. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 805, 102 P.3d 41, 46 (2004) ("The initial burden of establishing indigency is on the defendant." (citing to *Nikander v. Dist. Court in & for First Judicial Dist.*, 711 P.2d 1260, 1262 (Colo. 1986))); *see also Widdis v. Second Judicial Dist. Court*, 114 Nev. 1224, 1229, 968 P.2d 1165, 1168 (1998) (placing the burden "squarely on the defendant" to demonstrate indigency).

Like an indigency determination, the determination of a defendant's ability to pay the cost of a psychosexual evaluation is a factual determination that remains within the sound discretion of the district court. *See Rodriguez*, 120 Nev. at 807, 102 P.3d at 47 (citing *Nikander*, 711 P.2d at 1262). When determining the defendant's ability to pay, the court may consider evidence such as whether the defendant was represented by appointed counsel, a financial affidavit that establishes indigency, the presentence investigation report, the defendant's current or prospective custody status, or other evidence of their financial inability to pay the psychosexual evaluation cost. *See Gilbert v. State*, 99 Nev. 702, 704 n.1, 669 P.2d 699, 700 n.1 (1983) (noting appellant's indigency status was supported in the presentence report and because appellant was represented by a public defender); *Nikander*, 711 P.2d at 1262 (stating that factors to consider when determining indigency "include whether the defendant has any dependents, whether he is employed, income from all sources, real and personal property owned, extent of any indebtedness, necessary living expenses," and state and federal poverty guidelines); *cf. Widdis*, 114 Nev. at 1229-30, 968 P.2d at 1168-69 (issuing a writ of mandamus directing the district court to make an indigency determination because an affidavit of indigency was filed while appellant was incarcerated, but the appellant was subsequently released on bail and began immediate full-time employment).

If the court determines the defendant is indigent or unable to pay the full psychosexual evaluation cost, the district court must reduce that cost. NRS 176.139(7). Unlike NRS 179.225(3), which prohibits the court from imposing any extradition restitution under certain circumstances, NRS 176.139(7) requires the court to order the psychosexual evaluation cost only "to the extent of the defen-

dant's financial ability." The proviso "to the extent of" immediately precedes the limitation regarding the defendant's ability to pay and qualifies the district court's otherwise mandatory obligation to impose the psychosexual evaluation cost. *See State v. Beemer*, 51 Nev. 192, 192, 272 P. 656, 658 (1928) (explaining that the "natural and appropriate office of the proviso being to restrain or qualify some preceding matter," a statutory proviso "should be construed with reference to the immediately preceding parts of the clause to which it is attached" (internal quotation marks omitted)).

In this case, Bolden made a timely objection to the psychosexual evaluation cost based on his inability to pay. Although we note that Bolden made only bare assertions of his inability to pay, he was also represented in court proceedings by the Clark County Special Public Defender's Office, and therefore, the lower court had already made a finding of indigency that would entitle Bolden to the appointment of counsel. Moreover, the State does not seem to dispute Bolden's indigent status. *Gilbert*, 99 Nev. at 704 n.1, 669 P.2d at 700 n.1.[9] While NRS 176.139(7) does not mandate that the psychosexual evaluation cost be waived in every circumstance where there has been a finding of indigency, Bolden's timely objection, coupled with evidence of his indigent status, was sufficient to require the district court to *evaluate* the psychosexual evaluation cost in relation to Bolden's ability to pay in whole or in part and make findings on the record. Because the district court made no findings as to Bolden's ability to pay the psychosexual evaluation cost before it imposed the cost in full, we conclude that the district court abused its discretion. On remand, we direct the district court to consider Bolden's ability to pay for the psychosexual evaluation and make findings on the record. In doing so, we remind the court that it shall impose such cost only "to the extent of the defendant's financial ability[ ] to pay" it. NRS 176.139(7).

CONCLUSION

We conclude that NRS 179.225(2) requires the district court to undertake an investigative inquiry prior to imposing extradition restitution. In this case, the district court abused its discretion by imposing the extradition restitution without first determining whether Bolden had the ability to pay any existing obligations for child support, victim restitution, or administrative assessments. As a result, the court could not determine whether imposing restitution was mandatory or prohibited under NRS 179.225(3).

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[9]Bolden contends on appeal that the district court's file contained his financial affidavit, which Bolden submitted to qualify for the appointment of counsel and which verified his indigent status. The State disagrees as to Bolden's specific assets and income identified in the financial affidavit but otherwise does not dispute that the financial affidavit was available to the district court.

Further, while the district court is not required to undertake a similar investigative inquiry before imposing the cost of a psychosexual evaluation under NRS 176.139(7), the court is statutorily required to impose the cost only to the extent of the defendant's ability to pay. Bolden timely objected on the basis of his inability to pay, which was supported by evidence in the record, and the district court abused its discretion by imposing the full cost without first evaluating Bolden's ability to pay and making findings on the record. Accordingly, we affirm the judgment of conviction, but we vacate Bolden's sentence as to extradition restitution and the cost of the psychosexual evaluation and remand to the district court for resentencing.[10]

Gibbons, C.J., and Bulla, J., concur.

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[10]We also conclude that the district court erred by failing to impose the $25 administrative assessment as mandated by NRS 176.062(1). The statute provides that the court "shall" impose the assessment and does not include any waiver provisions. On remand, we direct the district court to impose the administrative assessment.

TOUGH TURTLE TURF, LLC, a Nevada Limited Liability Company, Appellant, *v.* BRYAN SCOTT, Individually and as Manager and/or Owner of FOXTAIL TURF, LLC; BRANDON DeGREGORIO; and VINCENT SAGER, Respondents.

No. 85249

November 2, 2023 537 P.3d 883

Appeal from a district court order denying a preliminary injunction. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded with instructions.

Snell & Wilmer, LLP, and *Kelly H. Dove*, *Dawn L. Davis*, and *Morgan T. Petrelli*, Las Vegas, for Appellant.

Sylvester & Polednak, Ltd., and *Allyson R. Johnson* and *Kelly L. Schmitt*, Las Vegas, for Respondents.

Before the Supreme Court, Cadish, Pickering, and Bell, JJ.

OPINION

By the Court, Pickering, J.:

Appellant Tough Turtle Turf, Inc., sought a preliminary injunction from the district court enforcing a noncompete covenant against respondents, three of its former employees. The court denied Tough Turtle's request on the basis the covenant was unenforceable due to procedural unconscionability. Because we conclude that there was minimal procedural unconscionability and that the district court was otherwise obligated to determine whether the covenant's remaining flaws could be cured by revision under NRS 613.195(6), we reverse the district court's order and remand for further consideration.

I.

At the time of each respondent's hiring, Tough Turtle was a subsidiary of a California-based company and classified respondents as independent contractors. When Tough Turtle bought out its previous owner's stake in the company, respondents were reclassified as employees and filled out accompanying paperwork, which did not include a noncompete covenant. Several years later, Tough Turtle's human resources provider sent another round of paperwork to respondents, including an employee handbook, various company policies, and an employment agreement. Each paragraph of the agreement was separately numbered and began on a new line with

a heading in the same typeface, font, and size as the text of the paragraph, except for the paragraph labeled "Non-Competition." That paragraph, the source of the disputed noncompete covenant, was merged with the preceding paragraph, such that it did not start on a new line. It was also numbered "12," even though the following paragraph was also numbered "12." Respondents each signed the agreement.

Several months later, respondent Bryan Scott allegedly began a new company, Foxtail Turf, for which respondent Brandon DeGregorio and respondent Vincent Sager occasionally moonlighted while maintaining their jobs with Tough Turtle. Tough Turtle began hearing from customers that Foxtail salespersons were pitching their familiarity with Tough Turtle's products and pricing structure and promising a better deal. Around this time, Scott resigned from Tough Turtle. DeGregorio and Sager were subsequently fired from Tough Turtle.

Tough Turtle sued respondents and others, including Tough Turtle's turf supplier, Turf Envy. Before these complaints were consolidated, Tough Turtle filed an ex parte application for a temporary restraining order against Turf Envy, which the district court treated as a motion for a preliminary injunction. Because an injunction would essentially enforce respondents' noncompete covenants with Tough Turtle, respondents filed a supplemental brief arguing against the injunction, asserting that the covenant was unconscionable and that Tough Turtle had unclean hands.

After a seven-day evidentiary hearing, the district court concluded that the noncompete covenant was unenforceable because the employment agreement merged the noncompete provision into the preceding paragraph rather than setting it out as its own separate paragraph, thereby calling into question whether the employees could readily ascertain its terms. The court also found that the noncompete covenant was "overbroad, oppressive, one-sided in favor of [Tough Turtle], and exceed[ed] [the] scope of what [was] necessary to protect [Tough Turtle]'s interests." But the court declined to modify the covenant, stating it could not "be redrafted by the court in a manner to allow for injunctive relief." Tough Turtle appeals, asking the court to reverse the portion of the order denying injunctive relief as to the noncompete provision.

II.

A.

When considering whether a contract is unconscionable, courts generally require a showing of both procedural and substantive unconscionability. 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 2023); *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002). A contract clause "is procedurally

unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 554, 96 P.3d 1159, 1162 (2004), *overruled on other grounds by U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018). Substantive unconscionability concerns the "contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy." 8 *Williston on Contracts*, *supra*, at § 18:10. Unconscionability is evaluated on a sliding scale; if one type of unconscionability is greater, the other may be lesser. *Burch*, 118 Nev. at 444, 49 P.3d at 650.

Here, the district court invalidated the noncompete covenant, finding that it was a "fatal" error to place the covenant where it could be easily overlooked, which made it procedurally unconscionable and therefore unenforceable as a matter of law. We cannot agree. The employment agreement used the same font size throughout. *See Ballesteros*, 134 Nev. at 190-91, 415 P.3d at 40-41 (concluding that an arbitration provision was not procedurally unconscionable where it was in the same font size as the other provisions and not buried in an endnote). And, while respondents complain that the agreement was one of several documents attached to a single email, they failed to show that they did not have a meaningful opportunity to review the agreement or that, when they signed and returned the employment agreement, they did not in fact assent to all of its terms, including the restrictive covenant. *See* 7 Joseph M. Perillo, *Corbin on Contracts* § 29.9, at 404 (rev. ed. 2002) (noting that procedural unconscionability may overcome the duty-to-read rule when the former suggests "there was in fact no intentional or apparent manifestation of assent to the document or the term or terms in question"); *see also FQ Men's Club, Inc. v. Doe Dancers I*, Case No. 79265, 2020 WL 5587435, at *3 (Nev. Sept. 17, 2020) (upholding finding of procedural unconscionability where the employer required immediate signatures in hectic circumstances that did not give the employees a meaningful opportunity to understand what they were signing). Any procedural unconscionability stemming from the merger of the noncompete covenant into the preceding paragraph of the employment agreement is not enough to invalidate it without an additional showing of substantive unconscionability.

In its written order, the district court concluded that not only was the covenant procedurally unconscionable but it was also overbroad, oppressive, excessive in scope, and one-sided in Tough Turtle's favor. But the district court did not analyze the covenant under NRS 613.195(1) and (6), which govern the enforceability of and

court revision to noncompete covenants, instead simply stating that it was unable to "redraft" the covenant. We agree with the district court that the noncompete covenant is overbroad in its geographic scope at minimum and, therefore, is substantively unconscionable as written. But if the noncompete covenant is modifiable so that it is no longer overbroad, the noncompete covenant would not be substantively unconscionable and, thus, would be enforceable.

B.

Whether the noncompete covenant is modifiable turns on the interpretation of NRS 613.195(6), a question reviewed de novo. *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). We give a statute's terms their plain meaning. *Id.* All provisions are considered together so as not to render any part of the statute superfluous. *Id.* Under the whole-text canon, we "interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of [the] statutes." *Id.* (internal quotation marks omitted); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (stating the whole-text canon as the rule that "[t]he text must be construed as a whole" and noting that "[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

The Legislature added NRS 613.195(6)[1] in response to *Golden Road Motor Inn, Inc. v. Islam*, which held that a district court may not modify an unreasonable noncompete covenant. 132 Nev. 476, 483, 376 P.3d 151, 156 (2016). NRS 613.195(6) provides that a district "court shall revise . . . to the extent necessary" a covenant that unreasonably limits time, geographical area, or scope of activity; imposes a greater restraint than is necessary to protect the employer; or imposes undue hardship on the employee. This provision overruled *Golden Road*'s holding that an unreasonable noncompete covenant can *never* be revised.

Tough Turtle essentially argues that, under the post-*Golden Road* NRS 613.195(6), a district court must *always* modify an overbroad noncompete covenant, so long as the covenant is supported by valuable consideration. And because the district court must always modify, Tough Turtle continues, it must always enforce a noncompete covenant, regardless of any procedural unconscionability. But this does not account for NRS 613.195(1). Subsection (1) conflicts

[1]This provision was numbered NRS 613.195(5) when originally enacted in 2017. *See* 2017 Nev. Stat., ch. 324, § 1, at 1861. In 2021, the Legislature renumbered it as NRS 613.195(6) but left the pertinent language intact. *See* 2021 Nev. Stat., ch. 77, § 22.5, at 315.

with Tough Turtle's reading of subsection (6) in that it provides that "[a] noncompetition covenant is void and unenforceable" if it imposes a "restraint that is greater than is required for the protection of the employer[; i]mpose[s] any undue hardship on the employee[; or i]mposes restrictions that are [not] appropriate in relation to the valuable consideration supporting the noncompetition covenant." For the reasons discussed below, we conclude that NRS 613.195(1) and (6), taken together, do not require a district court to always modify an overbroad noncompete covenant; however, the district court must modify an overbroad noncompete covenant when possible. Because the district court failed to properly analyze whether the noncompete covenant could be revised under NRS 613.195(6) in this case, we must reverse and remand.[2]

Courts may refuse to modify a contract that is "so lacking in the essential terms" that the court would have to provide them. *Ins. Ctr., Inc. v. Taylor*, 499 P.2d 1252, 1256 (Idaho 1972); *see also Eichmann v. Nat'l Hosp. & Health Care Servs., Inc.*, 719 N.E.2d 1141, 1149 (Ill. App. Ct. 1999) (refusing to modify a noncompete provision because the "drastic modifications" required to make it enforceable "would be tantamount to fashioning a new agreement"); *Bayly, Martin & Fay, Inc. v. Pickard*, 780 P.2d 1168, 1172-73 & n.19 (Okla. 1989) (refusing to modify a noncompete covenant because the defects were so substantial that the covenant "would have to be rewritten" and would require "the making of a new contract"). This accords with the general rule prohibiting courts from creating new contracts for parties. *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984) (citing Samuel Williston & Arthur L. Corbin, *On the Doctrine of* Beit v. Beit, 23 Conn. B.J. 40, 49-50 (1949)). NRS 613.195(6) does not change these or other fundamental precepts of contract law. It nonetheless mandates judicial revision of a restrictive covenant if this can be done without subjecting employees to unreasonable terms. *See Taylor*, 499 P.2d at 1255-56; *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 844 (Mo. 2012).

The federal district court considered NRS 613.195(6) in *Paws Up Ranch, LLC v. Martin*, concluding that once a covenant is found unenforceable as written, it then becomes the court's, rather than the parties', responsibility under NRS 613.195(6) to draft a reasonable noncompete covenant, "revising, creating and defining the contours of the right to be enforced." 463 F. Supp. 3d 1160, 1168 (D. Nev. 2020). We are not persuaded by this approach. *See Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (noting that federal district court decisions are not binding

[2]We reject respondents' request that we affirm based on the unclean hands doctrine. The district court did not address respondents' unclean hands defense, which raises factual and legal issues that are for the district court to resolve in the first instance.

on this court). If courts had a modification power that extended all the way to drafting a new contract, it would cross the line from the permissible modification of an existing noncompete covenant into the impermissible creation of a new contract for the parties. As discussed above, other courts have rejected the idea that modification goes that far.

NRS 613.195(6) calls for a court to "revise" the noncompete covenant—not to rewrite or redraft it. When the Legislature amended NRS 613.195 in 2021, it left subsection (1) intact. 2021 Nev. Stat., ch. 77, § 22.5, at 314-15. Under subsection (1), noncompete covenants with the same overbreadth issues described in subsection (6) are "void and unenforceable." Reading subsection (1) harmoniously with subsection (6) indicates that there are instances when a noncompete covenant will be unenforceable, such as when no valuable consideration supports the noncompete covenant or when the court would need to rewrite rather than revise the noncompete covenant. But overbreadth alone will not render the covenant unenforceable if the restrictions can be modified under subsection (6) so that they are reasonable and do not impose an undue hardship on the employee or a restraint greater than necessary for the employer's protection.

CONCLUSION

We reverse and remand. The district court erred by invalidating the covenant based on procedural unconscionability and in failing to adequately consider whether the overbroad scope of the covenant could be modified. On remand, the district court must determine whether it can modify the covenant under NRS 613.195(6). If the noncompete covenant is modifiable, then the court should revise the covenant so that it is reasonable under NRS 613.195(1).

Cadish and Bell, JJ., concur.

RUAG AMMOTEC GMBH, a Foreign Company; RUAG HUNGARIAN AMMOTEC, INC., a Foreign Company; RUAG AMMOTEC USA, INC., a Foreign Company; and RUAG HOLDING AG, a Foreign Company, Appellants, *v.* ARCHON FIREARMS, INC., a Domestic Corporation; ARSENAL FIREARMS LTD., a Foreign Company; AF PRO TECH GROUP KFT, a Foreign Company; and ARSENAL FIREARMS USA, LLC, Respondents.

No. 84142

November 16, 2023 538 P.3d 428

Appeal from district court orders denying motions to compel arbitration. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

Hogan Lovells US LLP and *Christopher J. Cox* and *Tej Singh*, Redwood City, California, and *Helen Y. Trac*, San Francisco, California; *Snell & Wilmer, LLP*, and *Kelly H. Dove*, Las Vegas, for Appellants.

Law Office of Hayes & Welsh and *Larson A. Welsh*, Henderson, for Respondent Archon Firearms, Inc.

Semenza Kircher Richard and *Christopher D. Kircher* and *Katie L. Cannata*, Las Vegas, for Respondents Arsenal Firearms Ltd., AF Pro Tech Group KFT, and Arsenal Firearms USA, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Lee, J.:

It is clear from our caselaw that a nonsignatory to a contract containing an arbitration clause can be compelled to participate in arbitration under ordinary principles of agency and contract. We have yet to consider, however, whether that nonsignatory can be compelled to participate in arbitration by another nonsignatory. We conclude that, under circumstances where the nonsignatory seeking to compel arbitration demonstrates both the right to enforce the contract and that compelling another nonsignatory to arbitration is warranted under standard principles of contract law or estoppel, compelling arbitration is appropriate. We therefore reverse the district court's order as to appellants' first motion to compel arbitration, which concluded otherwise, and remand for the district

court to consider whether the moving nonsignatory party in this case can demonstrate the conditions needed to compel the opposing nonsignatory party to arbitration. And based on the considerations outlined in this opinion for when a nonsignatory party can compel arbitration or be compelled to arbitrate, we reverse the district court's order as to appellants' second motion to compel arbitration and remand for the district court to determine whether a binding arbitration agreement exists involving the various nonsignatories.

FACTS AND PROCEDURAL HISTORY

In 2017, Arsenal Firearms Ltd. (Arsenal) and RUAG Hungarian Ammotec, Inc. (RUAG-Hungary) entered into three agreements for the manufacture and distribution of a pistol designed by Arsenal: an assembly agreement, a supply chain agreement, and a wholesale agreement (collectively, the RUAG-Arsenal Contracts). Each of the agreements identified RUAG-Hungary and Arsenal as the only parties to the agreements, and each contained identical arbitration provisions providing that the party seeking judicial relief "shall apply for arbitration" and "[a]ll disputes arising out of or in connection with the present Agreement shall then be finally settled under the Rules of Arbitration of the International Chamber of Commerce."

After executing the RUAG-Arsenal Contracts, Arsenal and other entities within its corporate family allegedly contracted with Arsenal Firearms North America Corp. (Arsenal-North America) for Arsenal-North America to be the exclusive distributor of the pistol in the United States. Arsenal-North America then allegedly assigned its distribution rights to respondent Archon Firearms, Inc. (Archon). Purportedly, Arsenal Firearms was rebranded as Archon to avoid a potential trademark dispute.[1]

RUAG-Hungary later sent letters to Arsenal terminating the RUAG-Arsenal Contracts. Archon then filed a complaint alleging 11 causes of action against several RUAG and Arsenal entities. Specifically, the RUAG defendants were RUAG-Hungary, RUAG Ammotec GmbH (RUAG-Germany), RUAG Ammotec USA (RUAG-USA), RUAG Holding AG (RUAG-Holding), and RUAG Schweiz AG (RUAG-Schweiz). The Arsenal defendants were Arsenal, AF Pro Tech Group KFT (AF-PTG), and Arsenal Firearms USA, LLC (Arsenal-USA). In the initial complaint, Archon alleged that the RUAG defendants failed to manufacture the number of pistols promised and that the pistols that *had* been manufactured required repairs to make them merchantable. Archon's complaint directly referenced oral and/or written contracts entered into around 2017 between the RUAG and Arsenal defendants for the

[1]It is unclear from the record to which Arsenal Firearms entity this allegation refers.

manufacture and sale of the pistol, and Archon requested declaratory relief that it was an intended third-party beneficiary of the contracts. Additionally, Archon alleged that it foreseeably relied on the contracts and suffered damages as a result of the purported breach.

Subsequently, Archon filed an amended complaint. Among other things, the amended complaint removed the breach-of-contract cause of action and the declaratory relief cause of action, and it omitted allegations that Archon was a third-party beneficiary of the contracts.[2] RUAG-Germany moved to dismiss or stay the action and compel arbitration with Archon under the RUAG-Arsenal Contracts (the first motion to compel arbitration). Although RUAG-Germany was a nonsignatory to the RUAG-Arsenal Contracts, it maintained that it could compel Archon, another nonsignatory, to arbitrate under the instruments because RUAG-Germany was an agent of RUAG-Hungary,[3] a signatory, and because it was a third-party beneficiary of the contracts. RUAG-Germany also argued that Archon's claims related to or arose from obligations imposed under the RUAG-Arsenal Contracts and that Archon received a direct benefit from the contracts. The district court denied the first motion to compel arbitration because neither RUAG-Germany nor Archon were parties to the RUAG-Arsenal Contracts.

The Arsenal defendants filed an answer to Archon's amended complaint and asserted seven crossclaims against the RUAG defendants. During the pending litigation and before RUAG-Hungary was dismissed for lack of personal jurisdiction, RUAG-Hungary and RUAG-Germany entered into a settlement agreement with Arsenal, AF-PTG, and nonparty Arsenal Collection s.r.o. (the Settlement Agreement). The Settlement Agreement provided the following:

> Subject to the duties under this Agreement, the Parties shall consider to be fulfilled by this Agreement all existing obligations, rights and claims arising from the [RUAG-Arsenal Contracts] and from all orders related to the mentioned agreements and the Pistols. There are no further claims and rights from one Party to the other and all disputed points and claims in connection with their business relationship to the Pistols are regarded as finally settled.

Like the RUAG-Arsenal Contracts, the Settlement Agreement also contained language that, should a party want judicial relief, the party "shall apply for arbitration," and "[a]ll disputes arising out of or in connection with this Agreement shall then be finally settled under the Rules of Arbitration of the International Chamber of

[2]The amended complaint also removed RUAG-Schweiz as a defendant.

[3]RUAG-Hungary was dismissed for lack of personal jurisdiction at the same time the district court considered the first motion to compel arbitration.

Commerce." Following execution of the Settlement Agreement, the Arsenal defendants filed amended crossclaims, maintaining claims for equitable or implied indemnity and contribution against the RUAG defendants.

The RUAG defendants moved to dismiss or stay the crossclaims and to compel the Arsenal defendants to arbitrate under the RUAG-Arsenal Contracts and the Settlement Agreement (the second motion to compel arbitration). The district court denied the second motion to compel arbitration, relying in part on the fact that three of the parties were not part of the Settlement Agreement (Arsenal-USA, RUAG-Holding, and RUAG-USA) and on its conclusion that the crossclaims fell outside the scope of the Settlement Agreement. The RUAG defendants appeal the district court's orders denying both the first and second motions to compel arbitration.

DISCUSSION

We are presented with a legal question not previously considered by this court: whether a nonsignatory to a contract containing an arbitration clause can compel another nonsignatory to participate in arbitration pursuant to the contract. In answering that question, we must keep in mind our state's "fundamental policy favoring the enforceability of arbitration agreements." *Uber Techs., Inc. v. Royz*, 138 Nev. 690, 693, 517 P.3d 905, 908 (2022) (internal quotation marks omitted). And because the RUAG-Arsenal Contracts and the Settlement Agreement involve interstate commerce, our analysis is governed by the Federal Arbitration Act (FAA) and Supreme Court precedent that interprets the FAA. *Id.*; *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 186, 415 P.3d 32, 38 (2018) (quoting 9 U.S.C. § 2). We review de novo the district court's denial of a motion to compel arbitration. *See Royz*, 138 Nev. at 692, 517 P.3d at 908.

"Under the FAA, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Id*. at 693, 517 P.3d at 909 (internal quotation marks omitted). "Generally, the contractual right to compel arbitration may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (internal quotation marks omitted). However, "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." *Comer v. Micor, Inc*., 436 F.3d 1098, 1101 (9th Cir. 2006) (quotation marks omitted); *see also El Jen Med. Hosp. v. Tyler*, 139 Nev. 322, 326-27, 535 P.3d 660, 666 (2023) ("[N]onsignatories to an agreement subject to the FAA may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally." (quoting *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009))).

And courts must apply state law in determining whether these "traditional principles . . . allow a contract to be enforced by or against nonparties to the contract." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (internal quotation marks omitted). Therefore, in considering whether a nonsignatory can enforce an arbitration clause against another nonsignatory, we rely on the substantive law of this state.

First motion to compel arbitration

The first motion to compel arbitration was premised on arbitration clauses in the RUAG-Arsenal Contracts. The arbitration clauses in the RUAG-Arsenal Contracts incorporated the International Chamber of Commerce (ICC) Rules of Arbitration. ICC Rules, Article 6(3) states in relevant part, "[i]f any party against which a claim has been made . . . raises one or more pleas concerning the existence, validity or scope of the arbitration agreement . . . the arbitration shall proceed and any question of jurisdiction . . . shall be decided directly by the arbitral tribunal." Thus, the arbitration agreements included a delegation provision. *See Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017) (concluding the incorporation of the ICC Rules is clear evidence that the parties delegated questions of arbitrability to the arbitrator). "A delegation [provision] is 'an agreement to arbitrate threshold issues concerning the arbitration agreement . . . such as *whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy*.' " *Royz*, 138 Nev. at 693, 517 P.3d at 909 (emphasis added) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). Where threshold questions of arbitrability are delegated to an arbitrator, "a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019); *see also Royz*, 138 Nev. at 693-94, 517 P.3d at 909-10.

Although the arbitration clauses in the RUAG-Arsenal Contracts include a delegation provision, the factual circumstances give us pause about whether the court, not an arbitrator, should determine if RUAG-Germany, a nonsignatory, can compel another nonsignatory, Archon, to arbitration. Courts appear split on whether an arbitration agreement's enforceability as to a nonsignatory is an arbitrability question delegable to an arbitrator. *Compare Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) (concluding "the arbitrator should decide for itself whether [the nonsignatory] can enforce the arbitration agreement" based on incorporation of a delegation clause), *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017) (determining that incorporated delegation clause applied to claims against nonsignatories), *Eckert/Wordell Architects, Inc. v. FJM Props. of*

Willmar, LLC, 756 F.3d 1098, 1100 (8th Cir. 2014) (concluding that whether an arbitration provision could be used to compel arbitration between a nonsignatory and a signatory was a threshold question of arbitrability subject to delegation), *and De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 797 (S.D. Ohio 2019) (deciding that "[w]hether a nonsignatory can enforce the arbitration agreement is a question of the enforceability of the arbitration clause" that could be delegated), *with Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398 (5th Cir. 2022) (holding the court "must decide whether [the nonsignatory] can enforce the . . . arbitration agreement; not an arbitrator" and "[w]hen a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between parties"), *and QPro Inc. v. RTD Quality Servs. USA, Inc.*, 761 F. Supp. 2d 492, 497 (S.D. Tex. 2011) ("When, as here, the issue is whether a nonsignatory to an arbitration clause may enforce it against a signatory, the courts have viewed that as a matter for the court to decide.").

We are persuaded that the issue is one of contract formation that must be decided by the courts in the first instance. *See In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021) (collecting Supreme Court cases and concluding issues regarding the formation of a contract are always for the courts to decide, even where "a delegation provision purports to require arbitration" of such issues). Where a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very *existence of an agreement involving the nonsignatory*. *See Schoenfeld v. Mercedes-Benz USA, LLC*, 532 F. Supp. 3d 506, 510 (S.D. Ohio 2021) (concluding that nonsignatory and signatory "never agreed to arbitrate *any* claims that might arise between them"); *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 632 (Tex. 2018) ("The question is not whether [the signatory] agreed to arbitrate with someone, but whether a binding arbitration agreement exists between [the signatory] and the [nonsignatory]."). And it remains with the courts to decide whether such an agreement exists. *See Henry Schein*, 586 U.S. at 69 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 515 n.4 (5th Cir. 2019) ("[*Henry Schein*] did not change—to the contrary, it reaffirmed—the rule that courts must first decide whether an arbitration agreement exists at all."); *see also Am. Builder's Ass'n v. Au-Yang*, 276 Cal. Rptr. 262, 265 (Ct. App. 1990) ("The question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court in the first instance."). For "[e]ven the most sweeping delegation cannot send the contract-formation issue to the arbitrator, because, until the court rules that a contract exists, there is simply no agreement to arbitrate." *K.F.C.*

v. Snap Inc., 29 F.4th 835, 837 (7th Cir. 2022); *see also Jody James Farms*, 547 S.W.3d at 632 (holding that, even where a delegation provision has been incorporated, "questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator"). Therefore, the district court properly considered whether RUAG-Germany, a nonsignatory, could compel another nonsignatory, Archon, to arbitration pursuant to the RUAG-Arsenal Contracts.

In *Truck Insurance Exchange v. Palmer J. Swanson, Inc.*, we held a nonsignatory may be obligated to arbitrate "if so dictated by the ordinary principles of contract and agency." 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (quotation marks omitted). In that case, we listed five theories for binding a nonsignatory to an arbitration agreement: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Id*. at 634-35, 189 P.3d at 660 (internal quotation marks omitted). Therefore, under established Nevada caselaw, a nonsignatory to an arbitration agreement can be obligated to arbitrate if one of the five theories is satisfied.

We likewise conclude these same five theories should be used to determine whether a nonsignatory has the right to enforce an arbitration agreement. *See Arthur Andersen*, 556 U.S. at 631 ("[T]raditional principles of state law allow a contract to be enforced *by or against* nonparties to the contract . . . ." (emphasis added) (internal quotation marks omitted)); *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36, 42-43 (1st Cir. 2012) (same); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 (9th Cir. 2009) ("General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against nonsignatories."); *Ross v. Am. Express Co.*, 478 F.3d 96, 99 (2d Cir. 2007) ("[W]e have recognized a number of common law principles of contract law that may allow non-signatories to enforce an arbitration agreement . . . ."); *Int'l Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir. 2000) ("Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties."); *see also Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs. Inc.*, 7 F.4th 555, 563 (7th Cir. 2021) ("Illinois courts have reasoned that, if nonsignatories may be *bound* to arbitrate under [theories of contract], then it would follow as a corollary that the same types of theories could afford a basis for a nonsignatory to *invoke* an arbitration agreement signed by others." (quoting *Equistar Chems., LP v. Hartford Steam Boiler Inspection & Ins. Co. of Conn.*, 883 N.E.2d 740, 747-48 (Ill. App. Ct. 2008))). Therefore, if a nonsignatory seeking to compel arbitration can establish a right to enforce the contract under any one of

these theories, it has shown a right to enforce the arbitration agreement within the contract.

Although *Truck Insurance Exchange* considered a situation where a signatory sought to compel a nonsignatory, we take the opportunity to clarify that a nonsignatory can be compelled to arbitrate by another nonsignatory after demonstrating both the right to enforce the contract and that compelling another nonsignatory to arbitration is warranted under one of the five theories. We determine such a result is provided for by principles of contract and agency law because, whether it is a signatory or nonsignatory seeking to compel the arbitration, the justification for compelling a nonsignatory to arbitration is the same. Thus, the five theories for binding a nonsignatory to an arbitration agreement apply whether it is a signatory or nonsignatory seeking to compel arbitration.

We also take a moment to address the fifth theory recognized in *Truck Insurance Exchange*: estoppel. "Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Comer*, 436 F.3d at 1101 (internal quotation omitted); *see also In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005) (recognizing "[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct"). The test for establishing estoppel depends on whether the theory is being used to bind a nonsignatory to arbitration or whether a nonsignatory is seeking to compel arbitration based on the theory. If it is the former, we made clear in *Truck Insurance Exchange* that "a nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." 124 Nev. at 636, 189 P.3d at 661 (quoting *Int'l Paper*, 206 F.3d at 418); *see also MAG Portfolio Consult, GmbH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001) (recognizing the "direct benefit" test for binding a nonsignatory under a theory of estoppel and commenting that "[t]he benefits must be direct—which is to say, flowing directly from the agreement"). We recently expounded upon the direct benefits estoppel doctrine in *El Jen* and stated that "a nonsignatory is not bound to an arbitration agreement simply because its claim relates to a contract containing the arbitration provision," as the doctrine applies only when "the nonsignatory party seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." 139 Nev. at 333, 535 P.3d at 670; *see also Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 778-80 (2d Cir. 1995) (holding that a nonsignatory cannot be bound to arbitrate without receiving a direct benefit from, or pursuing a claim integrally related to, the agreement containing the arbitration provision).

If it is the latter scenario—a nonsignatory seeking to compel arbitration based on a theory of estoppel—it is "essential . . . that the subject matter of the dispute [be] intertwined with the contract providing for arbitration." *Sokol Holdings Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008). Although used in a situation where a nonsignatory sought to compel a signatory to arbitration, we adopt the test outlined in *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), *abrogated on other grounds by Arthur Andersen*, 556 U.S. at 631. Under that test, a nonsignatory seeking to compel arbitration can satisfy a theory of estoppel (1) where the claims rely on the terms of the written agreement containing the arbitration provision or "arise out of and relate directly to the written agreement," or (2) where the claims involve "allegations of substantially interdependent and concerted misconduct by both the nonsignatory [seeking to compel arbitration] and one or more of the signatories to the contract." *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395-96 (4th Cir. 2005). To ensure the test serves the purpose of equitable estoppel, we understand the second method to require that the allegations be "founded in or intimately connected with the obligations of the underlying agreement." *Kramer*, 705 F.3d at 1129.

We acknowledge that "[a]rbitration agreements apply to nonsignatories only in rare circumstances." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 358 (5th Cir. 2003). We also acknowledge that caselaw considering whether a nonsignatory can compel arbitration or whether a nonsignatory can be compelled to arbitrate generally contemplates a scenario where a signatory is involved. But we find no clear requirement that such be the case. *See McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 343-44 (11th Cir. 1984) (requiring a contractor and construction manager to arbitrate, where no written agreement between the two existed but each had an arbitration agreement with the owner, after considering the close relationship of the three entities and of the construction manager's alleged wrongs with respect to his contractual obligations), *abrogated on other grounds by Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1171 (11th Cir. 2011). Rather, the five theories outlined above can be used in accordance with our state law principles of contract and agency, notwithstanding the fact that a signatory is not involved. Accordingly, where a nonsignatory to a contract containing an arbitration provision moves to compel another nonsignatory to arbitrate, the nonsignatory seeking to compel arbitration must demonstrate the right to enforce the arbitration agreement and show, in law or equity, that compelling the other nonsignatory to arbitration is warranted. *Cf. D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) ("The party

moving to enforce an arbitration clause has the burden of persuading the district court that the clause is valid.").

Having outlined when a nonsignatory can compel arbitration and when a nonsignatory can be compelled to arbitrate, we turn back to the matter before us—whether RUAG-Germany (a nonsignatory) can compel Archon (a nonsignatory) to arbitration. It is clear from the record that the district court denied the first motion to compel arbitration solely because RUAG-Germany and Archon were nonsignatories to the RUAG-Arsenal Contracts. The district court did not consider or make any findings relevant to whether they nonetheless could be bound by the arbitration agreements under general theories such as agency and equitable estoppel. *See, e.g.*, *Harrison Living Tr.*, 121 Nev. at 222, 112 P.3d at 1061 (holding "[w]hether the party seeking to establish equitable estoppel has met his or her burden is . . . generally a question of fact" for the district court to consider). We therefore reverse the district court's order as to the first motion to compel arbitration and remand for the district court to reconsider that motion consistent with this opinion.

Second motion to compel arbitration

The second motion to compel arbitration, where the RUAG defendants sought to compel the Arsenal defendants to arbitrate their crossclaims, was premised in part on the Settlement Agreement. The Settlement Agreement contained a delegation provision identical to those in the RUAG-Arsenal Contracts. Unlike the first motion to compel arbitration, the RUAG defendants sought to compel both nonsignatories *and* signatories to arbitration under the terms of the Settlement Agreement.

With regard to RUAG-Germany, Arsenal, and AF-PTG, the district court erred by denying the motion to compel because those parties signed the Settlement Agreement and the agreement contained a delegation provision. Therefore, the district court was without power to determine threshold questions of arbitrability, such as the scope of the arbitration provision. *See Henry Schein*, 586 U.S. at 68; *see also Royz*, 138 Nev. at 693-94, 517 P.3d at 909-10.

As to the nonsignatories to the Settlement Agreement (Arsenal-USA, RUAG-Holding, and RUAG-USA), consistent with our opinion today, it is left to the district court to determine in the first instance whether a binding arbitration agreement involving the nonsignatories exists.[4] We therefore reverse the district court's order

[4]Our opinion does not alter the tenet that, should an arbitration agreement unquestionably exist between the parties that clearly and unmistakably delegates threshold issues of arbitrability to the arbitrator, the question of whether a particular claim falls within the scope of the arbitration is for the arbitrator to resolve. *See Royz*, 138 Nev. at 694, 517 P.3d at 910 (concluding "the district

denying the second motion to compel arbitration and remand the matter for the district court to grant that motion as to the signatories to the Settlement Agreement and to reconsider that motion as to the nonsignatories.

Stiglich, C.J., and Cadish, Pickering, Herndon, Parraguirre, and Bell, JJ., concur.

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court may not bypass contract language delegating threshold issues to the arbitrator by finding that the arbitration agreement does not apply to the dispute"); *see also CMB Infrastructure Grp. IX, LP v. Cobra Energy Inv. Fin., Inc.*, 572 F. Supp. 3d 950, 975 (D. Nev. 2021).

GAIL HOLLAND, an Individual, Appellant, *v.* ANTHONY L. BARNEY, LTD., Respondent.

No. 84908-COA

November 22, 2023 540 P.3d 1074

Appeal from a district court order granting summary judgment in a fraudulent transfer action. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Reversed and remanded.

[Rehearing denied December 20, 2023]

Hutchison & Steffen, PLLC, and *Robert E. Werbicky*, Las Vegas; *Mincin Law, PLLC*, and *David Mincin*, Las Vegas, for Appellant.

Jerimy Kirschner & Associates, PLLC, and *Jerimy L. Kirschner*, Las Vegas, for Respondent.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Bulla, J.:

This case has a lengthy and complex procedural history involving multiple court orders and raises issues of Nevada law requiring clarification as to the preclusive effect of those orders and the equitable remedies available thereunder. We take this opportunity to provide guidance regarding these issues as they pertain to the centerpiece of this appeal—the ownership of real property located at 10512 Loma Portal Avenue, on which the bankruptcy court placed an equitable lien.

We conclude that an equitable lien placed on property to satisfy a debt—while not vesting the lienholder with an interest in the property—permits the lienholder to enforce the value of the equitable lien against the debtor's property even where that property has been subsequently transferred to a nondebtor spouse during divorce proceedings. In resolving this appeal, we take the opportunity to address certain nuances of claim preclusion. Here, based on the preclusive effect of prior court orders, we conclude that an equitable lien is the only remedy available to satisfy respondent's interest concerning the Loma Portal property. Thus, the district court erred in granting summary judgment by substituting other remedies in place of the equitable lien. Further, because genuine disputes of material fact remain as to the current value of the equitable lien placed on the Loma Portal property, as well as the value of the property

itself, we reverse and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The Howard Family Trust (Howard Trust) was created in 1998. Appellant Gail Holland's former spouse, Gloyd Green, became the successor trustee of the Howard Trust following the death of the last remaining settlor of the trust in 2005. Thereafter, Green began misappropriating trust assets, leading to litigation with the Howard Trust and its beneficiaries (collectively referred to as the Howard Trust parties).

Prior district court actions

In 2008, beneficiaries of the Howard Trust—Oscar Brannon Howard III (Howard) and Truman Holt (Holt)—became suspicious of Green's handling of the Howard Trust and commenced an action in the probate court in the Eighth Judicial District to determine whether Green had breached his fiduciary duties under the trust. Holland was not a party in the probate action. The probate court ordered Green to provide an inventory of the Howard Trust properties and a full accounting of trust assets. When Green failed to do so, the probate court removed Green as trustee and appointed Holt as the successor trustee in April 2008.

Several years later, in January 2012, Holland and Green purchased the Loma Portal property via grant, bargain, and sale deed held by the Holland-Green Family Trust (the HG Family Trust), of which they were the sole beneficiaries. In August 2012, the Howard Trust parties filed a civil suit in the Eighth Judicial District against Holland, Green, and the HG Family Trust, attempting to recover Howard Trust assets. Holt, in his capacity as trustee, also recorded a notice of lis pendens against the Loma Portal property. While this civil litigation was ongoing, the probate court enforced a forfeiture clause in the Howard Trust against Green and required him to "forfeit any and all beneficial interests" to which he might have been entitled under the Howard Trust. Further, the court ordered Green to return "any and all current property of the [Howard Trust] previously taken by [Green] from the Trust."[1]

Eventually, the district court in the civil action found that Green embezzled funds from the Howard Trust and announced from the bench its intention to enter judgment for $1,276,854.14 against Green, which included $638,427.07 in compensatory damages traced from the Howard Trust and an equal amount of punitive

[1]We note that, contrary to respondent Anthony L. Barney, Ltd.'s (Barney Ltd.) assertions, the Loma Portal property was never determined to be a property held by the Howard Trust and therefore was not a property "taken" by Green from the trust.

damages. But before this oral ruling was reduced to a written judgment, Holland and Green filed a petition under Chapter 11 of the Bankruptcy Code, and the action was removed to the United States Bankruptcy Court for the District of Nevada.

The bankruptcy proceedings

Following removal, the civil case against Holland and Green, previously pending in district court, continued as an adversary proceeding alongside the bankruptcy proceedings in the bankruptcy court. Upon motion from the Howard Trust parties, the bankruptcy court concluded that Holland and Green's Chapter 11 petition was made in bad faith to delay entry of judgment in the underlying state case and converted their case to a proceeding under Chapter 7.[2]

The Loma Portal property settlement

During the bankruptcy proceedings, Holland and Green attempted to declare a homestead exemption for the Loma Portal property under NRS 21.090. However, the bankruptcy court denied Holland and Green's request for a homestead exemption after receiving evidence that the funds used to purchase the Loma Portal property were misappropriated by Green from the Howard Trust.[3]

Holland and Green thereafter participated in settlement negotiations with the bankruptcy estate trustee, with the goal of purchasing the bankruptcy estate's interest in the Loma Portal property (and thereby continuing to use the property as their primary residence). As relevant here, the bankruptcy court approved the settlement and allowed Holland and Green to purchase the bankruptcy estate's interest in the Loma Portal property for $340,000 using untainted funds. In its order approving the settlement agreement, the bankruptcy court noted that the Howard Trust parties received notice of the settlement agreement "as required by law."[4]

Importantly, the order approving the settlement noted that the bankruptcy estate's interest in the Loma Portal property was subject to any existing liens and encumbrances:

> **IT IS FURTHER ORDERED** that the [bankruptcy estate trustee] is authorized to release and transfer the estate's interest, *if any*, in the real property located at 10512 Loma Portal Avenue, Las Vegas, NV 89166 (the "Loma Property")

[2]The bankruptcy filings later acknowledged that the Howard Trust's claim comprised 99.04 percent of the liabilities owed by the bankruptcy estate.

[3]Holland and Green appealed the denial of the homestead exemption to the United States Court of Appeals for the Ninth Circuit, which ultimately affirmed the underlying decision.

[4]We note that attorney Anthony L. Barney represented Howard in the bankruptcy proceedings and approved the settlement agreement on behalf of his client.

> also designated as Clark County Assessor Parcel Number 126-24-113-016, "as is, where is," and *subject to any liens and encumbrances*, to [Green and Holland] in exchange for payment of $340,000 due no later than September 22, 2017.[5]

(Emphases added.) At the time of the purchase of the Loma Portal property with the untainted funds as permitted by the settlement agreement there was no evidence of any prior liens or encumbrances on the property.[6]

The order approving the settlement also expressly reserved rights held by the Howard Trust, its trustee, or its beneficiaries against the property:

> **IT IS FURTHER ORDERED** that all rights held or claimed by the [Howard Trust] and/or its trustee or beneficiaries against the Loma Property, including those asserted in [the proceedings] pending herein, are expressly reserved notwithstanding approval of this settlement agreement.

Holland and Green thereafter timely paid $340,000 to the bankruptcy estate to purchase the Loma Portal property.[7] Pursuant to the terms of the settlement agreement, the bankruptcy trustee's final report designated the Loma Portal property as community property and Holland and Green's primary residence.

The adversary proceedings and bankruptcy judgment

At trial on the adversary proceedings related to the Howard Trust parties' claims against Holland and Green, the parties litigated various federal claims under 11 U.S.C. § 523 and several state causes of action, including (1) intentional misrepresentation, (2) fraud, (3) breach of fiduciary duty, (4) conversion, (5) constructive fraud, (6) unjust enrichment, (7) embezzlement, (8) civil theft, (9) breach of constructive trust, and (10) unfair and deceptive trade practices.

Following a three-day trial, the bankruptcy court dismissed "each and all" of the Howard Trust parties' claims against Holland. The bankruptcy court also dismissed the Howard Trust's parties'

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[5]Under 11 U.S.C. § 541(a), the bankruptcy estate obtained all legal or equitable interests of the debtor's separate property and all interests of the debtor and the debtor's spouse in community property. Accordingly, to the extent that the Loma Portal property was not subject to any prior liens or encumbrances, the bankruptcy estate obtained all of Holland and Green's legal and equitable interests in the Loma Portal property.

[6]We note that the lis pendens recorded by Holt on behalf of the Howard Trust parties is not a lien but only notice of a legal dispute concerning the property. *See* 51 Am. Jur. 2d *Lis Pendens* § 2 (2010) (explaining that a lis pendens serves to alert third parties to the fact of an existing suit on property).

[7]A copy of a check for $377,553.71 was provided in the record, indicating that Holland and Green tendered payment of $340,000, plus additional funds, to the bankruptcy trustee.

claims against Green for larceny under 11 U.S.C. § 523(a)(4), as well as the state law claims for embezzlement, civil theft, breach of constructive trust, and unfair and deceptive trade practices. Nevertheless, the bankruptcy court determined that the remaining claims against Green, including breach of fiduciary duty, intentional misrepresentation, and fraud, had merit and entered judgment in favor of the Howard Trust parties and against Green in the amount of $1,570,145.36, inclusive of compensatory damages, punitive damages, and prejudgment interest.

The bankruptcy court also made findings related to the Loma Portal property in its judgment, determining that "it is easily more likely than not under the preponderance of the evidence standard, that 100 percent of the funds used to [initially] purchase the Loma Portal property were assets of the Howard Trust." However, the bankruptcy court declined to grant the Howard Trust parties' request for a constructive trust on the property and ultimately dismissed the constructive trust claim in favor of awarding an equitable lien. In doing so, the bankruptcy court found that "the allegations in the amended complaint failed to set forth sufficient factual allegations to constitute a demand for imposition of a constructive trust, and even if this claim was adequately pleaded, and the Court finds that it is not, plaintiffs are not entitled to the remedy they seek." The bankruptcy court also found that the repurchase of the Loma Portal property by Holland and Green with untainted funds through the settlement agreement constituted "a partial, if not complete restitution of the Howard Trust funds that [Green] used to acquire the [Loma Portal] property when he paid $340,000 to the Chapter 7 trustee." Further, because the settlement agreement effectively repaid the funds misappropriated by Green, the bankruptcy court found that "money damages will make [the Howard Trust parties] whole" and, therefore, "a constructive trust is not essential to the effectuation of justice."

Accordingly, the court instead imposed an equitable lien on Green's interest in the Loma Portal property:

> **JUDGMENT IS FURTHER ENTERED** in favor of [the Howard Trust parties] and against [Green], and an equitable lien is imposed under Nevada state law upon *his interest* in the Loma Portal property referenced in the Court's September 20, 2018, oral ruling. *That lien shall be reduced dollar for dollar by any funds [the Howard Trust parties] receive from the Chapter 7 trustee in the bankruptcy case* filed jointly by [Holland and Green], as a result of the $340,000.00 settlement payment made by [Holland and Green] to purchase the estate's interest in the Loma Portal property.

(Emphases added.) We clarify that in its oral ruling, the court determined that the amount of the equitable lien would be equal to

$340,000, which was the purchase price of the Loma Portal property under the settlement agreement.[8]

The bankruptcy trustee's final accounting

Following conclusion of the adversary proceedings, the bankruptcy trustee submitted—and the bankruptcy court approved—the trustee's final report, which confirmed that the bankruptcy estate had received $340,000 in funds from Holland and Green to purchase the estate's interest in the Loma Portal property and that the Howard Trust received $377,553.71 as its pro-rata share of the bankruptcy estate. The bankruptcy court approved the final accounting without revision and entered judgment accordingly. The Howard Trust parties did not appeal from either the order approving the repurchase of the Loma Portal property or the final judgment.

The divorce proceedings

After receiving her bankruptcy discharge in April 2019, Holland filed a complaint for divorce and alleged marital waste of community property by Green. Green defaulted, and the district court entered a divorce decree granting Holland sole ownership of the Loma Portal property to account for marital waste by Green. In addition, the divorce decree provided that all necessary action could be taken to ensure the transfer of the property to Holland, including execution of a quitclaim deed, and noted that if the parties could not accomplish this on their own, the clerk of the court would be authorized to prepare the documents to effectuate the transfer.

Later, Holland, as a trustee of the HG Family Trust, recorded a quitclaim deed transferring any interest the trust had in the Loma Portal property to herself as an individual, in accordance with the divorce decree.[9] The existence of the equitable lien, placed by the bankruptcy court on Green's interest in the Loma Portal property, was not addressed in the divorce decree.

The underlying district court action

Subsequently, Howard (through his estate) assigned his interest and right to recovery of the judgment entered by the bankruptcy court to Barney Ltd., and during subsequent litigation in state pro-

[8]During the September 20, 2018, hearing the bankruptcy court clarified that the Howard Trust parties "seek an equitable lien on the Loma—Loma Portal property for its full value. [They] do not state what that value purports to be, and given Green's recent purchase of the [bankruptcy] estate's interest in that property for $340,000, the Court finds that this is the value [they] are referring to."

[9]During oral argument, Holland's counsel indicated that the Loma Portal property had been repurchased by Holland and Green individually and held as community property.

bate court, the district court determined that Holt had withdrawn from the litigation and that Barney Ltd. was "the only remaining real party in interest with legal standing to pursue collection" under the bankruptcy judgment. In April 2021, Barney Ltd. initiated a suit in the Eighth Judicial District Court against Holland and Green alleging four claims for relief: quiet title, fraudulent transfer, constructive trust, and conversion. Holland filed an answer to the complaint, but Barney Ltd. was unable to serve Green with the complaint.[10]

Barney Ltd. filed a motion for summary judgment on all four claims, primarily arguing that the bankruptcy judgment established an equitable lien on the Loma Portal property in the amount of $1,276,854.14—the entirety of the remaining bankruptcy judgment after receipt of the bankruptcy distribution. Related to the alleged fraudulent transfer, Barney Ltd. argued that the divorce proceeding did not give Green the right to convey title to the Loma Portal property to Holland and maintained that the quitclaim deed from Holland as a trustee of the HG Trust to Holland personally was void. And because this fraudulent transfer voided the transaction, Barney Ltd. argued that the district court should quiet title in his favor and impose a constructive trust on the property.

Holland opposed the motion and filed a countermotion for summary judgment. Holland primarily argued that res judicata applied, given that the bankruptcy court had dismissed all claims against her with prejudice, including claims related to conversion and a constructive trust against the Loma Portal property.[11] In addition, Holland argued that while the bankruptcy court placed an equitable lien on the Loma Portal property, that lien only applied to Green's community interest in the property (approximately $211,120), which had already been satisfied by the $340,000 settlement payment. Holland further contended that the $340,000 amount comprised the majority of the total $377,553.71 disbursement received by the Howard Trust parties in the bankruptcy discharge. Holland also asserted that the claim for fraudulent transfer failed as a matter of law because Barney Ltd. could not show that Green fraudulently transferred his interest to Holland.

In supplemental briefs requested by the district court, Barney Ltd. contended that—irrespective of any payments already made—the Loma Portal property continued to be encumbered by the amount

[10]Green's current whereabouts are apparently unknown, and he was later voluntarily dismissed from this action by stipulation of the parties.

[11]We reiterate that the Howard Trust parties' state law claims for intentional misrepresentation, fraud, breach of fiduciary duty, conversion, constructive fraud, unjust enrichment, embezzlement, civil theft, breach of constructive trust, and unfair and deceptive trade practices against Holland were dismissed in the bankruptcy action.

of the judgment against Green. Barney Ltd. argued that the equitable lien ran with the property and that neither the divorce decree nor the subsequent transfer could eliminate this obligation without complete payment of the entire judgment. Holland countered these arguments, highlighting the specific language in the bankruptcy judgment indicating that the equitable lien, if it survived, would apply only to Green's interest in the Loma Portal property.

Following a hearing, the district court entered summary judgment against Holland, granted Barney Ltd. a constructive trust on the Loma Portal property, and quieted title to the property in Barney Ltd.'s favor. In its order, the court found that res judicata[12] applied to the 2012 probate court order (which directed Green to return any and all property of the Howard Trust to the trustees) and concluded that the Loma Portal property should have been surrendered to the Howard Trust during the probate action when the court instructed Green to return all property he had taken from the Trust, past or present. The district court also appeared to recognize that res judicata played a role in the bankruptcy court proceedings.

Consequently, the district court ruled that because Green had initially purchased the Loma Portal property entirely with stolen funds, he acquired the property illegally. Therefore, the court decided any held title was legally void—including the transfer of the property to Holland individually—leaving nothing for subsequent conveyance and supporting summary judgment in Barney Ltd.'s favor on its quiet title, fraudulent transfer, and conversion claims. The district court quieted title in Barney Ltd.'s name and imposed a constructive trust on the property, finding that Holland's actions amounted to acts of conversion against Barney Ltd. On March 24, 2022, one day after entry of the summary judgment order, Barney Ltd. recorded the order despite the 30-day automatic stay on the execution of judgments pursuant to NRCP 62 as revised in 2019. On May 2, Barney Ltd. initiated eviction proceedings against Holland. On June 21, the district court denied Holland's motion for relief from judgment, and this court ultimately granted a stay of the proceedings below pending this appeal.[13]

ANALYSIS

On appeal, Holland asks this court to reverse and remand the district court's grant of summary judgment, arguing that the district court erred when it awarded a constructive trust and quieted title

[12]We note that the modern trend is to refer to res judicata as claim and issue preclusion. *See Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1051, 194 P.3d 709, 711 (2008).

[13]In light of this opinion, we lift this court's June 29, 2022, Order Granting Stay.

in Barney Ltd.'s favor.[14] Holland primarily contends that the district court erred in failing to properly consider the preclusive effect of the prior orders and judgments in bankruptcy court and family court. And although Holland recognizes that the bankruptcy court imposed an equitable lien on the property, she contends that genuine disputes of material fact remain as to the amount of that lien in relation to the value of the Loma Portal property. Barney Ltd. contends that summary judgment was warranted, as the district court appropriately considered the prior judgments from the earlier litigation, and that a constructive trust is an appropriate equitable remedy to redress Green's (and by extension Holland's) misdeeds against the Howard Trust.

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Before a district court may grant summary judgment, the moving party must "show[ ] that there is no genuine dispute as to any material fact." NRCP 56(a); *see also Wood*, 121 Nev. at 729, 121 P.3d at 1029 ("Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine [dispute] of material fact [remains] and that the moving party is entitled to judgment as a matter of law." (alteration in original, internal quotation marks omitted)). All evidence must be viewed in a light most favorable to the nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings but must instead present specific facts demonstrating the existence of a genuine factual dispute supporting their claims. NRCP 56(e); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31.

For foundational purposes, we first discuss Nevada's jurisprudence regarding constructive trusts and equitable liens placed on real property to secure a debt. Next, because our resolution of this appeal ultimately rests on the preclusive effects of prior court orders, we provide guidance on that subject. Finally, we address genuine disputes of material fact that prevent the granting of summary judgment.

Nevada recognizes both equitable liens and constructive trusts to address unjust enrichment

Equitable remedies, such as equitable liens and constructive trusts, are available to a plaintiff when "legal remedies, such as stat-

[14]Holland also argues that the district court abused its discretion in resolving her motion for stay and her post-judgment motion seeking relief from its order granting summary judgment and contends that Barney Ltd. violated NRCP 62 by taking actions to enforce the judgment of the district court before the judgment became final. We need not address these issues in light of our holding in this opinion.

utory review, are not available or are inadequate." *State, Dep't of Health & Human Servs. v. Samantha Inc.*, 133 Nev. 809, 812, 407 P.3d 327, 329 (2017) (quoting Richard J. Pierce Jr., *Administrative Law Treatise*, 1701 (5th ed. 2010)). The Nevada Supreme Court previously approved the use of the Restatement (First) of Restitution (1937) in *Namow Corp. v. Egger*, 99 Nev. 590, 592, 668 P.2d 265, 267 (1983),[15] and recognized both equitable liens and constructive trusts as remedies to restore property belonging to another.

An equitable lien can be a proper remedy to reimburse a creditor whose money was stolen and used to purchase real property. *See Maki v. Chong*, 119 Nev. 390, 393-94, 75 P.3d 376, 379 (2003). While a lien is a security interest in property, it does not confer a title interest or ownership. *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 958, 338 P.3d 1250, 1256 (2014). The lienholder does not obtain the right to control or dispose of the property, and these rights remain with the property owner until foreclosure proceedings are undertaken. *Id.*

A constructive trust is also a remedy to restore stolen funds used to purchase property. *See Namow*, 99 Nev. at 592, 668 P.2d at 267; *see also* Restatement (First) of Restitution § 160 (1937). However, a constructive trust is a remedial device "by which the holder of legal title to property is deemed to be a trustee of that property for the benefit of another who in good conscience is entitled to it." *Namow*, 99 Nev. at 592, 668 P.2d at 267.

In this instance, a constructive trust and an equitable lien were alternative equitable remedies available to the Howard Trust parties (and by extension, Barney Ltd.) to redress the misappropriation of trust funds by Green. *See id.* But where, as here, two alternative equitable remedies exist, a plaintiff may have the "option of seeking to enforce one or the other, based upon whichever result will maximize [their] recovery." 51 Am. Jur. 2d *Liens* § 30 (2023). No matter which option a plaintiff decides to pursue, however, the availability of a particular equitable remedy is not absolute and is generally left to the discretion of the trial court. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) (stating that "district courts have full discretion to fashion and grant equitable remedies").

Here, the decision of whether to impose a constructive trust or equitable lien was made by the bankruptcy court, which expressly rejected the Howard Trust parties' request for a constructive trust in favor of awarding an equitable lien. As discussed below, the bankruptcy court's determination that an equitable lien was the

[15]We recognize that there have been subsequent editions of the Restatement of Restitution, but the edition adopted in *Namow* continues to provide a workable framework for resolving the application of equitable remedies.

appropriate remedy has preclusive effect upon the parties and in subsequent legal proceedings.

Claim preclusion applies to the prior bankruptcy orders in this matter

A district court's decision as to claim preclusion is reviewed de novo. *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). Central to this appeal is whether the bankruptcy judgment precludes certain claims and issues raised by the parties. The doctrine of claim preclusion serves "vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case," and "[t]here is simply 'no principle of law or equity which sanctions the rejection by a . . . court of the salutary principle of res judicata.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)). Because claim preclusion applies equally to actions at law or in equity, *see* 50 C.J.S. *Judgments* § 926, we hold that the orders of the bankruptcy court related to the Loma Portal property had preclusive effect in the subsequent district court actions.

Claim preclusion aims to achieve finality by preventing another lawsuit based on the same facts as in an initial suit. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712 (2008). It applies when "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id*. at 1054, 194 P.3d at 713 (internal footnote omitted). Claim preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same claim." 50 C.J.S. *Judgments* § 973.

We initially address the first two requirements of *Five Star*. In this case, the parties stand in privity. Privity exists when a person has "acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (omission in original) (internal quotation marks omitted). Here, Barney Ltd., as assignee of its client's interest in the bankruptcy judgment, steps into the shoes of the Howard Trust and its beneficiaries and—based on privity—is entitled to collect on the judgment only to the extent that the Howard Trust and its beneficiaries would be entitled to do so. Thus, Barney Ltd. and the Howard Trust parties are identical for the purpose of claim preclusion. And because Holland was also a party to the bankruptcy proceedings and the subsequent litigation, the first requirement is satisfied.

Next, the parties are bound by matters decided after a competent court has entered a final judgment on the merits. *Russell v.*

Comm'r, 678 F.2d 782, 786 (9th Cir. 1982). Therefore, the bankruptcy judgment was final and, thus, binding on the parties in the appeal before us.[16]

Having concluded that the first two elements of *Five Star* have been satisfied, we now consider the third element, whether the claims brought in the district court action were based on "the same claims or any part of them that were or could have been brought" in the bankruptcy action, thereby addressing the parties' arguments regarding the preclusive effect as applied to those claims and issues in the district court's order granting Barney Ltd.'s motion for summary judgment.

The district court erred when it granted summary judgment on Barney Ltd.'s claims for constructive trust, quiet title, fraudulent transfer, and conversion

On appeal, Holland argues that Barney Ltd.'s causes of action for constructive trust, quiet title, fraudulent transfer, and conversion are barred by claim preclusion and asks this court to reverse the district court's order granting summary judgment on those claims. Barney Ltd. responds that its claims are not restrained by the judgment in the bankruptcy court, as they arise not from the initial purchase of the property by Holland and Green but rather from Holland's subsequent transfer of the property following the decree of divorce.

Constructive trust

Barney Ltd. requested that the district court place a constructive trust on the Loma Portal property to satisfy Green's debt because he initially purchased the property with funds stolen from the Howard Trust. Applying the doctrine of claim preclusion, we conclude that Barney Ltd. is prevented from asserting the competing remedy of a constructive trust in the underlying district court action based on Green's initial misappropriation of trust funds because the bankruptcy court expressly considered and rejected that remedy and the Howard Trust parties did not appeal from that decision. *See Five Star*, 124 Nev. at 1055, 194 P.3d at 713. Accordingly, the bankruptcy court's findings on this matter are final and binding upon Barney Ltd. as the assignee of the Howard Trust parties. Therefore, we hold that the district court erred when it disregarded the findings and conclusions of the bankruptcy court by substituting its own remedy in place of the remedy already litigated and obtained by the parties. *See Federated Dep't Stores*, 452 U.S. at 401.

[16]We note, however, that to the extent the district court relied upon the probate court's 2008 order to apply claim preclusion against Holland, this was in error, as the 2008 judgment was not a final judgment on the issue, and Holland was not a party to *that* dispute.

Quiet title

As explained above, claim preclusion bars claims that were *or could have been* raised in the prior action between the same parties. *See Five Star*, 124 Nev. at 1054, 194 P.3d at 713. Here, the Howard Trust parties commenced an adversarial proceeding against both Holland and Green in bankruptcy court but did not assert a cause of action for quiet title. The ownership of the Loma Portal property was unequivocally disputed in the adversarial proceedings before the bankruptcy court, where the Howard Trust and its beneficiaries attempted to lay claim to the title of the property under the remedy of a constructive trust. In conjunction with their request for a constructive trust, they also could have asserted a claim for quiet title to the property. Therefore, we conclude that claim preclusion forecloses Barney Ltd. from now asserting a quiet title claim in this proceeding based on Green's conduct already considered by the bankruptcy court.

Fraudulent transfer and conversion

In the proceedings below, the district court granted Barney Ltd.'s motion for summary judgment on his fraudulent transfer and conversion claims. As to fraudulent transfer, Barney Ltd. alleges that Holland never obtained title to the Loma Portal property because Green purchased the Loma Portal property with funds misappropriated from the Howard Trust—rendering all subsequent transfers of that property *void ab initio* and therefore fraudulent. But, as with Barney Ltd.'s quiet title claim, the facts underlying this claim were available during the bankruptcy proceedings.

At the time of the bankruptcy action, title under the grant, bargain, and sale deed was held by the HG Family Trust with two beneficiaries, Holland and Green. Thus, both Holland and Green held a community ownership interest in the Loma Portal property when they filed for bankruptcy, which allowed the bankruptcy court to exercise jurisdiction over the property. *See* 11 U.S.C. § 541(a). Moreover, Barney Ltd.'s privy—the Howard Trust parties—were present and consented to the entry of the settlement agreement adopted by the court that allowed Holland and Green to repurchase and hold title to the Loma Portal property as part of their community property estate. As the Howard Trust parties failed to assert the claim that Green's interest in the property was *void ab initio* during the prior proceedings, Barney Ltd. is also precluded from asserting this claim in the current action. *See Five Star*, 124 Nev. at 1054, 194 P.3d at 713.

Nevertheless, Barney Ltd. argues that its other grounds for its claims of fraudulent transfer and conversion are not subject to claim preclusion, as they do not result from Green's initial purchase of the property with Howard Trust funds, but instead originate from

Holland's purportedly wrongful transfer of title to the Loma Portal property from the HG Family Trust to herself as an individual following the end of the bankruptcy proceedings and as a result of the divorce proceedings. We agree.

Although these claims meet the first two elements of claim preclusion under *Five Star*, the alleged underlying fraudulent transfer and conversion of Green's share of the Loma Portal property to Holland occurred after the bankruptcy proceeding and, therefore, were not and could not have been brought during that first action. *Id*. Accordingly, we now turn to Barney Ltd.'s other arguments regarding its fraudulent transfer and conversion claims.

We need not address Barney Ltd.'s conversion claim in detail as the parties appear to concede, and we agree, that conversion applies only to personal property. Accordingly, the conversion claim against Holland fails because Barney Ltd. alleges that she converted real property belonging to the Howard Trust. Thus, to the extent that the district court relied on conversion to award Barney Ltd. the Loma Portal property, this was in error. *See, e.g.*, *Edwards v. Emperor's Garden Rest*., 122 Nev. 317, 329, 130 P.3d 1280, 1287 (2006) ("Conversion is a distinct act of dominion wrongfully exerted over personal property.").

Turning to the fraudulent transfer claim, such a claim under the Nevada Uniform Fraudulent Transfer Act is a "claim by a creditor that a debtor transferred property with the intent to defraud the creditor by placing the property out of the creditor's reach." *Tahican, LLC v. Eighth Judicial Dist. Court*, 139 Nev. 11, 15, 523 P.3d 550, 554 (2023); *see also* NRS 112.180(1). When the creditor seeks a remedy for a fraudulent transfer under NRS 112.210(1)(a), the district court may void the transfer and return the title to the debtor. *Tahican*, 139 Nev. at 15, 523 P.3d at 554. Alternatively, after a creditor obtains a judgment on a claim against the debtor, the court "may levy execution on the asset transferred or its proceeds." NRS 112.210(2).

The transfer of the Loma Portal property pursuant to the divorce decree was not a fraudulent transfer

To the extent that Barney Ltd. argues that Holland's transfer of title to the property following the divorce decree was fraudulent and voided title to the property, we disagree.[17] Generally, courts must make an equal division of community property in a divorce unless there is a compelling reason, such as marital waste, to make an exception. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019). Marital waste includes one spouse's deliberate misuse of

[17]Because neither the Howard Trust parties nor Barney Ltd. had an ownership interest in the Loma Portal property, they were not parties in the family court proceedings.

community assets for unethical or illegal purposes. *Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996). Family courts have jurisdiction to transfer property from one spouse to another. *Cf. Guerin v. Guerin*, 116 Nev. 210, 212, 993 P.2d 1256, 1257 (2000) (affirming a district court order transferring property from one spouse to another in a divorce decree); *see also Landreth v. Malik*, 127 Nev. 175, 184, 251 P.3d 163, 169 (2011) (recognizing that "the family court division has original and exclusive jurisdiction over matters affecting the familial unit including divorce, custody, marriage contracts, community and separate property, child support, parental rights, guardianship, and adoption").

Nevada law broadly provides that a "transfer" is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." NRS 112.150(12). In this case, after finding marital waste by Green, the family court transferred the Loma Portal property from the marital community to Holland as her sole and separate property, as permitted by Nevada law. *See Kogod*, 135 Nev. at 75, 439 P.3d at 406 (allowing the family court to unequally dispose of assets in the event of marital waste).[18]

While the quitclaim deed from the HG Family Trust to Holland was a transfer of ownership interest, it does not necessarily follow that it was fraudulent, particularly where the transfer was authorized by the family court when it made its property distribution to Holland.[19] Indeed, the family court merely equalized the remaining community assets by awarding the Loma Portal property to Holland to compensate her for the marital waste incurred by Green. And, as discussed further below, this transfer does not qualify as a fraudulent transfer, as Barney Ltd.'s equitable lien runs with the property, and therefore Holland received title to the property subject to that lien. *See* 51 Am. Jur. 2d *Liens* § 18. Because the family court transferred the property as a valid exercise of its jurisdiction and the equitable lien remained attached to the property, we conclude that this transfer does not constitute a fraudulent transfer under NRS 112.180(1).

[18]Although it is unclear from the record whether the family court was aware of the equitable lien placed on Green's share of the Loma Portal property by the bankruptcy court before transferring the property to Holland, this did not prohibit the family court from adjudicating the ownership of a marital asset.

[19]We note that in the divorce decree the family court explicitly stated that the clerk of the court could sign any necessary documents, such as quitclaim deeds, on behalf of an uncooperative party to effectuate property distribution. Thus, assuming a quitclaim deed had been required to effectuate the transfer of the Loma Portal property to Holland, the divorce decree authorized the use of a quitclaim deed for that purpose. *Cf. Guerin*, 116 Nev. at 212, 993 P.2d at 1257.

As established above, because Holland and Green had a valid community property interest in the Loma Portal property, the family court necessarily was able to transfer that property as a proper exercise of its jurisdiction. Thus, to the extent that the district court's order in the underlying proceeding invalidated the divorce decree by voiding the property transfer thereunder, the district court in this action exceeded its jurisdiction. *See* NRS 3.220 (providing that district judges have equal and coextensive jurisdiction and power). And it is well established that district courts lack jurisdiction "to review the acts of other district courts." *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990). Because judges sitting in the family division have "all the constitutional powers" of a district judge, *Landreth*, 127 Nev. at 185, 251 P.3d at 170, the district court had no authority to disregard the family court's divorce decree. Accordingly, Barney Ltd.'s arguments related to its fraudulent transfer and conversion claims are unavailing.

The district court erred when it failed to enforce the equitable lien established under the bankruptcy judgment

In addition to the claims brought above, and as recognized by both the parties during oral argument, Barney Ltd. argued in its motion for summary judgment that the doctrine of claim preclusion prohibits Holland from contesting the existence and validity of the equitable lien placed upon the property by the bankruptcy court. *See Five Star*, 124 Nev. at 1054, 194 P.3d at 713. For the same reasons the claims above cannot be relitigated in this new action, we conclude that the parties' interests in the Loma Portal property are subject to the equitable lien imposed by the bankruptcy court. Accordingly, we conclude that the district court erred to the extent that it failed to recognize the continued existence of the equitable lien and its enforceability.

Indeed, Holland was aware of Barney Ltd.'s equitable lien, and even if she misunderstood the effect of the lien on the property after her discharge, she was bound by the bankruptcy judgment and took title to the entire property subject to the equitable lien placed on Green's interest. *See Bank of India v. Weg & Myers, P.C.*, 691 N.Y.S.2d 439, 445 (N.Y. App. Div. 1999) ("A subsequent holder of the property takes it subject to the rights of the equitable lienor . . . including the right of restitution to the extent of the lien." (internal citation omitted)); 51 Am. Jur. 2d *Liens* § 18. Further, as a party to the prior district court and bankruptcy proceedings, Holland was aware of the lis pendens providing notice of the Howard Trust parties' purported interest in the property. *See Weddell v. H2O, Inc.*, 128 Nev. 94, 106, 271 P.3d 743, 751 (2012) ("The doctrine of lis pendens provides constructive notice to the world that a dispute

involving real property is ongoing."), *abrogated on other grounds by Tahican*, 139 Nev. 11, 523 P.3d 550; *see also* NRS 14.010(3) (stating that a lis pendens constitutes "constructive notice to a purchaser or encumbrancer of the property affected thereby"). Thus, Holland cannot be considered a bona fide purchaser of the property, and her interest is subject to the equitable lien. *See* Restatement (First) of Restitution § 168 cmt. b (recognizing that "where a person holds property subject to an equitable lien in favor of another and transfers it to a person who is not a bona fide purchaser, the latter holds the property subject to the equitable lien").[20]

Questions of fact remain regarding the remaining value of the equitable lien and the value of Green's share of the Loma Portal property to satisfy any remaining portion of the equitable lien

Finally, genuine disputes of material fact remain, rendering summary judgment inappropriate under NRCP 56. Because the bankruptcy court unequivocally imposed an equitable lien on Green's interest in the Loma Portal property, we hold that the district court erred when it failed to recognize and adjudicate the rights and interests associated with Barney Ltd.'s equitable lien on the property.[21] Indeed, Holland conceded at oral argument before this court that genuine disputes of material fact remain as to the value of Green's share of the property that remains to satisfy the lien. We therefore reject the parties' contentions that summary judgment should be granted and, for the reasons discussed below, reverse and remand.

The initial amount of the equitable lien

Holland contends that the value of the equitable lien is limited to the amount of Green's interest in the property, whereas Barney Ltd. contends that the value of the equitable lien is inclusive of the remaining judgment (in excess of $1.2 million dollars). However, both parties' interpretations of the amount of the equitable lien are belied by the record.

Thus, we reject the parties' interpretations and hold that the bankruptcy court imposed an equitable lien upon Green's interest in the Loma Portal property in the amount of $340,000—the property's value based on the purchase price paid at the time of the bankruptcy settlement, as clarified by the bankruptcy court in its oral statement as to the value of the lien, relied upon in its written judgment.

[20]We reject Barney Ltd.'s argument that a lis pendens secures an ownership interest in property, as it only provides notice of legal proceedings involving the property.

[21]We reject Holland's argument that the subsequent transfer of title to the property extinguished the equitable lien.

The remaining value of the equitable lien

Finally, we conclude that a genuine dispute of material fact exists regarding the amounts paid, if any, from the bankruptcy settlement to satisfy the equitable lien. Our review of the record suggests that the Howard Trust was to receive a distribution of funds in the amount of $377,553.71 at the conclusion of the bankruptcy proceedings as approved by the bankruptcy court. What is unclear is how much of this distribution was applied toward satisfying the equitable lien that was placed on the Loma Portal property. The bankruptcy court specifically included a provision in its order that the amount of the equitable lien would be reduced "dollar for dollar" by any distribution received by the Howard Trust and its beneficiaries from the bankruptcy trustee. Thus, the bankruptcy court unquestionably anticipated that some, if not all, of the settlement proceeds received by the bankruptcy trustee from Holland and Green would satisfy the lien placed on Green's share of the property. On remand, the district court will need to make this determination in the first instance.[22]

The value of the Loma Portal property

To enforce the equitable lien against Green's interest in the property, which is now held by Holland, the district court will also necessarily need to determine the current value of the Loma Portal property. The equitable lien attaches only to Green's share of the property, which in a community property state such as Nevada equals one-half of the property's value, notwithstanding that the title to the entirety of the property remains with Holland. On remand, the district court will need to determine the current value of the Loma Portal property and make the necessary calculations to determine the value of one-half of the property that is encumbered by the equitable lien. Then, the court will need to determine the remainder of the equitable lien amount that Barney Ltd. is entitled to enforce. Unless the entire repurchase price of $340,000 was accounted for in the distribution to the Howard Trust parties by the bankruptcy trustee, Barney Ltd. is entitled to enforce the remainder of the equitable lien against Green's share of the Loma Portal property.

CONCLUSION

We conclude that the district court failed to recognize the preclusive effect of prior court orders and to properly apply the doctrine of claim preclusion when considering Barney Ltd.'s motion for sum-

[22]We also note that Barney Ltd. appears to suggest that Holland failed to raise election of remedies as an affirmative defense. However, we need not address this argument, as the election of a constructive trust was rejected by the bankruptcy court. Because claim preclusion resolves this issue, there is no further election to be made.

mary judgment. Because the bankruptcy court placed an equitable lien on Green's interest in the Loma Portal property, Barney Ltd. is entitled to enforce any remainder of the equitable lien in accordance with Nevada law, but it is not entitled to a constructive trust, title to the property, or recovery for fraudulent transfer or conversion. And as genuine factual disputes remain as to the current value of the equitable lien and the value of the Loma Portal property, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

Gibbons, C.J., and Westbrook, J., concur.

CARMEN SABATER, AN INDIVIDUAL; AND VINCENT JAMES DESIMONE, AN INDIVIDUAL, APPELLANTS, *v.* SHAUN RAZMY, AN INDIVIDUAL, RESPONDENT.

No. 85161

November 22, 2023 538 P.3d 1145

Appeal from a district court order dismissing a tort action for failure to timely effect service of process. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

Feher Law, APC, and *Andrew Alexandroff*, Torrance, California, for Appellants.

Christian, Kravitz, Dichter, Johnson & Sluga, LLC, and *Gena L. Sluga*, Las Vegas, for Respondent.

Before the Supreme Court, CADISH, PICKERING, and BELL, JJ.

OPINION

By the Court, BELL, J.:

Following a car crash, Appellants Carmen Sabater and Vincent Desimone filed a lawsuit against Respondent Shaun Razmy for personal injuries. Sabater and Desimone failed to serve the summons and complaint on Razmy within 120 days. As a result, the district court issued an order to show cause. After that order issued, the summons and complaint were served, and Razmy filed a motion to quash the service of process and to dismiss the complaint. The district court granted the motion to dismiss, denying Sabater and Desimone's late motion for an extension of time to serve process. Sabater and Desimone appeal, arguing the district court improperly denied their request for an extension of time to serve the summons and complaint and Razmy's motion to dismiss was itself untimely.

When a party fails to effectuate service of process and fails to request an enlarged period for service within 120 days of the complaint's filing date, that party must show good cause for the initial delay in requesting an extension before a motion to extend the time to serve can be considered. Here, because Sabater and Desimone failed to plead good cause for the delay in moving for an enlarged period for service, the district court did not abuse its discretion in denying the motion for an extension of time to serve the complaint.

After the period for service closes, a party may seek the dismissal of an action under NRCP 12(b)(4) when there is insufficient service.

Although NRCP 12(b) does not permit the filing of a motion to dismiss based on insufficient service after a responsive pleading has been filed, the rule does not contain any other time limit for filing the motion to dismiss. Here, no responsive pleading had been filed when Razmy filed his motion to quash service and dismiss the complaint, so the motion was not untimely. We conclude the district court did not abuse its discretion when it denied the request for enlargement of time to serve and dismissed the action.

FACTS AND PROCEDURAL HISTORY

In 2019, Sabater and Desimone were involved in a car crash with Razmy. On August 26, 2021, Sabater and Desimone filed a negligence complaint against Razmy. Per NRCP 4(e)(1), the summons and complaint needed to be served on Razmy within 120 days, or by December 24, 2021, but Sabater and Desimone neglected to calendar the date. As a result, December 24 passed without Sabater and Desimone serving the summons and complaint. Due to the lack of service, on February 23, 2022, the district court issued an order to show cause why the case should not be dismissed. Following the order to show cause, on March 15, Sabater and Desimone served Razmy with the summons and complaint and filed proof of service with the district court. Service occurred 81 days after the 120-day deadline.

One month later, on April 15, Razmy moved to quash the service of process as untimely and to dismiss the complaint for failure to timely serve. Any opposition to this motion was due by April 29, but Sabater and Desimone failed to file a timely opposition. Razmy filed a notice of nonopposition on May 6, requesting the district court grant the motion as unopposed. An opposition was eventually filed on May 20.

In the opposition, Sabater and Desimone argued Razmy's motion to quash was untimely, as it needed to be filed within the 21 days provided post-service for defendants to file an answer. Sabater and Desimone also denied being served with Razmy's motion to quash. Additionally, Sabater and Desimone sought leave to retroactively extend the 120-day period for service of the summons and complaint, having failed to request such an extension within the statutory period. Sabater and Desimone argued a clerical calendaring error and high rates of turnover at their counsel's office supported good cause to grant the extension.

Razmy replied to the opposition, pointing out that Sabater and Desimone's counsel failed to register an email address with the district court and provide a Nevada address to the State Bar of Nevada. Without this required information, Razmy's attorney was forced to search prior email correspondence to locate an email suitable for service and sent notice to another lawyer at the firm.

After a hearing, the district court declined to grant Sabater and Desimone an extension, finding they did not prove good cause existed for their failure to file a motion to extend the service deadline before that deadline expired. Instead, the district court granted Razmy's motion to dismiss, finding that the motion was timely filed before the filing of any answer and that because Sabater and Desimone failed to serve the summons and complaint within the statutory time frame, dismissal was required. Sabater and Desimone appeal the district court's dismissal of the complaint without prejudice.

DISCUSSION

On appeal, Sabater and Desimone argue the district court abused its discretion by denying their motion for an extension of time to serve the summons and complaint. They also argue Razmy's motion to quash was untimely pursuant to NRCP 12 and should have been denied.

The district court did not abuse its discretion in denying the motion for an extension of time to serve the summons and complaint or in granting Razmy's motion to dismiss

Sabater and Desimone claim that the district court abused its discretion by denying their motion for an extension of time to effectuate service. We review a district court's denial of a motion for an extension of time to serve for an abuse of discretion. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010).

The district court did not abuse its discretion in denying the retroactive request for an extension of time to serve Razmy, as Sabater and Desimone failed to demonstrate good cause for their late motion. A request for an extension of time to serve a summons and complaint must be made within the initial 120-day period for service, a threshold requirement for relief under NRCP 4(e)(4) and *Saavedra-Sandoval*, 126 Nev. at 597, 245 P.3d at 1201. When a party fails to file a timely motion to extend time for service, that party must demonstrate good cause exists for the untimely request before the court will consider whether good cause exists for an extension. *Id.* "Only upon a showing of good cause for the delay in filing the motion to enlarge time should the court then engage in a complete *Scrimer* analysis to determine whether good cause also supports the request for enlargement of time for service of process . . . ." *Id.*; *see also Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195-96 (2000) (establishing various factors to determine whether good cause exists to allow a plaintiff to serve process beyond the 120-day deadline).

Sabater and Desimone did not request an extension of time for service until 147 days after the period for service had closed. In

that motion, Sabater and Desimone addressed whether there was good cause for an extension; however, they did not present separate argument regarding any good cause for the failure to request this extension within the 120-day deadline. When asked, counsel admitted being unfamiliar with our holding in *Saavedra-Sandoval*. Therefore, Sabater and Desimone have waived any argument on appeal regarding possible good cause for their failure to make a timely request for an extension. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Moreover, we need not address the district court's analysis of the *Scrimer* factors because Sabater and Desimone's failure to show good cause for the untimely motion for an extension rendered consideration of those factors moot. *Scrimer*, 116 Nev. at 516-17, 998 P.2d at 1195-96. We conclude that the district court did not abuse its discretion in denying the motion for an extension of time to serve the summons and complaint.

The district court properly dismissed for failure to timely serve process

Sabater and Desimone contend that the district court abused its discretion by granting Razmy's motion to dismiss. We review "[a]n order granting a motion to dismiss for failure to effect timely service of process . . . for an abuse of discretion." *Abreu v. Gilmer*, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999). We review the district court's interpretation of NRCP 12(b) de novo. *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006). "When a rule is clear on its face, we will not look beyond the rule's plain language." *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013).

The plain language of NRCP 12 provides no time restraint on a defendant's motion to dismiss for lack of service before a responsive pleading has been filed. NRCP 12(a)(1)(A)(i) requires that defendants serve an answer to a complaint "within 21 days after being served with the summons and complaint." Prior to filing an answer, a defendant may assert certain defenses by motion. Those defenses include insufficient service of process. NRCP 12(b)(4); *see also Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000) (explaining that, under NRCP 12(b), "before a defendant files a responsive pleading such as an answer, that defendant may move to dismiss for lack of personal jurisdiction, insufficiency of process, and/or insufficiency of service of process").

While no other time limit governs a motion filed under NRCP 12(b)(4), a defendant takes risks filing such a motion beyond the 21 days provided for answering the complaint—if the motion or

an answer is not filed by 21 days after service, a plaintiff could obtain a default. NRCP 55. Even so, "[d]efault . . . is not automatic." *Opaco Lumber & Realty Co. v. Phipps*, 75 Nev. 312, 314, 340 P.2d 95, 96 (1959), *superseded by statute on other grounds as stated in Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 548, 331 P.3d 850, 855 (2014); *see also Scheinwald v. Bartlett*, 51 Nev. 155, 157-58, 271 P. 468, 468-69 (1928) (noting that where no default is entered, district courts have discretion to allow an untimely answer).

Here, Razmy did not file an answer. Instead, Razmy filed a motion to dismiss the complaint for insufficient service of process 31 days after the complaint was served. Razmy risked default by failing to make any defensive filing within 21 days of service, but given the lack of a pre-answer deadline to file motions under NRCP 12(b)(4), the motion to dismiss was not untimely. We conclude the plain language of NRCP 12 supports the district court's ruling, and we find no error in the district court's decision to grant the motion to dismiss. Because Razmy's motion to dismiss was timely, Sabater and Desimone did not serve Razmy within 120 days, and the district court properly denied an extension of time to serve, the case was properly dismissed under NRCP 4(e)(2).

CONCLUSION

When a plaintiff fails to demonstrate good cause for failing to seek an extension of time to serve the summons and complaint within the 120-day period prescribed by NRCP 4(e), the district court may properly deny an untimely motion for an extension of time. Additionally, under NRCP 12, a motion to dismiss for insufficient service of process may be filed at any time before a responsive pleading is filed. Absent the filing of a responsive pleading or entry of a default, a motion to dismiss for insufficient service of process is not untimely. Accordingly, we affirm the district court's order dismissing the complaint.

Cadish and Pickering, JJ., concur.