Case No. 70498

In the Supreme Court of Nevada

ALBERT THOMAS, et al.,

Appellants,

vs.

MEI-GSR HOLDINGS, LLC, et al.,

Respondents.

APPEAL

from the Second Judicial District Court, Washoe County
The Honorable ELLIOT A. SATTLER, District Judge
District Court Case No. CV12-02222

RESPONDENTS' PETITION FOR REHEARING

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
KRISTEN MARTINI (SBN 11,272)
DALE KOTCHKA-ALANES (SBN 13,168)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

H. STAN JOHNSON (SBN 265)
COHEN-JOHNSON, LLC
255 East Warm Springs Road
Suite 100
Las Vegas, Nevada 89119
(702) 823-3500

Attorneys for Respondents

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

MEI-GSR Holdings, LLC; Gage Village Commercial Development, LLC; and AM-GSR Holdings, LLC are limited liability companies. Grand Sierra Resort Unit Owners' Association is a nonprofit corporation; no publicly traded company owns more than 10% of its stock. No publicly traded company has an interest in this appeal.

H. Stan Johnson of Cohen-Johnson, LLC and Mark Wray of The Law Offices of Mark Wray, Gayle Kern of Kern & Associates, Ltd., and Sean Brohawn of Brohawn Law represented respondent here and in the district court. Daniel F. Polsenberg, Joel D. Henriod and Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP have appeared before this Court.

Dated this 17th day of April, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Regulations

9

PETITION FOR REHEARING

Respondents MEI-GSR Holdings, LLC; Grand Sierra Resort Unit Owners' Association; Gage Village Commercial Development, LLC; and AM-GSR Holdings, LLC seek rehearing of this Court's February 26, 2018 order of reversal. This Court correctly recognized that NRS 38.300–.360[1] subjects appellants' claims to mandatory administrative remedies, and that appellants did not meet this prerequisite. *See* Order at 5 & n.2, 10 & n.4. This Court waived the statutory requirement, however, because it mistakenly held that the statute is not jurisdictional. *See* Order at 7-8; NRAP 40(c)(2)(A), (B). That error requires rehearing.

[1] Consistent with this Court's finding at Order 5–6 n.20, respondents refer to the 2011 version unless otherwise noted. The 2011 version of NRS 38.300–.360 appears in the Rule 28(f) addendum.

ISSUE ON REHEARING

NRS 38.310 (2011) provides, in part, that

> 1. No civil action based upon a claim relating to:
>
> > (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; * * *
>
> may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360 * * * .
>
> 2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

NRS 38.330(5) (2011) provides, in part, that

> Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360.

Do these statutes limit the court's subject-matter jurisdiction?

ARGUMENT

This Court mistakenly found that "nothing in the text of NRS 38.310 provides that mediation or arbitration is required before the court may obtain jurisdiction, nor do respondents contend on appeal

that NRS 38.310 is jurisdictional in nature." *See* Order at 7. Based on this mistaken assumption, this Court "conclude[d] that NRS 38.310 does not implicate a district court's subject matter jurisdiction and the district court erred in granting respondents' motion to dismiss for lack of subject matter jurisdiction." *See* Order at 7-8. This Court's conclusion is mistaken because (1) respondents did raise the jurisdictional issue; and (2) the text and context of NRS 38.310 show that a court cannot exercise jurisdiction over CC&R claims that bypass the statutory exhaustion requirements of NRS 38.300–.360.

This Court Has Not Treated Mandatory Mediation or Arbitration as Subject to Waiver or Forfeiture

Although this Court has not previously decided whether NRS 38.300–.360 limits the district court's jurisdiction over claims involving the interpretation of real-property covenants, conditions and restrictions (CC&Rs), this Court has never allowed a district court to bypass those pre-suit requirements. The *en banc* Court recently enforced NRS 38.300–.360 even when the argument was raised for the first time on appeal. *Aliante Master Ass'n v. Prem Deferred Trust*, Docket No. 71026 (Order of Reversal and Remand, Feb. 23, 2018). While deferring the jurisdictional question, the *en banc* Court addressed the failure to

mediate or arbitrate before filing suit as "plain error." *Id.* at 5. The Court acknowledged that "NRS 38.310's mediation or arbitration requirement controls here" and agreed that the class members in that case "were required to mediate or arbitrate their claims under NRS 38.310 before bringing claims in district court and, thus"—notwithstanding the defendant's failure to raise the issue—"the district court was *required* to dismiss the class members' claims pursuant to NRS.38.310(2)." *Id.* at 6 (emphasis added).

The Statutory Requirement is Jurisdictional

The statutory text and context reveal that the required exhaustion of administrative remedies limits the district court's subject-matter jurisdiction.

NRS 38.320(1) gives exclusive original jurisdiction over CC&R claims to Nevada's Real Estate Division of Business and Industry for mandatory arbitration or mediation. In similar contexts, this Court and other courts have concluded that those administrative remedies establish a jurisdictional prerequisite.

NRS 38.310(1) deprives the district court of jurisdiction if the exhaustion requirements of NRS 38.300-.360 have not been met: in that

circumstance, "[n]o civil action . . . may be commenced in any court." Subsection 2 goes farther in dictating not just what the parties must do, but what the *court* must do: "A court *shall dismiss* any civil action which is commenced in violation" of NRS 38.310(1)—quintessential jurisdiction-stripping language. Together, the subsections make the Legislature's intent unmistakable: these exhaustion requirements are jurisdictional.

The Complaint, Filed in Violation of the Statute, was Void

Even more, this Court has held that complaints filed without statutory affidavits are void ab initio. NRS 38.330(5) contains such a mandate: complaints seeking review after exhaustion "must contain a sworn statement" confirming compliance with the exhaustion requirements of NRS 38.300-.360. Appellants' complaint did not. (*See* 1 App. 1.) So it is though the complaint was never filed, and the district court never acquired jurisdiction over the action.

On Rehearing, this Court should Affirm the Dismissal

Without jurisdiction, the district court correctly dismissed the action. Appellants could not avoid dismissal through judicial estoppel be-

cause that doctrine does not confer jurisdiction. On rehearing, the district court's order dismissing the complaint should be affirmed.

I.

THERE IS NO WAIVER OF THE JURISDICTIONAL QUESTION

A. Respondents Argued that NRS 38.130 Did Implicate the District Court's Subject-Matter Jurisdiction

Respondents argued both that NRS 38.310 was jurisdictional and that, even if not, the district court's order could be upheld. They relied on numerous authorities indicating that the language of NRS 38.310 mandated exhaustion before the district court could exercise subject-matter jurisdiction, or that similar statutes implicated the district court's subject-matter jurisdiction. (*See* RAB at 43 n.13, 45-46, 48-49 n.14, 64-65.)

While respondents indicated that the terminology was unimportant, respondents argued that "whether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable." (RAB 14-15, 50.) The alternative argument—that even if NRS 38.310 were not jurisdic-

tional the district court's order may be upheld—does not diminish the argument that NRS 38.310 *is* jurisdictional.

B. Respondents Can Raise the Issue on Rehearing

"[W]hether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011). This rule includes raising the issue of the district court's lack of subject-matter jurisdiction for the first time in a petition for rehearing.[2] So even if respondents had not raised the issue in the answering brief, they could do so for the first time in this petition.

---

[2] *See, e.g.*, *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991) (***rejecting*** argument that party "MUST [have] waived [jurisdictional argument] because they did not raise it until their motion for rehearing" because a "lack of jurisdiction is fundamental error and may be raised for the first time before this court"); *Preblich v. Battley*, 181 F.3d 1048, 1054 (9th Cir. 1999) (holding when an "issue concerns the district court's subject matter jurisdiction," the court is "obligated to consider" the issue, even when "raised for the first time in a petition for rehearing"); *Baltimore & O.S.W.R. Co. v. New Albany Box & Basket Co.*, 96 N.E. 28, 29 (Ind. App. 1911) (holding "the question of jurisdiction is one of such a character that it should be considered by the court at any time while the appeal is pending," including "upon rehearing"); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("Indeed, a party may raise such an objection even if the party had previously acknowl-

II.

THE FAILURE TO COMPLY WITH NRS 38.310 DEPRIVED THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION

A. NRS 38.310 is Not Merely a Claims-Processing Statute; the Text and Context Show that it is Jurisdictional

NRS Chapter 38 mandates the exhaustion of administrative remedies, including mediation or arbitration, before the district court can acquire jurisdiction. Mere "claims-processing rules" such as filing deadlines may not implicate jurisdiction if they only "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015). But NRS Chapter 38 contains substantive requirements that implicate the merits of the case, not just time limitations and deadlines.

1. The Administrative Remedies are Substantive

NRS 38.320-.360 sets forth elaborate procedures for exhausting a party's CC&R claims with the Nevada's Real Estate Division of Business and Industry. NRS 38.320(1) reiterates that "[a]ny civil action de-

---

edged the trial court's jurisdiction.").

scribed in NRS 38.310 ***must*** be submitted for mediation or arbitration by filing a written claim with the Division." (Emphasis added). Then, NRS 38.330 expresses that the parties "shall" pursue binding arbitration, unless the parties agree to mediation or non-binding arbitration. The parties could agree to make the pre-litigation efforts nonbinding, but they could not agree to obviate that process altogether.

2. The Mandatory Language of Dismissal is Jurisdictional

NRS 38.310 confirms that these substantive provisions "carry jurisdictional consequences," *see Henderson*, 562 U.S. at 438, by speaking not just to the parties, but to the power of the court itself. Subsection 1 prohibits the commencement of a civil action "in any court" until the claim has been submitted to the Division for mediation or arbitration. Subsection 2 reinforces this mandate by demanding that a "court ***shall dismiss*** any civil action which is commenced in violation of the provisions of subsection 1." (Emphasis added.)

A plain reading of NRS 38.310, alone and in its statutory context, shows that this mandatory administrative remedy is jurisdictional, depriving the district court of subject-matter jurisdiction until the plaintiff complies with all of its administrative requirements. That jurisdiction-

al prerequisite is not judicially imposed; it is the clear expression of the Legislature.

B. Mandatory Administrative Remedies Deprive the District Court of Subject-Matter Jurisdiction

This Court has held that such mandatory administrative remedies limit subject-matter jurisdiction. In *Benson v. State Eng'r*, 131 Nev., Adv. Op. 78, 358 P.3d 221, 224, 228 (2015), this Court's last published word on the subject, this Court affirmed district court's dismissal of petitioner's action for lack of subject-matter jurisdiction when the petitioner failed to exhaust available administrative remedies before seeking judicial review. That decision adheres to the rationale in *Eluska v. Andrus*, twice cited with approval by this Court, where the Ninth Circuit explained that "when exhaustion is statutorily mandated, the exhaustion requirement is jurisdictional and the district court must dismiss the action." 587 F.2d 996, 999 (9th Cir. 1978); *see also Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1283 (9th Cir. 1994) (holding because plaintiff "failed to properly exhaust the statutorily mandated exhaustion requirements . . . , no jurisdiction exists over its action").

Other Circuits have applied this jurisdictional rule as well. *See Vazquez v. Sessions*, 881 F.3d 396, 402 (5th Cir. 2018) (holding when the "exhaustion requirement is statutorily mandated, [the] failure to exhaust . . . serves as a jurisdictional bar"); *Un v. Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005) (holding when "exhaustion is statutorily mandated, the requirement of exhaustion of administrative remedies is jurisdictional").

Recognizing the jurisdictional limits in NRS Chapter 38 would be consistent with *Benson*, *Eluska*, and other similar decisions. Not only does NRS 38.310(1) oust the district court from exercising jurisdiction over appellants' claims, but NRS 38.320(1) directs parties instead to the Real Estate Division for the exclusive administrative remedy of arbitration or mediation. And NRS 38.310(2) mandates dismissal of appellants' district court action—signaling a lack of subject-matter jurisdiction.

C. Courts Across the Nation have Applied the Same Rule to Statutes Mirroring NRS 38.310

The United States Supreme Court and other courts considering statutes with language similar to NRS 38.310 align with respondents on this jurisdictional analysis. The U.S. Supreme Court's decision in

Gonzalez v. Thaler, 565 U.S. 134 (2012), and the Tenth Circuit's decision in *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013), both confirm that the mandatory language of NRS 38.310 is jurisdictional.

1. Language Directing that "an Appeal may Not be Taken" is Jurisdictional

In *Gonzales,* the United States Supreme Court explained that a "rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" 565 U.S. at 141 (alteration in original) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)). The United States Supreme Court in *Gonzales* held that the terms of 28 U.S.C. § 2253(c)(1), which governed habeas appeals and provided that "[u]nless a circuit judge or justice issues a certificate of appealability, ***an appeal may not be taken to the court of appeals***" was "'clear' jurisdictional language" that establishes "until a COA has been issued federal courts of appeals lack [subject-matter] jurisdiction to rule on the merits of appeals from habeas petitioners." 564 U.S. at 142 (emphasis added). The *Gonzales* Court found that such language is jurisdictional because it governs a court's "adjudicatory authority." *Id.* at 141-42; *see also Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (holding that a statute providing that an action "shall not be filed or

maintained in a Federal court" and actions related thereto "shall be promptly dismissed" imposed jurisdictional consequences); *Klamath-Siskiyou Wildlands Ctr. v. MacWhorter*, 797 F.3d 645, 647 (9th Cir. 2015) (holding that the clause "'[n]o action may be commenced'" found in 16 U.S.C. § 1540(g)(2)(A)(i) "is jurisdictional" and "acts as an absolute bar to bringing suit under the ESA [Endangered Species Act]").[3]

2. Pre-Suit Resolution Processes are Jurisdictional

This decision is not new for the United States Supreme Court. In *Rock Island A. & L.R. Co. v. United States*, the Court considered whether failure to comply with the exhaustion requirements set forth in a tax statute mandated dismissal. 254 U.S. 141, 142 (1920) (Holmes, J.). The statute expressed that "no suit shall be maintained" until after an appeal to the Commissioner of Internal Revenue. *Id.* Because the taxpayer took the first step in the administrative process, but not the last,

[3] Citing *Gonzalez*, 565 U.S. at 142 (*supra*)), *Keene Corp. v. United States*, 508 U.S. 200, 208-09 (1993) (holding that the language "[n]o person shall file or prosecute'" is jurisdictional) & *Weinberger v. Salfi*, 422 U.S. 749, 756 (1975) (holding that "[n]o action . . . shall be brought under [28 U.S.C. § 1331]" is jurisdictional language)).

the taxpayer never acquired the statutory right to sue in court. *Id.* at 141, 143.[4]

In *Case*, the Tenth Circuit considered whether the prerequisite, found in 28 U.S.C. § 2244(b)(3)(A) requiring a habeas petitioner filing a successive habeas application to first "move in the appropriate court of appeals for an order authorizing the district court to consider the application," was jurisdictional. 731 F.3d at 1026-27. The Court held that "Section 2244's gate-keeping requirements are jurisdictional in nature" because the statute mandates that the district court "'shall dismiss any claim . . . unless the applicant shows that the claim satisfies the re-

[4] *See also Meliezer v. Resolution Tr. Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (stating that the new claims procedure gives the receiver of a failed financial institution the authority to review claims, and holding that the statute was jurisdictional despite that the statute did "not explicitly mandate exhaustion of administrative remedies before judicial intervention, [since] the language of the statute and indicated congressional intent make clear that such is required"); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (holding that jurisdiction to enforce a collective bargaining agreement only vests once grievance and arbitration procedures are exhausted); *Nat'l Football League Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 227 (5th Cir. 2017) (explaining that exhaustion under collective bargaining procedures is a rule reflecting the forum in which an employee's remedy lies, which is the grievance procedures to settle disputes under the LMRA) (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965)) ("Congress has expressly approved contract grievance procedures as a preferred method for settling disputes").

quirements of [§ 2244(b)].'" 731 F.3d at 1027 (quoting 28 U.S.C. § 2244(b)(4)). The *Case* court found that a statute "is jurisdictional when it governs a court's adjudicatory capacity." 731 F.3d at 1027. The Court reasoned that the requirement that "a successive habeas corpus application 'shall be dismissed' unless the gate-keeping requirements are met" is "jurisdictional" because it "clearly speaks to the power of the court to entertain the application, rather than any procedural obligation of the parties." 731 F.3d at 1027. The court further found that the "statutory language mandating dismissal also sets forth a threshold limitation on the statute's scope providing further indication that the gate-keeping requirements are jurisdictional rules, not mere claim-processing rules." *Id.*

3. NRS 38.310 Uses the Same Kind of Jurisdiction-Stripping Language

Nevada's federal courts have correctly concluded that NRS 38.310 is a jurisdictional bar. *Anderson v. Assessment Mgmt. Servs.*, Case No. 2:13-CV-02185-GMN, 2015 WL 1530601, at *3 (D. Nev. Apr. 6, 2015) (dismissing complaint for lack of subject-matter jurisdiction because plaintiff did not comply with NRS 38.310); *accord Moulton v. Eugene*

Burger Mgmt. Corp., Case No. 3:08CV00176BES-VPC, 2009 WL 2004373, at *4 (D. Nev. July 9, 2009).

The plain language of NRS 38.310(1)—"[n]o civil action . . . may be commenced in any court" until exhaustion of the mediation or arbitration process with the Division—represents the same "'clear' jurisdictional language." The district court in that circumstance lacks adjudicatory authority; exclusive original jurisdiction lies with the mediator or arbitrator through the Division. Appellants never went to the administrative agents with original jurisdiction, so they never vested the district court with jurisdiction.

NRS 38.310(2) confirms that jurisdictional limit. By mandating that "court ***shall dismiss any civil action*** which is commenced" without exhausting the mandatory administrative remedies in subsection 1, the limits the *power* of the district court to entertain an unmediated and unarbitrated action to enforce CC&Rs.[5]

---

[5] In *McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev., Adv. Op. 64, 310 P.3d 555, 558 (2013), this Court used almost identical reasoning to reject appellants' argument that "NRS 38.310(2) prohibits the district court from dismissing a complaint once it commences, irrespective of whether the complaint violates NRS 38.310(1)." *The McKnight* Court held that such argument was "meritless because NRS 38.310(2)'s language does not determine when a court can dismiss a civil action; ra-

III.

INDEPENDENTLY, THE LACK OF A SWORN STATEMENT DEPRIVED THE DISTRICT COURT OF SUBJECT-MATTER JURISDICTION

Even if appellants had exhausted their administrative remedies by pursuing non-binding arbitration, the district would still lack subject-matter jurisdiction because of the requirement that the complaint "contain a sworn statement indicating that the issues in the complaint have been arbitrated pursuant to the provisions of NRS 38.300 to 38.360, inclusive." NRS 38.330(5).[6]

---

ther, it mandates the court to dismiss any civil action initiated in violation of NRS 38.310(1)." As this Court has held that NRS 38.310(2) "mandates dismissal" because appellants failed to exhaust the administrative remedy of mandatory mediation, *see id.*, a holding that the district court lacked subject matter jurisdiction and affirming the district court's dismissal of this action is proper.

[6] NRS 38.330(1), which provides for mediation upon the agreement of all parties, does not similarly permit parties to the mediation to file a civil action. Parties to mediation, therefore, must pursue arbitration before they are permitted to file a civil action. Parties to binding arbitration may not pursue a de novo civil action because, pursuant to Nevada's Uniform Arbitration Act, they may only confirm, vacate, or modify the arbitration award pursuant to NRS 38.239-.242. This fully comports with the legislative history. *See* Exhibit 2, Minutes of the Senate Committee on Judiciary, 68th Session, June 16, 1995, at 7 (explaining that "the bill is designed to allow the parties mediation, if both parties agree to it. If mediation is not successful, or if a decision cannot be made, or if no mediation is sought, the matter will go to arbitration. The parties can elect to make the arbitration binding, in which case there is no [de novo] court review; or they can decide[] to have nonbind-

A. Statutory Affidavit Requirements are Not Waivable

In *Otak Nevada, LLC v. Eighth Judicial District Court*, this Court held that a construction defect complaint was "***void ab initio***" when the plaintiff filed the complaint without a statutorily required affidavit and expert report. 127 Nev., Adv. Op. 53, 260 P.3d 408, 411 (2011) (emphasis added). The Court reasoned that the "Legislature's use of 'shall' in NRS 11.259 demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently filing the required affidavit and report." *Otak Nevada, LLC*, 127 Nev. Adv. Op. 53, 260 P.3d at 411.

This court relied upon *Fierle v. Perez*, 125 Nev. 728, 219 P.3d 906 (2009) and *Washoe Med. Ctr. v. Dist. Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790 (2006), which previously held that because a medical malpractice "complaint filed under NRS 41A.071 without the required affidavit was

---

ing arbitration, with the option of a rehearing before the court or filing for a trial de novo before the court.").

The 2013 amendments allow an action to be filed after arbitration, mediation, or referral to the Division's program, but it remains clear that an affidavit must accompany *all* complaints, whether following mediation, arbitration, or participation in the Division's program. *See* 2013 Nev. Stat. 2295, 2297, 2299 (AB 370, §§ 1, 6) (adding NRS 38.325 and modifying NRS 38.330(1)).

void ab initio, such complaints may not be amended because they are void and do not legally exist." *Otak Nevada, LLC*, 127 Nev. Adv. Op. 53, 260 P.3d at 411. This Court concluded that because a construction defect complaint filed "without the required affidavit and expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment." 127 Nev. Adv. Op. 53, 260 P.3d at 412.

B. The Affidavit Requirement in NRS 38.330(5) Could Not be Waived

1. The Affidavit Requirement is Independent from the Substantive Exhaustion Requirement

Here, not only did appellants bypass the statutorily mandated administrative remedies, but they served their complaint without the sworn statement that NRS 38.330(5) requires. (1 App. 1.)

Mirroring the affidavit requirement in construction-defect cases, NRS 38.330(5) requires that the complaint contain a sworn statement indicating that the matter had been referred to mandatory mediation along with all the other requirements of NRS 38.300 to 38.380. *See also Liberty Mut. v. Thomasson*, 130 Nev. Adv. Op. 4, 317 P.3d 831, 834 (2014) ("the word 'must' . . . imposes a mandatory requirement"). Ac-

cordingly, even if appellants had pursued non-binding arbitration so as to be *permitted* to file a proper complaint, their failure to attach the affidavit is another violation of NRS 38.300–.360 for which the district court was required to dismiss the action. The complaint was void.

2. Without the Affidavit, the Court had No Valid Complaint Over which to Exercise Jurisdiction

Because appellants' complaint is void ab initio, the district court could not acquire subject-matter jurisdiction over this action. In *Parks v. Garrison*, this Court explained that the district court "acquire[s] ***jurisdiction of the subject–matter*** and of the parties ***upon the filing of the complaint*** and service of summons upon the defendant." 57 Nev. 480, 67 P.2d 314, 314 (1937) (emphasis added). A district court "lacked subject matter jurisdiction" to order a police commander to appear or to issue a contempt order for the commander's failure to appear when "[n]o civil or criminal action was pending." *Cunningham v. Eighth Judicial Dist. Court*, 102 Nev. 551, 560, 729 P.2d 1328, 1334 (1986). The Court reasoned that no civil action had commenced because no complaint had been filed as required by NRCP 2 and 3. *See Cunningham*, 102 Nev. at 556-57, 729 P.2d at 1331-32. Because the district

court judge lacked subject-matter jurisdiction, the district court's orders were "void." *Id.* at 560-61, 729 P.2d at 1334.

Here, too, the complaint is deemed to have never been filed because it "never legal existed." *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) (holding "void ab initio" complaint "never legally existed"); *accord Coyote Creek Mobile Home Cmty. LLC v. McCracken*, Case No. A144006, 2016 WL 3092001, at *7 (Cal. Ct. App. May 24, 2016) (holding void ab initio complaint "had no effect, and it was as if the pleading had never been filed").

Just as in *Cunningham*, without a filed complaint, no civil action was commenced, and the district court therefore again would lack subject-matter jurisdiction.[7] The district court appropriately dismissed appellants' complaint for lack of subject-matter jurisdiction.

---

[7] *See Alabama Dep't of Corrections v. Montgomery Cnty. Comm'n*, 11 So. 3d 189, 192 (Ala. 2008) (holding when "a complaint . . . is void ab initio" then "[a]ny action taken by a court [is] without subject-matter jurisdiction"); *Black Canyon Citizens Coal., Inc. v. Board of Cty. Comm'rs of Montrose Cty.*, 80 P.3d 932, 935 (Colo. App. 2003) (holding where the "complaint was void ab initio, jurisdiction over the dispute was never conferred on the court"); *Jordan v. Metro-N. Commuter R.R. Co.*, Case No. 3:13-CV-749 (JBA), 2015 WL 5684027, at *4 (D. Conn. Sept. 28, 2015) (holding "[c]ourt lacks subject matter jurisdiction over" "void ab initio" complaint); *In re Summit Metals, Inc.*, 477 B.R. 484, 503 (Bankr. D. Del. 2012) (holding "[c]omplaint is void ab initio . . . and will be dis-

IV.

JUDICIAL ESTOPPEL CANNOT CONFER JURISDICTION

Because the district court lacks subject-matter jurisdiction, judicial estoppel is inapplicable. In *Friedman v. Eighth Judicial District Court*, this Court held that a "court that lacks subject matter jurisdiction . . . does not acquire it by [judicial] estoppel." 127 Nev. 842, 852, 264 P.3d 1161, 1168 (2011). The Court reasoned: "It matters not that the defendant specifically and voluntarily elected the tribunal" because it "is a well-established principle that 'no action of the parties can confer subject-matter jurisdiction upon a court' where the court has no authority to act." *Id.*; s*ee also Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014) (holding that "judicial estoppel cannot be used to create subject matter jurisdiction"); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1228 (10th Cir. 2011) (refusing to "allow judicial estoppel to substitute for subject-matter jurisdiction").

---

missed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1)"); *Savo v. Mastrianno*, Case No. CV146047572S, 2014 WL 6843593, at *4 (Conn. Super. Ct. Oct. 28, 2014) (holding "complaint . . . was void ab initio, and therefore the court lacks subject matter jurisdiction").

As judicial estoppel may not be used to confer subject-matter jurisdiction, and the district court was without subject-matter jurisdiction, the district court properly refused to apply the doctrine of judicial estoppel and properly dismissed appellants' complaint for lack of subject-matter jurisdiction.

CONCLUSION

The question of whether the district court ever had jurisdiction over appellants' complaint is an important one that merits rehearing. The exhaustion and affidavit requirements in NRS 38.300–.360 are jurisdictional, and the Legislature directed courts to dismiss any action that violates those requirements. Appellants concededly ignored those requirements, leaving the district court without jurisdiction. The district court properly recognized this and dismissed the complaint. This Court should grant rehearing and affirm.

Dated this 17th day of April, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

H. STAN JOHNSON (SBN 265)
COHEN-JOHNSON, LLC
255 East Warm Springs Road
Suite 100
Las Vegas, Nevada 89119
(702) 823-3500

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 4,660 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 17th day of April, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that on April 17, 2018, I submitted the foregoing PETITION FOR REHEARING for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

G. David Robertson
Jarrad C. Miller
Jonathan J. Tew
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501

Robert L. Eisenberg
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519

/s/ Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP