IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUDI LEE LYTLE; AND JOHN ALLEN LYTLE, AS TRUSTEES OF THE LYTLE TRUST,

Appellant ,

v.

MARJORIE B. BOULDEN, TRUSTEE OF THE MARJORIE B. BOULDEN TRUST; LINDA LAMOTHE; AND JACQUES LAMOTHE, TRUSTEES OF THE JACQUES & LINDA LAMOTHE LIVING TRUST,

Respondents .

Supreme Court No.: 73039
District Court Case No.: A-16-747800-C

APPELLANTS' OPENING BRIEF

Appeal

From the Eighth Judicial District Court, Clark County
Honorable Timothy Williams, Judge

Appellants' Opening Brief

(Docket 73039)

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Jurisdictional Statement

The Supreme Court has jurisdiction via NRAP 3A(b)(3). On April 26, 2017, the district court granted Marjorie B. Boulden, Trustee of the Marjorie B. Boulden Trust, Linda Lamothe and Jacques Lamothe, Trustees of the Jacques & Linda Lamothe Living Trust's (collectively, "Respondents") Motion for Partial Summary Judgment to quiet title to property and for cloud on title, and in doing so granted a permanent injunction prohibiting Trudi Lee Lytle, John Allen Lytle, as Trustees of the Lytle Trust ("Appellants"), from enforcing a judgement obtained in civil litigation against Respondents' real properties.

Routing Statement

Pursuant to NRAP 17(b)(7), the case is presumptively assigned to the Court of Appeals because it is an appeal from an order granting injunctive relief. However, Appellants contend the case should be heard by the Supreme Court due to its familiarity with the issues and matters at hand. The Supreme Court has considered and determined appeals related to Appellants and Rosemere Estate Property Owners' Association, which issues are unique and involved herein. See Dockets 60657, 61308, 65721, 63942, 65294.

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Issue Presented

1. Whether the district court erred in granting a permanent injunction after finding that Appellants clouded title to Respondents' properties when Appellants recorded abstracts of judgment awarded to Appellants in a separate civil action against Respondents' homeowners' association, Rosemere Estates Property Owners' Association (the "Association")?

Statement of the Case

Appellants appeal the district court's Amended Findings of Fact and Conclusions of Law whereby the district court issued a permanent injunction prohibiting Appellants from recording an abstract of judgment or other judgment lien against Respondents' real property. Order Granting Motion to Alter or Amend Findings of Fact and Conclusions of Law ("Amended Order"), Appellants' Index ("AA") 000550 - 000556.

A. Statement of Facts

1. The Association

On January 4, 1994, Baughman & Turner Pension Trust (the "Developer"), as the subdivider of a cul-de-sac to be made up of nine (9) residential lots on a street known as Rosemere Court in Las Vegas, Nevada, recorded with the Clark County Recorder's Office a Declaration of Covenants, Conditions, and Restrictions ("Original CC&Rs"). Request for Judicial Notice in Support of Opposition to

Motion for Summary Judgment ("RJN for Opp."), Original CC&Rs, AA000155 – 000156, 000159, *see also* RJN for Opp, Order Granting Motion for Summary Judgment, AA000167. Appellants purchased their property, Lot 163-03-313-009 ("Appellants' Property") on November 6, 1996, from the original buyer who first purchased it from the Developer on August 25, 1995. *Id.*, AA000167.

Respondents each own property within the Association. Complaint, AA000001 - 000002. In or about August 2017, Respondents Robert Z. Disman, an individual, and Yvonne A. Disman (collectively the "Dismans") purchased the real property formerly belonging to Respondent Boulden. The Dismans are the current owners and were added to this Appeal by this Court on December 5, 2017.

The Original CC&Rs, in the first paragraph, defines Rosemere Estates as "Lots 1 through 9 of Rosemere Court, a subdivision…" RJN for Opp., Original CC&Rs, AA000159. The document adds that "it is the desire and intention of the Subdivider to sell the land described above and to impose on it mutual, beneficial, covenants, conditions and restrictions under a general plan or scheme of improvement for the benefit of all of the land described above and the future owners of the lots comprising said land." *Id.* Thus, the Association includes each lot, or unit, therein.

Sometime after Appellants purchased their property, a group of homeowners formed the Association. RJN for Opp., Articles of Organization, AA000155 – 000156, 000164. In 1997, Respondents, acting on behalf of all owners, filed Non-

Profit Articles of Incorporation (the "Articles") pursuant to Nevada Revised Statutes ("NRS") 82, which formalized the property owners' committee and named it "Rosemere Estates Property Owners Association."[1] *Id.* It was the intention of the homeowners to formalize the "owners committee" referenced in the Original CC&Rs. RJN for Opp, Order Granting Motion for Summary Judgment, Finding of Fact ("FOF") Nos. 14, 15, AA000155 – 000156, AA000168.

2. The Underlying Litigation

In 2007, Appellants filed a NRS 38.310 mandated non-binding arbitration before the Nevada Real Estate Division ("NRED"), naming the Association as respondent. The underlying dispute arose out of the Amended Covenants, Conditions, and Restrictions (the "Amended CC&Rs") which were recorded by the Association's Board of Directors on July 3, 2007, and enforced by the Association against Appellants, and Appellants' Property. Appellants sought to un-cloud title to their property through the revocation of the Amended CC&Rs.

After the arbitrator found in favor of the Association, Appellants filed for a trial de novo in district court, case number A-09-593497-C (the "Underlying Litigation"), which was assigned to Judge Michelle Leavitt in Department XII of the Eighth Judicial District Court. After the matter was initially dismissed by the

[1] Throughout the district court litigation, Respondents disingenuously refer to the Association as the "Rosemere LPA" or "Rosemere Limited Purpose Association." There is no such entity. The Association is a Chapter 82 corporation, formed pursuant to the laws of the State of Nevada, to formalize the "owners' committee" referenced in the Original CC&Rs and named "Rosemere Estates Property Owners' Association." RJN for Opp, Order Granting Motion for Summary Judgment, FOF Nos. 14, 15, AA000155 – 000156, AA000168.

district court, Appellants appealed to the Supreme Court, prevailed, and the matter was then remanded back to the district court.

Appellants ultimately prevailed, entirely, in the Underlying Litigation, and the district court granted Appellants summary judgment on July 29, 2013. RJN for Opp., Order Granting Summary Judgment, AA000166 - 000177. In doing so, the district court found the Amended CC&Rs were improperly adopted and unlawfully recorded. *Id.* at AA000176. The district court ordered that the Amended CC&Rs were *void ab initio*. *Id.* Finally, the district court ordered the Association to release the recording of the Amended CC&Rs, which revocation was ultimately accomplished. *Id.*

The matter was once again appealed, and the Nevada Supreme Court affirmed the district court's Order Granting Appellants' summary judgment. RJN for Opp., Supreme Court Order, AA000155 -000156, 000179 - 000183. The Supreme Court remanded the case to the district court for redetermination of costs, attorneys' fees and damages on October 19, 2015. *Id.*

On May 25, 2016, after hearing Appellants' motion for attorneys' fees, the Court awarded Appellants $297,072.66 in attorneys' fees pursuant to the Original CC&Rs, Amended CC&Rs and NRS 116.4117. RJN for Opp., Order Awarding Attorneys' Fees, AA000155 – 000156, 000186 - 000189.

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On June 17, 2016, after a prove-up hearing, the district court awarded Appellants damages in the amount of $63,566.93. Order Awarding Damages, RJN for Opp., Order Awarding Damages, AA000155 – 000156, 000189 – 000192. These damages included amounts expended by Appellants in the design, engineering, and other costs associated with the construction of their home for Rosemere Estates, all of which were now stale and useless. *Id.*

Finally, on February 13, 2014, the district court awarded Appellants $1,962.80 in costs. Then, after remand from the Supreme Court, the district Court awarded Appellants' additional costs in the amount of $599.00 on July 22, 2016. RJN for Opp, Order Awarding Costs, AA000155 – 000156, 000193 – 000194.

On September 2, 2016, Appellants recorded abstracts of judgment against each property within the Association pursuant to the authorities set forth herein. RJN for Opp, Abstracts of Judgment, AA000155 – 000156, 000195 - 000220.

3. The Financial Burden Of The Litigation Against The Appellants

While Respondents constantly characterized themselves as victims in this case, quite the opposite is true. Allen Lytle, now retired from Southwest Gas, and Trudi Lytle, a retired school teacher, were forced to bear a tremendous financial and emotional burden in fighting the Association for over seven (7) years. The fight was necessitated by the Association's unwillingness to revoke the illegally recorded Amended CC&Rs as well as the Association's unconscionable threats

and actions to foreclose against Appellant's property when Appellants dared not to pay a special assessment to fund litigation against them.

Appellants' legal fight was necessary because, as the district court found in the Underlying Litigation

- the Amended CC&Rs created unreasonable restrictions on construction that made it impossible for Appellants to build their home. RJN for Opp., Order Granting Summary Judgment, Findings of Fact ("FOF") Nos. 28-30, AA 000155 – 000156, 000170.
- the Board for the Association took unlawful steps to amend the CC&Rs, which included the failure to obtain unanimous consent of the homeowners. RJN for Opp., Order Granting Summary Judgment, Conclusions of Law, Nos. 22, 23, AA 000155 – 000156, 000169.
- the promotion and purported adoption of the Amended CC&Rs was procedurally unconscionable in as much as the Board forced the Amended CC&Rs to a vote with no advanced notice or discussion. RJN for Opp., Order Granting Summary Judgment, FOF, Nos. 23, 24, 32, 33, AA 000155 – 000156, 000169.

Meanwhile, Respondents contributed heartily to the legal fund against Appellants (by way of payment of special assessments). Respondents also each testified on the Association's behalf. Declaration of Richard E. Haskin ("Haskin Decl."), AA000147 - 000154.

Interestingly, Respondents both refused, initially, to approve the Amended CC&Rs, declining to sign in favor on the day of the adoption meeting. Lamothe sought legal counsel with Appellants to file suit against the Association but ultimately refused to join the fight for fear of retribution. Years later, during deposition, Respondents, now testifying on the Association's behalf, recanted their objection to the Amended CC&Rs and testified that they approved of the Amended CC&Rs after further thought. Haskin Decl., ¶ 3, Lamothe Deposition Transcript, AA000147 – 000154.

Appellants seek to recover the funds they lost because of the Association's actions, which amounts were awarded to Appellants by the district court in the Underlying Litigation.[2]

B. Procedural History

Respondents filed this lawsuit on December 8, 2016, seeking to quiet title to their respective properties and setting forth claims for quiet title, cloud on title, and slander of title. Complaint, AA000001 – 000009, see also First Amended Complaint, AA000122 - 000132.

On April 26, 2017, after a hearing, the district court granted Respondents' Motion for Partial Summary Judgment on all claims. *See* Findings of Fact and Conclusions of Law and Order Granting Motion for Partial Summary Judgment ("Order"), AA000275 - 000282. Therein, the district court granted a permanent

[2] The Association did not appeal the district court's orders regarding damages, attorneys' fees or costs.

injunction against Appellants. *Id.* The district court also entered an order granting summary judgment as to Respondents' slander of title claim. *Id.*

On May 16, 2017, the Trust filed a Motion for Reconsideration as to the slander of title claim, arguing that the district court made no findings with respect to malice, oppression, or fraud, and, therefore, a finding of slander of title was unwarranted. Motion for Reconsideration, AA000380 – 000418. That Motion for Reconsideration was heard on June 29, 2017, and was granted, and the district court entered Amended Findings of Fact and Conclusions of Law ("Amended Findings"), withdrawing any findings related to Respondents' slander of title claim. Amended Order, AA000550 - 000556.

Summary of Argument

The district court erred in granting Respondents a permanent injunction when the district court erroneously concluded that because the Association was declared a *limited purpose association* in the Underlying Litigation, NRS 116.3117 did not apply and afford Appellants the right to place a judgment lien against Respondents' real property located within the Association. The district court errored in several respects. First, at all times during the Underlying Litigation, from which the monetary judgment was awarded, the Association operated a unit owners' association that enjoyed all of the rights and benefits of NRS Chapter 116 and also undertook the Chapter's burdens and obligations. Indeed, the district court in the Underlying Litigation, citing *Mackintosh v. California Federal Sav. &*

Loan Ass'n (1997) 113 Nev. 393, 405-406, 935 P.2d 1154, 1162, made such a finding in awarding Appellants attorneys' fees incurred therein pursuant to NRS 116.4117 and the Amended CC&Rs, even though the district court had declared such Amended CC&Rs *void ab initio*.

Further, the statutory construction of NRS Chapter 116 and principles of common-interest community law provide a judgment creditor with the right to record a lien against all units within the Association because such units, whether they be owned or unowned, are defined as a physical portion of the common-interest community. Thus, the Association includes all units therein. NRS 116.021, NRS 116.093.

Argument

I. THE DISTRICT ERRED IN GRANTING THE PERMANENT INJUNCTION

A. The Court Should Apply A De Novo Standard Of Review To The District Court's Granting A Permanent Injunction

A district court's granting of an injunction is generally reviewed under an abuse of discretion standard, or if the decision was based on an erroneous legal standard. *Univ. and Comm. College System of Nevada v. Nevadans for Sound Govt.*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004), *see also Attorney General v. NOS Communications*, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004); *S.O.C., Inc. v. The Mirage Casino–Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001); *Dangberg*

Holdings v. Douglas Co., 115 Nev. 129, 142–43, 978 P.2d 311, 319 (1999). While factual determinations will be set aside when clearly erroneous or not supported by substantial evidence, questions of law are reviewed de novo. *Univ. and Comm. College Systems of Nevada*, 120 Nev. at 721, 100 P.3d at 187.

In the present case, this Court should review the district court's order de novo. Questions of statutory construction are reviewed de novo. *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013), *see also Univ. and Comm. College Systems of Nevada*, 120 Nev. at 721, 100 P.3d at 187; (holding that questions of law are reviewed de novo, even in the context of an appeal from a preliminary injunction.) In *Univ. and Comm. College Systems of Nevada*, the appellants argued the district court committed legal errors in issuing a preliminary injunction through, what appellants contended was, an erroneous interpretation of NRS 293.127565. *Id.* The Supreme Court reviewed the district court's decision de novo, giving a thorough and impressive academic review of the statute in affirming part of the district court's holding and reversing another portion. *Id.* 120 Nev. at 736, 296 P.3d at 196.

In *Boulder Oaks Comm. Ass'n. v. B&J Andrews Enterprises, LLC*, 125 Nev. 397, 215 P.3d 27 (2009), the Supreme Court reviewed a district court's granting of a preliminary injunction on a de novo standard where the district court considered the application of NRS, Chapter 116, to an association's determination that a homeowners' consent was not required to amend CC&Rs. *Id.*, 125 Nev. at 403-04,

215 P.3d at 31.

In the present case, the district court determined certain provisions of the Common-Interest Ownership Act (NRS, Chapter 116) did not apply and provide rights and remedies to Appellants. Amended Order, FOF No. 9, Conclusions of Law ("COL") No. 2, AA000550 - 000556. In order to reach this conclusion, the district court first concluded that the Association was a limited purpose association pursuant to NRS 116.1201 and, therefore, certain provisions of Chapter 116 did not apply. *Id.*, FOF Nos. 8, 9, COL No. 2, AA000552, 000553. Appellants contend, however, for the reasons set forth herein, that specific provisions of Chapter 116 apply and provide the basis for Appellants' right to record abstracts of judgment against Respondents' properties. Therefore, this Court should review the district court's determination de novo.

B. The District Court Erred In Finding Respondents Were Likely To Prevail On The Merits

"NRS 33.010(1) authorizes an injunction when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act. Before a preliminary injunction will issue, the applicant must show '(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.' In considering preliminary injunctions, courts also weigh the potential

hardships to the relative parties and others, and the public interest." *Univ. and Comm. College Systems of Nevada*, 120 Nev. at 721, 100 P.3d at 187, *see also S.O.C.*, 117 Nev. at 407, 23 P.3d at 246 (2001); *Dangberg Holdings*, 115 Nev. at 142–43, 978 P.2d at 319.

In the present case, the issue before the district court, and indeed this Supreme Court, is the Plaintiffs'/Respondents' likelihood of success on the merits. Respondents, ultimately, cannot make such a showing because NRS 116.3117, and other provisions of the Common-Interest Ownership Act authorize Appellants to lien Respondents' properties, as set forth below.

1. The District Court Erred In Finding That NS 116.3117 Does Not Apply To The Association Because The Association Is A Limited Purpose Association

The district court found that: (1) "The Association is a 'limited purpose association' as referenced in NRS 116.1201(2); and (2) "As a limited purposes association, NRS 116.3117 is not applicable to the Association." Amended Order, FOF No. 9, COL No. 2, AA000552, 000553. The second of these conclusions is erroneous.

Appellants are within their rights, as judgment creditors of the Association, to record a lien against each unit within the Association because (1) NRS 116.3117 provides this specific right to judgment creditors of a unit owners' association, (2) Appellants may invoke all of the rights set forth in the entirety of Chapter 116

because the Association invoked such rights during the underlying litigation (and prior thereto), and (3) Chapter 116's statutory mechanism provides such rights to Appellants.

a. NRS 116.3117 Permits A Judgment Creditor To Record A Lien Against All Units Within An Association

When a statute is facially clear, the Court should give effect the statute's plain meaning. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court (First Light I)*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "[W]hen a term is defined in NRS Chapter 116, the statutory definition controls and any definition that conflicts will not be enforced." *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 406, 215 P.3d 27, 32 (2009). Further, NRS 116.003 states that "the words and terms defined in NRS 116.005 to 116.095, inclusive, have the meanings ascribed to them in those sections." *Id.*

NRS 116.3117 provides, in pertinent part:

> 1. In a condominium or planned community:
>
> (a) Except as otherwise provided in paragraph (b), **a judgment for money against the association**, if a copy of the docket or an abstract or copy of the judgment is recorded, is not a lien on the common elements, but **is a lien in favor of the judgment**

> **lienholder against all of the other real property of the association and all of the units in the common-interest community at the time the judgment was entered**. No other property of a unit's owner is subject to the claims of creditors of the association.

[Emphasis added.] Quite succinctly, Nevada's Common-Interest Ownership Act, set forth in Chapter 116, provides a judgment creditor has a lien "against all of the units in the common-interest community at the time the judgment was entered." NRS 116.3117(1)(a).

Moreover, to the extent there can be any doubt as to the operation of NRS 116.3117, the comments to Section 3-117 of the Uniform Common Interest Ownership Act (1982) — the uniform act upon which NRS Chapter 116 is based – – reinforce that which is already clear from the plain language of the statute: "the Act makes the judgment lien a direct lien against each individual unit . . ." *See* UCIOA § 3-117, cmt. 2, *see also, e.g., Ensberg v. Nelson*, 320 P.3d 97, 102 (Wash. Ct. App. 2013) ("[B]y statute, a condominium association is a lien in favor of the judgment lienholder against all of the units in the condominium."); *Summit House Condominium v. Com.*, 523 A.2d 333, 336 (Pa. 1987) ("[A] judgment against the Council would have constituted a lien against each individual condominium unit owner."); *Interlaken Service Corp. v. Interlaken Condominium Ass'n, Inc.*, 588 N.W.2d 262, 266 (Wisc. 1998) ("[A]ny money judgment obtained by [the plaintiff

as against the association] would result in a lien against each of the condominium units.").

The purpose of the statute, however, is not to provide a remedy to creditors. Rather, it protects unit owners within an association and limits the extent to which a creditor can collect on a judgment against an association as to each unit owner. NRS 116.3117 provides that a creditor must first collect against any security interest the creditor may have in common elements before pursuing units. NRS 116.3117(1)(b).

2. In The Present Case, The Association Is Afforded All Rights And Remedies Of NRS, Chapter 116 Because Prior To Final Determination In The Underlying Litigation, The Association Enjoyed Such Benefits To The Detriment Of Appellants

With due respect to the district court, its most egregious and fundamental error was in declaring that because the Association is a *limited purpose association*, Appellants are not entitled to the protections, rights and remedies set forth in Chapter 116, including NRS 116.3117 (cited above). Amended Order, FOF No. 9, COL No. 2, AA000552, 000553. For a myriad of reasons set forth herein, NRS 116.3117 applies in this case and affords Appellants the right to lien Respondents properties.

a. The Different Types Of *Common Interest Communities*

The term "homeowners' association" is often misused and, indeed, in the State of Nevada has no true statutory definition. Rather, a "homeowners' association" is more of an informal, catch-all term for all types of common interest communities.

Chapter 116 applies to all types of governing bodies of residential common interest communities created in Nevada. NRS 116.1201. A "common-interest community" is defined as "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration." NRS 116.021. The types of common interest communities include: (1) unit owners' association, (2) limited purpose associations (NRS 116.1201(2)(a)), (3) small planned communities (NRS 116.1203), (4) nonresidential planned communities (NRS 116.1201(2)(b)), (5) time shares (NRS 116.1201(2)(e)), and condominiums (NRS 116.027).

Chapter 116 applies to "all common interest communities" created within Nevada, with defined limitations for limited purpose associations, small planned communities, and nonresidential planned communities. NRS 116.1201.

b. As The District Court Found In The Underlying Litigation, From July 3, 2007 Through July 29, 2013, The Association Was A Unit Owners' Association, For Which The Entirety Of NRS, Chapter 116 Applied

While the district court in the Underlying Litigation held that the Association was a limited purpose association (RJN for Opp., Order Granting Summary Judgment, AA000155 – 000156, AA000172 - 000173), the district court in that case found that the Amended CC&Rs were recorded on July 3, 2007, in the office of the Recorder for Clark County, Nevada (*Id.* at FOF 35, AA000171) and from July 3, 2007, through July 29, 2013, when the district court granted Appellants' summary judgment in that case, the Association was a full-blown unit owners' association, subject to and taking advantages of all rights, privileges and remedies afforded by the entirety of Chapter 116, including the right to assess and initiate Chapter 116 foreclosure proceedings for failure to pay assessments, which is exactly what the Association did to Appellants. *See generally* RJN for Opp., Order Granting Summary Judgment, AA000155 – 000156, AA000167 - 000177.[3] The Amended CC&Rs adopt Chapter 116 of the Nevada Revised Statutes. RJN for Opp., Amended CC&Rs, at Article I, AA000155 – 000156, AA000226. The

[3] The Association, in adopting the Amended CC&Rs, stated that one of the basis for such adoption was to "conform to NRS Chapter 116." Order Granting Summary Judgment, AA _____.

Amended CC&Rs define the Association pursuant to the Uniform Common-Interest Ownership Act. *Id.* at 1.1, AA000226. The Amended CC&Rs routinely reference Chapter 116 of the Nevada Revised Statutes. *See*, *e.g.*, *id.* at 1.13, 1.14, 1.30, 8.1, 10.3 (referring to the lien statutes codified in Chapter 116), AA000226 – 000230, 000241, 000242.

In granting Appellants' Motion for Attorneys' Fees, the district court in the Underlying Litigation cited *Mackintosh,* 113 Nev. at 405-406, 935 P.2d at 1162, and held that Appellants could recover attorneys' fees under the Amended CC&Rs because that document, while declared *void ab initio* by the district court, was in effect and enforced by the Association against the Appellants at all times during the underlying litigation. *See generally*, RJN for Opp., Order Granting Attorneys' Fees, AA000155 – 000156, 000186 - 000189.

In *Mackintosh*, *supra*, the purchasers of real property sued a savings and loan association for rescission of a residential property purchase agreement. *Mackintosh*, 113 Nev. at 396-397, 935 P.2d at 1157. The Supreme Court upheld a district court's granting of summary judgment and determination that the purchasers had rescinded the purchase agreement. *Id.* 113 Nev. at 405-406, 935 P.2d at 1162. However, the Supreme Court held the district court improperly denied the purchasers' request for attorneys' fees, which request was based on the attorney fee provision in the rescinded agreement. *Id.* The district court, in denying attorneys' fees stated that the rescinded agreement was "void from its date

of inception, just as if the contract had never existed." *Id.* The Supreme Court disagreed and cited a Florida Supreme Court case, *Katz v. Van Der Noord*, 546 So.2d 1047 (Fla. 1989), which held:

> We hold that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract.

Id. at 1049.

Similarly, in the present case, the "legal fictions" that accompany the district court's determination in the Underlying Litigation that the Amended CC&Rs were *void ab initio* cannot change the fact that they did, indeed, exist from July 3, 2007, through July 29, 2013, and were enforced against Appellants.

The foregoing is akin to the evidentiary "sword and shield" doctrine. Therein, it is held that a party may not use a privilege as both a sword to assert a claim and a shield to protect the content related to the claim. *Molina v. State* 120 Nev. 185, 194, 87 P.3d 533, 539 (2004). A party attempting to enforce a contract

against another cannot argue that a court's determination that it was void shields the party from the provisions that would be detrimental, *e.g.* an attorneys' fee provision. Or, in the present case, members of the Association should not be permitted to shield themselves from certain provisions of Chapter 116, namely NRS 116.3117, once the district court declared the Amended CC&Rs void after years of those same Amended CC&Rs being recorded and enforced against Appellants. In fact, the Amended CC&Rs' restrictions were so severe that they prevented Appellants from building their dream home in the Rosemere Estates community and thrust Appellants into years of litigation that exhausted Appellants' retirement savings and created emotional turmoil. RJN for Opp., Order Granting Summary Judgment, FOF Nos. 25 – 31, AA000155 – 000156, AA000170 - 000171. Indeed, Appellants, as the only undeveloped lot, were the only targets of the Amended CC&Rs and the prohibitive building restrictions. *Id.*

There are other instances during which the Association took clear advantage of the entirety of Chapter 116 during this operative time period despite a subsequent finding that the Association is a limited purpose association and the Amended CC&Rs are void. For example, the Association filed countersuits against Respondents, something a limited purpose association is not permitted to do. NAC 116.090(1)(c)(1), (prohibiting a limited purpose association from enforcing restrictions against unit owners). The Association moved to dismiss and had the Complaint dismissed in the Underlying Litigation, purportedly as a result

of a failure to timely file under Chapter 38, which does not apply to limited purpose associations.

Appellants obtained a judgment against the Association due to the Association's action taken in order to both defend and impose its position as a unit owners' association. During the entire pendency of the Underlying Litigation (and indeed well before), the Association operated pursuant to the statutory luxuries afforded to it as a litigant by NRS Chapter 116. And had the Association, and not Appellants, prevailed in the Underlying Litigation, the Association would enjoy all of the benefits as a judgment creditor against Appellants, including the right to lien Appellants' property and foreclose thereon. The district court's ruling in the instant case provides the Association with forgiveness to utilize NRS Chapter 116 and the Amended CC&Rs as swords to impose the Association's will during the Underlying Litigation and prior thereto, but as shields from liability and collection once the Association's position was declared invalid. The public policy underlying *Mackintosh* and its progeny is that such two-faced positions cannot stand the test of equities.

c. NRS 116.3117 Applies To Limited Purpose Associations

As set forth in Chapter 116 and explained above, the Association is a common interest community consisting of nine (9) units, as that term is defined by Chapter 116, and organized as a limited purpose association. RJN for Opp., Order

Granting Summary Judgment, FOF No. 6, COL Nos. 7 – 19, AA000155 – 000156, AAA000167 - 000174, *see also* NRS 116.021, NRS 116.093. NRS 116.1201(2)(a)(4) provides, in pertinent part, that Chapter 16 does not apply to a limited purpose association, "except that a limited purpose association shall comply…with the provisions of NRS 116.4101 to 116.412." Included within the scope of these provisions is NRS 116.4117, which addresses civil actions for damages for failure or refusal to comply with provisions of Chapter 116 or an association's governing documents. NRS 116.4117(2) provides:

> Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:
>
> (a) By the association against:
>
> (1) A declarant;
>
> (2) A community manager; or
>
> (3) A unit's owner.
>
> (b) By a unit's owner against:
>
> (1) The association;
>
> (2) A declarant; or

(3) Another unit's owner of the association.

(c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

Thus, an owner in a limited purpose association may pursue a civil action against an association as set forth in NRS 116.4117, as Appellants did in the Underlying Litigation.

Following the linear statutory reference, then, from NRS 116.4117, NRS 116.3111(3) provides, among other things, that "[l]iens resulting from judgments against the association are governed by NRS 116.3117." NRS 116.3117 then provides:

> a judgment for money against the association, if a copy of the docket or an abstract or copy of the judgment is recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the other real property of the association and all of the units in the common-interest community at the time the judgment was entered. No other property of a unit's owner is subject to the claims of creditors of the association.

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As a judgment creditor and lienholder in a proper civil action brought under NRS 116.4117, Appellants have a lien on all units in the Association, a common interest community. Pursuant to this right as set forth in NRS, Chapter 116, Sections 4117(2), 3111 and 3117, Appellants recorded the abstracts of judgment.

3. General Common-Interest Community Principles Define The Association As Including Each Unit Therein, And Appellants May Record An Abstract Against Each Unit

NRS 17.150(2) provides, in pertinent part:

> A transcript of the original docket or an abstract or copy of any judgment or decree of a district court of the State of Nevada or the District Court or other court of the United States in and for the District of Nevada, the enforcement of which has not been stayed on appeal, certified by the clerk of the court where the judgment or decree was rendered, may be recorded in the office of the county recorder in any county, **and when so recorded it becomes a lien upon all the real property of the judgment debtor not exempt from execution in that county**, owned by the judgment debtor at the time, or which the judgment debtor may afterward acquire, until the lien expires.

[Emphasis added.]

In recording the abstracts of judgment against the units within the Association, the abstracts became a lien upon all the real property of the Association, as the judgment debtor. Each unit, owned or unowned, within the Association is property of the Association, as set forth in Chapter 116. NRS 116.3117 mirrors the foregoing by encapsulating the lien framework within a single statute.

NRS 116.021 defines a "common interest community" as all "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration." NRS 116.093 defines a "unit" as the "physical portion of the common-interest community designated for separate ownership or occupancy..." Thus, an association, or common interest community, includes each unit in the community, including those owned by third parties.

This Nevada Supreme Court concluded as much in granting standing to homeowners' associations to file claims on behalf of unit owners in construction defect cases. In *D.R. Horton, Inc. v. Eighth Judicial Dist. Court,* 125 Nev. 449, 215 P.3d 697 (2009), the Supreme Court held that "provisions of NRS Chapter 116, among other sources, demonstrate that a common-interest community includes individual units..." *Id.*, 125 Nev. at 451, 215 P.3d at 699. Thus, the

Supreme Court concluded that a homeowners' association has standing to file representative actions on behalf of its members for construction defects of units.

NRS 116.3117, clarifies that a judgment may be recorded against each unit. This is not a special rule of any sort in favor of creditors, rather it adds statutory clarity that a judgment against the common-interest community can be recorded against all property within that community, including units defined as being included in the community. These definitions are echoed in the Uniform Common Interest Ownership Act, under Section 1-203(9) and 1-203(35).

a. The Original CC&Rs Defines The Association As Including Each Lot Therein

Pursuant to the Original CC&Rs, a lien or judgment against the Association established under the Original CC&Rs attaches to each lot within the Association. As a result, the individual property of the owners within the Association, defined as Lots 1 through 9, is subject to lien.

The Original CC&Rs provide as follows:

> WHEREAS, it is the desire and intention of Subdivider to sell the land described above and to impose on it mutual, beneficial covenants, conditions and restrictions under a general plan or scheme of improvement for the benefit of all the land described above and the future owners of the lots comprising said land.

RJN for Opp., Original CC&Rs, ¶2, AA000155 – 000156, 000159. (referring to the "Lots 1 through 9 of Rosemere Court" in the definition above, thereby including Respondents lots, which Respondents do not dispute).

> A breach or violation of these CC&R's or any re-entry by reason of such breach **or any liens established hereunder** shall not defeat or render invalid or modify in any way the lien of any mortgage or deed of trust made in good faith and for value **as to said lots or PROPERTY or any part thereof**; that these CC&R's shall be binding and effective against any owner of said PROPERTY whose title thereof is acquired by foreclosure, trustee's sale or otherwise.

Id. at ¶4, AA000160 (emphasis added).

The Original CC&Rs were recorded against each of the nine (9) lots within the Association, and each owner, or prospective owner, including Respondents, purchased property with record and actual notice of the foregoing rights and remedies.[4] RJN for Opp., Order Granting Summary Judgment, FOF No. 1, AA000155 - 000156, 000167.

[4] While CC&Rs are a restrictive covenant, the CC&Rs are interpreted like a contract. *See, e.g., Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.2d 664, 665-66 (2004) (stating that the CC&Rs are a restrictive covenant, which is interpreted like a contract); *see also Lee v. Savalli Estates Homeowners Ass'n*, 2014 WL 4639148 (Nev. Sept. 16, 2014) (affirming *Diaz* that the rules of construction governing contracts apply to the CC&Rs). "A court should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 597 P.2d 174, 176 (1978).

The second provision cited above specifically attaches liens established under the Original CC&Rs "to said lots or Property." The attorneys' fee award, in relevant part, specifically finds Appellants' lien or judgment is established under the Original CC&Rs. RJN for Opp., Order Granting Attorneys' Fees, at 2:1-15, AA000155 – 000156, AA000187. If liens under the Original CC&Rs could not attach to the lots, there would be absolutely no need to include this provision, *i.e.* there would be no need for the Original CC&Rs to state that such a lien could not extinguish the first deed of trust or any other mortgage. Again, the Association has no property to even secure any loan as the only property that exists is Lots 1 through 9, which includes Respondents' properties. Nowhere in the Original CC&Rs is there any inclusion of property owned by the Association or subject to the Original CC&Rs other than "Lots 1 through 9." The district court's finding that a lien against the Association does not attach to Respondents properties, which is included within "Lots 1 through 9," renders these provisions meaningless. *Phillips*, 94 Nev. at 282, 597 P.2d at 176.

Nothing under this provision distinguishes Appellants' liens or judgment pursuant to the attorneys' fees provision from any other provision or lien or judgment in the Original CC&Rs. The Original CC&Rs simply state "any liens established hereunder." RJN for Opp., Original CC&Rs, AA000155 – 000156, 000159. This necessarily includes Appellants' liens.

II. CONCLUSION

For the reasons set forth above, Appellants Trudi Lee Lytle and John Allen Lytle, as Trustees of the Lytle Trust, request this Court reverse the district court's order granting a permanent injunction and remand that case back to the district court.

DATED this 24th day of January, 2018.

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Certificate of Compliance

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This brief has been prepared in a proportionally spaced typeface using **Microsoft Word 2010 Times New Roman 14—point font**.

2. I further certify that this Brief complies with the page or type—volume limitations of NRAP 32(a)(7). Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

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3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of January 2018.

Richard E. Haskin
Counsel for Appellants

Certificate of Service

1. Electronic Service:

I hereby certify that on this date, the 24th day of January 2018, I submitted the foregoing **Appellant's Opening Brief (Docket 73039)** for filing and service through the Court's eFlex electronic filing service. According to the system, electronic notification will automatically be sent to the following:

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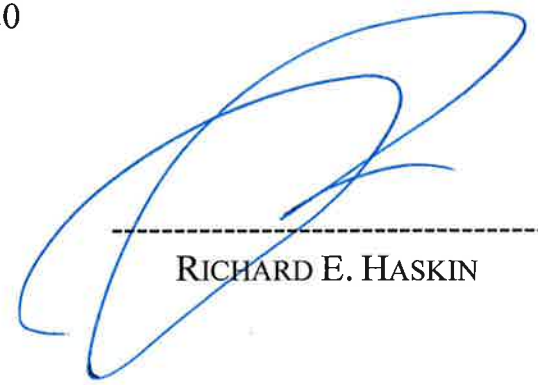

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