IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 73039

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

Appellant,

vs.

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

Respondents.

District Court Case No. A-16-747800-C

Respondents' Answering Brief

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, certifies that the following are persons and entities 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.

Marjorie B. Boulden, Trustee of the Marjorie B. Boulden Trust, and Linda Lamothe and Jacques Lamothe, Trustees of the Jacques & Linda Lamothe Living Trust, are individuals and Trusts that are not affiliated with any corporations.

Daniel T. Foley, Esq. of the firm of Foley & Oakes, PC has appeared on behalf of Marjorie B. Boulden, Trustee of the Marjorie B. Boulden Trust, and Linda Lamothe and Jacques Lamothe, Trustees of the Jacques & Linda Lamothe Living Trust and will continue to appear on their behalf.

JURISDICTIONAL STATEMENT

Respondents accept the Appellants' Jurisdictional Statement.

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.

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I. STATEMENT OF THE ISSUES

Except for some nomenclature discussed further below, Respondents accept the Appellants' Statement of the Issues.

II. STATEMENT OF THE CASE

Respondents accept the Appellants' Statement of the Case.

III. STATEMENT OF FACTS

Respondents take issue with Appellants' loose use of the words "home owners' association" and "association" and otherwise believe a separate Statement of Facts is needed.

A. Creation Of The Rosemere Subdivision And CC&Rs

1. Appellants and Respondents agree that the Baughman & Turner Pension Trust, the developer of the Rosemere Court subdivision (the "Subdivision"), recorded CC&Rs on the 9-unit Subdivision on or about January 4, 1994 (the "Original CC&Rs"). AA000046 – 000049.

2. Appellants and Respondents agree that the Original CC&Rs did not create a NRS 116 home owners' association but instead simply subjected the 9-unit Subdivision to the mutually beneficial covenants, conditions and restrictions set for in the Original CC&Rs. AA000067, lines 8 – 14.

3. Appellants and Respondents agree that the Original CC&Rs, paragraph numbered 21, required the homeowners in the Subdivision to create a "property owners' committee" to oversee the landscaping, the entrance way planters, the exterior perimeter walls, the entrance gate, and the entry drive for ingress and egress purposes. AA000067, lines 15 - 19. There is no "common area" within the Subdivision. AA000052. All 9 lots extend to the center of the streets and/or the entry way. AA000052.

4. Appellants and Respondents agree that pursuant to the Original CC&Rs' mandate that a property owner's committee be created, the property owners within the Subdivision created a non-profit corporation in 1997 to provide a corporate vehicle that could open a bank account for the committee. AA000067 lines 20 – 25. The non-profit corporation was named the Rosemere Estate's Property Owners' Association (the "Corporation"). AA000067. lines 20 – 25.

5. Appellants and Respondents agree that the creation of the Corporation did not create a NRS 116 home owners' association as there was no intent to do so and no bylaws, regulations, or rules, etc. were ever adopted as part of the Corporation. AA000067, lines 20 – 25.

6. Appellants and Respondents agree that in July 2007, 5 or 6 of the 9 home owners in the Subdivision (less than 67%), voted to amend the Original CC&Rs. AA000065, lines 12 – 15. The proposed amended CC&Rs were

significantly more expansive, complex, and different than the Original CC&Rs (the "Amended CC&Rs"). AA000064, lines 4 – 22.

7. The Appellants and the Respondents did not vote to approve the Amended CC&Rs. AA000138, lines 1 – 2. Thereafter two of the homeowners recorded the Amended CC&Rs. AA000065, lines 16 – 18, AA000222 – 000260. Again, the Appellants and the Respondents were not involved in the recording of the Amended CC&Rs. AA000258.

B. The Underlying Suit And Declaratory Judgment Sought And Obtained By Appellants.

8. In response to the recording of the Amended CC&Rs and in an effort to have the Amended CC&Rs judicially determined to be invalid, the Appellants filed suit against the Corporation (the home owner's committee), Case #09-593497-C (the "Underlying Suit") AA000037 - 000041. The Appellants ultimately obtained a Summary Judgment for Declaratory Relief from Judge Michelle Leavitt declaring that the Amended CC&Rs were improperly amended, improperly recorded, were invalid, had no force or effect and were void *ab initio*. (the "Underlying Summary Judgment") AA000060 – 000071.

9. Judge Leavitt, at the Appellants' specific requests in the pleadings and Motion for Summary Judgment, made the following Findings of Undisputed Facts, Legal Determinations, and Judgments:

Finding Of Undisputed Material Facts

1. 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). AA000061, lines 5 – 8.

2. The Original CC&Rs consist of four (4) pages and 25 paragraphs, with no bylaws annexed, no amendment provision, and no homeowners association, as defined by Chapter 116. AA000061, lines 9 – 10.

3. The Original CC&Rs create a "property owners' committee" with very limited maintenance duties over specific common area items (exterior walls and planters, entrance way and planters, entrance gate, and the private street), which are specifically set forth in Paragraph 21 of the Original CC&Rs. AA000061, lines 11 – 14.

4. The Original CCR&s then grant each homeowner, and not any homeowners' association, the power to enforce the Original CC&Rs against one another. AA000061, lines 15 – 16.

11. The primary reasons that the Lytles selected the property were limited restrictions contained in the Original CC&Rs and the lack of a "unit-owners association," as that term is legally defined by Chapter 116 of the Nevada Revised Statutes ("NRS"). AA000062, lines 3 – 5.

15. In 1997, two owners, acting on behalf of all owners, filed a Non-Profit Articles of Incorporation (the "Articles") pursuant to NRS 82, which formalized the property owners' committee and named it "Rosemere Estates Property Owners Association." AA000062, lines 13 – 15.

34. The Amended CC&Rs were not agreed to by all property owners at the July 2, 2007 meeting. In fact, only five of the property owners approved, with three property owners who

refused to sign the amendment. A fourth homeowner submitted a disputed proxy that was not counted by the board. AA000065, lines 12 – 15.

35. Despite the failure to obtain the required unanimous approval for amending the Original CC&Rs, the Association proceeded, on July 3, 2007, to record the Amended CC&Rs in the office of the Recorder for Clark County, Nevada. AA000065, lines 16 - 18.

Legal Determinations

5. Plaintiff's Cause of Action for Declaratory Relief seeks (1) a declaration from the Court that Amended CC&Rs were not properly adopted by the members of the Association and were improperly recorded against the Plaintiff's Property, and (2) a permanent injunction against the Association from adopting further amendments without unanimous consent. AA000066, lines 9 – 12.

6. Summary Judgment as to the Declaratory Relief Cause of Action is warranted based on the Court's finding that the Amended CC&R's were not adopted with unanimous consent, as required, and were, therefore, improperly recorded against Plaintiff's Property. AA000066, lines 13 – 15**.**

11. **Here, no Chapter 116 unit-owners' association was formed** because no association was organized prior to the date the first unit was conveyed. The Association was not formed until February 25, 1997, more than three years after Rosemere Estates was formed and the Original CC&Rs were recorded (emphasis added). AA000067, lines 8 – 11.

12. Further, the Association did not have any powers beyond those of the "property owners committee" designated in the original CC&Rs – simply to care for the landscaping and other common elements of Rosemere Estates as set forth in Paragraph 21 of the Original CC&Rs. AA000067, lines 12 – 14.

13. The Original CC&Rs provide for the creation of a "property owners' committee," which is a "limited purpose association," as defined by the 1994 version of NRS 116.1201, then in effect. The provision provided that Chapter 116 did not apply to "Associations created for the limited purpose of maintaining… "[t]he landscape of the common elements of a common interest community…" (emphasis added). AA000067, lines 15 – 19.

14. In 1997, Rosemere Estates' owners formed the Association for the express and limited purpose of (1) tending to limited matters set forth in Paragraph 21 of the Original CC&Rs, (2) holding a bank account in which to deposit and withdraw funds for the payment of the limited common area expenses assigned to the Owners Committee, and (3) purchasing liability insurance. The intent was never to form a unit-owners' association within the meaning of Chapter 116. AA000067, lines 20 – 25.

15. A limited purpose association cannot enforce "any restrictions concerning the use of units by the units' owners, unless the limited-purpose association is created for a rural agricultural residential common-interest community." NRS 116.1201 (2)(a)(5). There is no question that Rosemere Estates was not "created for a rural agricultural residential common-interest community," hence the Association cannot enforce "any restrictions concerning the use of units by the units' owners…" AA000068, lines 1 – 6.

17. In keeping with this well-settled and general principal, the Court construes the Original CC&Rs pursuant to the plain meaning of the language therein. **Nowhere is there reference in the Original CC&Rs to a "unit-owner' association" or "homeowners association." Rather, the Developer created a 116.1201 *limited purpose association* termed a "property owners' committee," and the Developer provided that committee with limited rather than comprehensive, duties and powers** (emphasis added)**.** AA000068, lines 14 – 19.

18. Consistent with the absence of a governing body, e.g. unit-owners' association, delegated with duty to enforce the Original CC&Rs, the Developer provided each homeowner the right to independently enforce the Original CC&Rs against one another. AA000068, lines 20 – 22.

19. **The Association is a limited purpose association under 116.1201, is not a Chapter 116 'unit-owners' association," and is relegated to those specific duties and powers set forth in paragraph 21 of the Original CC&Rs and NRS 116.1201.** (emphasis added). AA000068, lines 23 – 25.

20. **Because Rosemere Estates is a limited purpose association under NRS 116.1201, NRS 116.2117, the statutory provision governing amendments to the CC&Rs, does not apply here** (emphasis added). AA000069, lines 3 – 5.

22. There has never been a unanimous consent to amend the Original CC&Rs. Specifically, unanimous consent was not received in 2007, when the Amended CC&Rs were wrongfully recorded by the Association. AA000069, lines 13 – 16.

Judgment

A. Declaration

25. Pursuant to the foregoing, **this Court declares and orders that the Amended CC&Rs were not properly adopted or recorded, that the Amended CC&Rs are invalid, and that the Amended CC&Rs have no force and effect.** This order, may be recorded in the Office of the Clark County Recorder's Office by any party and, once recorded, shall be sufficient notice of same. AA000070, lines 8 – 14.

B. Injunctive Relief

26. The Association is permanently enjoined from recording and enforcing the Amended CC&Rs. The Association is hereby ordered to release the Amended CC&Rs. Document Number 20070703-0001934, recorded with Clark County Recorder on July 3, 2007, within ten (10) court days after the date of Notice of Entry of this Order. AA000070, lines 15 - 19.

10. As noted in the caption of the Underlying Suit, Appellants did not include the Respondents as parties to the Underlying Suit. AA000037 and 000041.

11. Judge Leavitt, at Appellants' request, three years after the Underlying Summary Judgment, in June 2016, after the Corporation's attorneys had ceased representing the Corporation, awarded Appellants their Attorneys' Fees and Costs in the Underlying Suit against the Corporation in the amount of $297,072.66 plus $63,566.93 in damages (the Underlying Judgment"). AA000073 – 000076.

12. Appellants then recorded Abstracts of Judgment of the Underlying Judgment against the Respondent's property within the Subdivision. AA000078 – 000084.

C. The Subject Litigation

13. On December 8, 2016, Respondents filed suit against the Appellants to, among other things, remove the Abstracts of Judgment which were clouds against their titles. AA000001 – 000009. After exhaustive briefing and a stipulation between the parties as to all of the material facts, Judge Williams granted Partial Summary Judgment in Respondents' favor, ordered the Abstracts of Judgment stricken from the Recorder's Office records and enjoined the Appellants from further clouding the Respondents' titles. AA000550 – 000556.

14. Judge Williams found the same pertinent undisputed facts made by Judge Leavitt and made basically the same conclusions of law as requested by Appellants and found by Judge Leavitt.

15. Specifically, Judge Williams found:

1. None of the Plaintiffs (Respondents) were ever parties in the Rosemere LPA Litigation (the Underlying Suit). AA000553, line 17.

2. None of the Plaintiffs (Respondents) were a "losing party" in the Rosemere LPA Litigation (the Underlying Suit) as that term is found in Section 25 of the Original CC&Rs. AA000553, lines 18 – 19.

3. The Defendants (Appellants) obtained a Summary Judgment for Declaratory Relief from the District Court in the Rosemere LPA Litigation (the Underlying Suit), which found and ruled as follows:

   a. The Association is a limited purpose association under NRS 116.1201, is not a Chapter 116 "unit-owners' association," and is relegated to only those specific duties and powers set forth in Paragraph 21 of the Original CC&Rs and NRS 116.1201.

   b. The Association did not have any powers beyond those of the "property owners committee" designation in the Original CC&Rs – simply to care for the landscaping and other common elements of Rosemere Estates as set forth in Paragraph 21 of the Original CC&Rs**.**

   c. Consistent with the absence of a governing body, the Developer provided each homeowner the right to independently enforce the Original CC&Rs against one another.

d. The Amended and Restated CC&Rs recorded with the Clark County Recorder's Office as Instrument #20070703-0001934 (the "Amended CC&Rs") are invalid, and the Amended CC&Rs have no force and effect. AA000552, lines 1 – 12.

4. Pursuant to NRS 116.1201(2) much of NRS Chapter 116 does not apply to the Association because it is a limited purpose association that is not a rural agricultural residential community. AA000552, lines 13 – 15.

Conclusions Of Law

1. The Association is a "limited purpose association" as referenced in NRS 116.1201(2). . AA000553, lines 11 - 12.

2. As a limited purpose association, NRS 116.3117 is not applicable to the Association. AA000553, line 13.

IV. SUMMARY OF ARGUMENT

NRS 116.1201(2)(a) clearly and unambiguously states that, except for specifically designated subsections, Chapter 116 does not apply to "limited purpose associations". The statute goes on to list very specifically 28 subsections of Chapter 116 that limited purpose associations must comply with. It is undisputed that NRS 116.3117, the statutory provision relied upon by Appellants when they recorded the Abstracts of Judgment, is not an exception to the inapplicability of Chapter 116.

Appellants cite this Court to its case of *D.R. Horton, Inc. v. Eighth Judicial Dist. Court (First Light I),* 123 Nev. 468, 476, 168 P.3d 737 (2007) for the long

accepted common-sense principal that when a statute is facially clear and unambiguous, the Court should give effect to the statute's plain meaning. Instead of then addressing how one should interpret the facially clear and unambiguous language of NRS 116.1201(2)(a) "[t]his chapter does not apply to a limited-purpose association", Appellants spend 25 pages purposefully dodging the very statute that is the subject of their Appeal and the core of Judge Williams' and Judge Leavitt's rulings. Appellants do not claim that NRS 116.1201(2)(a) is in anyway unclear or ambiguous.

Appellants rely on *Mackintosh v. California Federal Sav. & Loan Ass'n*., 113 Nev. 393, 935 P.2d 1154 (1997) for the proposition that the judicially declared void *ab initio* Amended CC&Rs are instead controlling and actually converted the Subdivision into a Chapter 116 home owners' association for a period of time which allows for the application of NRS 116.3117. *Mackintosh* is completely irrelevant to the issues in the case at bar and does not stand for the legal argument proffered by Appellants.

Appellants otherwise, proffer a "linear statutory reference" argument using statutory subsections of NRS 116 that have no relevance or applicability to the issues in this case and/or are specifically declared inapplicable to limited purpose associations to create a circuitous argument that NRS 116.3117 does in fact apply

to limited purpose associations despite the legislature's facially clear and unambiguous statutory language.

V. ARGUMENT

A. The Parties Agree That There Are No Questions Of Material Fact And This Case Involves Only Issues Of Law

Counsel for Appellants and Respondents agreed in open Court before Judge Williams that there were no issues of material facts. AA000563 line 25 – 000564 line 15. Appellants do not allege any disputed facts in their Opening Brief.

B. NRS 116.3117 Has No Application Whatsoever To The Original CC&Rs, The Corporation, The Home Owners' Committee, Or The Limited Purpose Association, And Cannot Be Used To Attach The Abstracts Of Judgment To The Respondents' Property

1. The Underlying Summary Judgment, Requested, Obtained And Drafted By Appellants, Specifically Declared The Subdivision And/Or The Corporation To Be A Limited Purpose Association That Is Not Governed by NRS 116

In the Underlying Suit, the Appellants specifically sought and obtained a declaratory judgment that the Subdivision and/or the Corporation "is a limited purpose association under NRS 116.1201, is not a Chapter 116 'unit-owners' association,' and is relegated to only those specific duties and powers set forth in Paragraph 21 of the Original CC&Rs and NRS 116.1201." AA000068, lines 23 – 25. In the Underlying Summary Judgment Judge Leavitt made numerous specific

and important findings of fact and legal determinations requested by Appellants in support of her ruling, including but not limited to the following:

- No Chapter 116 unit-owners' association was formed by the Original CC&Rs; AA000067, lines 8 – 11.
- Instead the Original CC&Rs created a "property owners' committee" with very limited maintenance duties" which makes it a "limited purpose association," and the provisions in Chapter 116 do not apply to the Corporation or home owners' committee which were created for those limited purposes. AA000061, lines 11 – 14.

2. The Respondents Were Not Parties To The Underlying Suit And Were Not Parties, Debtors, Or Obligors Under the Underlying Judgment

As set forth above, there is no dispute that the Respondents were never parties in the Underlying Suit. AA000037 – 000041 and AA000060 – 000071.

Also as set forth above, the Underlying Judgment was issued in favor of the Appellants against only the Corporation. AA000060 – 000071. There is no dispute that Underlying Judgment was not rendered against the Respondents. There is also no dispute that the Appellants, pursuant to Paragraph 24 of the Original CC&Rs, could have filed suit directly against Respondents and the other homeowners, but the Appellants chose not to do so. AA000049.

Finally, the Abstracts of Judgment recorded by the Appellants do not in any way name or refer to the Respondents. AA000078 - 000084. The Appellants and their counsel simply attached cover pages to the Abstracts of Judgment that included the Respondents' parcel numbers. AA000078 and AA000082.

3. The Original CC&Rs Do Not Create Any Joint Liabilities For The Properties That Are Encumbered Thereby, But Instead The Original CC&Rs Mandate Exactly The Opposite

The Original CC&Rs specifically provide that in the event that any disputes arise between residents relating the Original CC&Rs that each resident has the right to initiate and prosecute their disputes against each other. Paragraph 24 of the CC&Rs provides:

> Except as otherwise provided herein, Subdivider or any owner or owners of any of the lots **shall have the right to enforce any or all of the provisions of the covenants, conditions and restrictions upon any other owner or owners.** In order to enforce said provision or provisions, any appropriate judicial proceeding in law or in equity may be initiated and **prosecuted by any such lot owner or owners against any other owner or owners**. (emphasis added) AA000049.

The Original CC&Rs did not create an association that would enforce the Original CC&Rs, represent home owners in actions to enforce the Original CC&Rs, or make determinations regarding disputes. Nowhere in the Original CC&Rs is there any provision that even remotely hints that a judgment against one

person or party may somehow be attached to non-parties' properties. Certainly, there is nothing in the Original CC&Rs that can possibly be stretched to mean that all owners within the Subdivision are at risk if one property owner obtains a judgment against another. AA000046 – 000049.

C. NRS 116.3117 Has No Application Whatsoever To The Original CC&Rs, The Corporation, The Home Owners' Committee, Or The Limited Purpose Association And Cannot Be Used To Attach The Subject Judgment To The Respondents' Property

Appellants' sole argument for their proposition that the subject Underlying Judgment can attach to the Respondents' properties is through the application of NRS 116.3117. However, the Underlying Summary Judgment, and NRS 116.1201(2)(a) specifically make NRS 116.3117 inapplicable to the Subdivision and/or the Corporation (the home owners' committee).

NRS 116.3117 provides that a recorded judgment against a NRS 116 association attaches to all of the property owned by the members within the association. Again, the Appellants specifically sought and obtained a judgment declaring that the Subdivision is a "limited purpose association" that is **NOT** subject to NRS 116 including NRS 116.3117.

The Underlying Summary Judgment specifically provides:

> The Association is a limited purpose association under NRS 116.1201, **is not a Chapter 116 "unit-owners**

> **association"**, and **is relegated to only those specific duties and powers set forth in paragraph 21 of the Original CC&Rs and NRS 116.1201** (emphasis added). AA000068, lines 23 – 25.

NRS 116.1201(2)(a) specifically provides that Chapter 116 does not apply to limited-purpose associations, with the exception of various types of agricultural and other associations that even the Appellants do not claim have any application here. Since chapter 116 does not apply to the Corporation NRS 116.3117 does not apply either.

There are no specific powers set forth in NRS 116.1201 or referenced in the Paragraph 19 of the Underlying Summary Judgment that in any way relate to, or intimate that, judgments obtained against the Corporation could attach to all of the properties.

Judge Williams, consistent with Appellants' declaratory judgment from Judge Leavitt, simply ruled "**The Association is a "limited purpose association" as referenced in NRS 116.1201(2).** AA000553, line 12. **As a limited purpose association, NRS 116.3117 is not applicable to the Association."** AA000553, line 13.

These rulings are not even contestable. They are entirely consistent with the Underlying Summary Judgment and track NRS 116.1201 to the letter.

D. Appellants Misinterpret And Misapply This Court's Decision In *Mackintosh*

One of Appellants' primary arguments to overcome NRS 116.3117's inapplicability to limited purpose associations is a proposal that because the Amended CC&Rs were recorded on July 3, 2007 and weren't declared void *ab initio* until July 29, 2013, that the Corporation was "full-blown unit owners' association" during that time period, and therefore NRS 116.3117 was applicable to the Subdivision from July 3, 2007 through July 29, 2013,. Appellants' Opening Brief page 18. Appellants cite to this Court's decision *Mackintosh v. California Federal Sav. & Loan Ass'n*., 113 Nev. 393, 935 P.2d 1154 (1997) wherein this Court found that a prevailing party in a contract rescission case could be awarded attorneys' fees under an attorneys' fee provision in the rescinded contract. In *Mackintosh* the parties voluntarily executed a residential home purchase agreement and the buyers moved into and occupied the home for three years and then sued the seller for fraud and breach of fiduciary duty and sought to rescind the purchase agreement. The District Court ruled in the buyers' favor and rescinded the purchase agreement. This Court ultimately held that despite the rescission of the purchase agreement, the attorneys' fee provision in the purchase agreement was applicable as the parties had performed under the purchase agreement for three years.

The case at bar does not involve a contract voluntarily entered into between the Appellants and the Respondents that was performed and later rescinded. Unlike *Mackintosh*, the issue in the case at bar is not whether the Judge Leavitt erred in awarding fees and costs to the Appellants in the Underlying Suit. The issue in this case is whether NRS 116.3117 is applicable to the Subdivision, the Corporation, and the residents in the Subdivision despite the specific terms of the Original CC&Rs and NRS116.1201(2)(a).

The issue before this Court is the statutory language of NRS 116 and the esoteric concept of attaching a judgment against the property of a non-party to litigation. NRS 116.3117 certainly provides the unique ability for a successful litigant to collect on a judgment obtained against a "full-blown unit owners' association"; however, the circumstances under which this judgment collection tool can be utilized is very specific and controlled entirely by NRS 116. This Court's decision in *Mackintosh* does not in any way address NRS 116.3117 nor does it address homeowners' associations, attaching property, collecting on judgments, third party liability, or any other issue in this case. *Mackintosh* is irrelevant to the case at bar and provides no support whatsoever to the Appellants' position.

Next, the facts of *Mackintosh* make it completely distinguishable from the case at bar. As stated above, the Appellants and the Respondents never entered

into any form of contract with each other. In fact, the Appellants and the Respondents all voted against the Amended CC&Rs. AA000138, lines 1 – 2. The Original CC&Rs specifically required homeowners with disputes relating to the Original CC&Rs to litigate their claims against each other and provided no remedy to or from the Subdivision, the Corporation or the homeowners' committee. AA000049. Unlike *Mackintosh*, the Appellants never filed suit against the Respondents and never sought or obtained relief against the Respondents.

Further, the Amended CC&R's were not "rescinded" by Judge Leavitt in the Underlying Suit, they were judicially declared to be void *ab initio*, as if they never existed, and were stricken from the County Recorders' records. AA000060 – 000071. There is a significant distinction between something that is entirely void from its inception, as opposed to divisible, voidable, or rescindable. The Ninth Circuit Court of Appeals in *Golden Pisces, Inc. v. Fred Wahl Marine Construction, Inc.*, 495 F.3d 1078 (9th Cir.2007), citing to *Mackintosh*, affirmed the denial of an award of attorneys' fees in a void contract case when it was determined, like the facts in the case at bar, that there had not been mutual assent between the parties to the written contract, that the written contract was therefore invalid from its inception, and was void *ab initio*. Citing to the *Mackintosh* case, the Ninth Circuit Court stated:

> "[t]he Nevada Supreme Court similarly distinguished between a void contract and a rescinded contract in

> Mackintosh v. California Federal Savings and Loan Association, 113 Nev. 393, 935 P.2d 1154 (1997), and enforced an attorneys' fees provision in favor of the party who prevailed by showing that the contract at issue was rescinded. Id. at 1162.
>
> …
>
> The principle that emerges from our survey of federal and state case law is that, consistent with the American Rule, a party who prevails by demonstrating that a contract is entirely void, as opposed to divisible, voidable, or rescindable, cannot then seek the benefit of an attorneys' fees provision from that contract. Applying this principle here, we find no reason to create a new equitable exception to the American Rule so as to enforce the attorneys' fees clause from the written form contract that Golden Pisces and OneBeacon successfully argued was void for lack of mutual assent. *Id*. at 1082 – 1083.

Like the parties in *Golden Pisces, Inc.*, and unlike the parties in *Mackintosh*, the Appellants and Respondents never entered into a contract of any sort between themselves. The Respondents and the Appellants never agreed to a single provision within the Amended CC&Rs. The Amended CC&Rs were never valid as they violated the Original CC&Rs and neither the Appellants nor the Respondents ever consented to them and never recognized any duties or benefits provided by them.

Finally, contrary to Appellants' statement on page 18 of their Opening brief that the district court in the Underlying Suit found that from July 3, 2007 through July 29, 2013 "the Association was full-blown unit owners' association subject to and taking advantages of all rights, privileges and remedies afforded the entirety of

Chapter 116," no such findings or determination were ever made by Judge Leavitt. Appellants' citation to the record on page 18 of the Opening Brief is a blanket citation to the entirety of Underlying Summary Judgment. A thorough review of that Underlying Summary Judgment reveals that Judge Leavitt never found or even intimated that the Corporation or Subdivision was ever a full-blown unit owner's association. In fact, the entirety of the Underlying Summary Judgment, is a rationale and specific finding that the Amended CC&Rs were void from their inception because the Corporation was a limited purpose association and the Amended CC&Rs were not unanimously approved. Appellants' proposition that the Corporation was ever a full-blown unit owners' association is a self-serving erroneous claim that is completely contradicted by the Underlying Summary Judgment.

E. The Only Potential Use Of The Shield And Sword Is By The Appellants

Appellants' argument that the Respondents are utilizing a shield and sword defense is grossly misplaced. The Appellants are the only parties herein that were parties in both the Underlying Suit and the case at bar. Appellants are the only parties that are now taking contrary positions. The Respondents did not vote in favor of the Amended CC&Rs, they were not party defendants in the Underlying Suit, and they never asserted any position other than the validity of the Original CC&Rs. The Respondents never attempted to enforce the Amended CC&Rs and

there were never any allegations that the Respondents ever sought to take advantage of any provisions of the Amended CC&Rs.

The Appellants on the bottom of page 7 of their Opening Brief falsely attempt to characterize the Respondents as their opponents in the Underlying Suit by alleging without any evidentiary support or reference to the record that the Respondents paid special assessments that may have been used to pay attorneys' fees. Appellants cite to the deposition transcript of Ms. Lamothe at AA000147 – 000154. Ms. Lamothe's proffered deposition testimony fully supported the Appellants' position in the Underlying Suit and in the case at bar. Ms. Lamothe testified in deposition that she did not vote in favor of the Amended CC&Rs, she believe the board should have further investigated the Appellants' claims regarding the invalidity of the Amended CC&Rs, that the Board did not adequately answer her questions regarding the Amended CC&Rs, that she opposed the stringency of the Amended CC&Rs, and that improper verbal attacks had been made against the Appellants by others. AA000147 – 000154 Otherwise, there is nothing in the record regarding the Respondents paying special assessments or assessments being used to fund the Underlying Suit.

The fact is that Appellants in the Underlying Suit fought to enforce the Original CC&Rs and have the Amended CC&Rs declared void *ab initio* and they

prevailed. Now the Appellants are fighting to breath life into the Amended CC&Rs that they successfully had judicially declared to be void *ab initio.* The Appellants not the Respondents are utilizing the sword and shield doctrine to their benefit.

F. Appellants' "Linear Statutory Reference" Argument Is Completely Unsupported, Impossible Under The Original CC&Rs, And Internally Inconsistent

Appellants' last argument on Pages 22 - 24 of the Opening Brief is self-styled a "linear statutory reference" argument. The only definition of "linear referencing" to be found relates to a method of storing geographic locations by using relative positions along a measured linear feature. See Wikipedia. Appellants do not cite this Court to any legal authority to support statutory interpretation via "linear referencing".

Regardless, Appellants' argument begins with NRS 116.1201(2)(a) which clearly and unambiguously states that Chapter 116 is not applicable to limited purpose associations. Appellants point out that NRS 116.1201(2)(a) lists 28 specific subsections of Chapter 116 that do apply to limited purpose associations: NRS 116.31155, NRS 116.31158, NRS 116.31038, NRS 116.31083, NRS 116.31152, NRS 116.31073, NRS 116.31075, and NRS 116.4101 to NRS116.412. These 28 specific subsections cover a wide range of subjects and of course do not include NRS 116.3117. Undeterred that the legislature specifically did not include

subsection NRS 116.3117 as being applicable to limited purpose associations, the Appellants then proceed, through a self-serving analysis of one of the subsections, 116.4117(2)(b)(1), which has no particular or special application to limited purpose associations, to come to the convenient conclusion that subsection NRS 116.3117 does actually apply to limited purpose associations.

Otherwise, NRS 116.4117(2)(b)(1) which provides that a unit owner may sue "the association" if it fails to comply with Chapter 116 clearly has no application to this limited purpose association. The Underlying Suit did not in any way involve any breaches or even alleged breaches by any of the homeowners of any of those 28 subsections. NRS 116.4117(2)(b)(1) is simply a recitation of who can sue and be sued if there are breaches related to any applicable portions of NRS 116. Since there are no allegations of any breaches of any applicable provisions of NRS 116, NRS 116.4117(2)(b)(1) and its list of potential plaintiffs and defendants is irrelevant to this case.

Also, pursuant to the Original CC&R's and the Underlying Summary Judgment, there is no "association" for the unit owners to sue. As has been pointed out by Appellants and Respondents a number of times, paragraph 24 of the Original CC&Rs specifically prevents homeowners within the subdivision from suing the association and limits their remedies to suits against other homeowners

who are believed to have failed to comply with the obligations under the Original CC&Rs. Appellants use of NRS 116.4117(2)(b)(1) to start their "linear statutory reference" argument completely fails from its inception, as under the Original CC&Rs and the Underlying Summary Judgment, filing suit against the "association" is not only not allowed, it is not possible as an "association", as that term as defined in NRS 116 never existed in connection with the Subdivision.

Turning again to *D.R. Horton, Inc. v. Eighth Judicial Dist. Court (First Light I),* 123 Nev. 468, 476, 168 P.3d 737 (2007), cited in Appellants' opening brief, the long accepted common-sense principal is that when a statute is facially clear and unambiguous, the Court should give effect to the statute's plain meaning. Moreover, when this Court reviews questions of law and statutory interpretation *de novo*, legislative intent is the controlling factor. This Court has long held that in "[w]hen interpreting a statute, legislative intent 'is the controlling factor'. *Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). The starting point for determining legislative intent is the statute's plain meaning; when a statute 'is clear on its face, a court cannot go beyond the statute in determining legislative intent' *Id*; *see also Catanio*, 120 Nev. At 1033, 102 P.3d at 590 ('We must attribute the plain meaning to a statue that is no ambiguous.')" *State v. Lucero,* 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011)**.** See also *State v. White,* 130 Nev. Adv. Op. 56, 330 P.3d 482, 484 (Nev. 2014)**;** *Bacher v. State Engineer*, 122 Nev. 1110,

1117, 146 P.3d 793, 798 (2006); *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010). Additionally, this Court has held that statutory construction should always avoid an absurd result." *Sheriff* v. *Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008).

NRS 116.1201(2)(a)(1–5) is without question clear, unambiguous, specific, and detailed. There is no possible way to read that statute and arrive at the conclusion that the Legislature intended to apply any portions of NRS 116 to limited purpose associations other than the 28 subsections specified in NRS 116.1201(2)(a)(1–5). To imply through circular reasoning or "linear statutory reference" that the Legislature actually intended NRS 116.3117 to apply to limited purpose associations would be an absurd result.

VI. CONCLUSION

NRS 116.1201(2)(a) clearly and unambiguously states that, except for specifically designated subsections, Chapter 116 does not apply to "limited purpose associations". It is undisputed that NRS 116.3117, the statutory provision relied upon by Appellants when they recorded the Abstracts of Judgment, is not an exception to the inapplicability of Chapter 116.

This Court should give effect to NRS 116.1201(2)(a)'s plain meaning, "[t]his chapter does not apply to a limited-purpose association". It is impossible to

interpret that statute to mean that NRS 116.3117 applies to limited purpose associations, and to find as much would be an absurd result.

The Appellants' arguments and efforts to undermine their own Summary Judgment granted by Judge Leavitt and adopted and reinforced by Judge Williams are strained, self-contradicting, and completely without merit. The Amended CC&Rs were judicially declared void *ab initio* and they cannot be used now as basis for allowing Judgments to be attached to the property of non-parties to the Underlying Litigation. Judge Williams was absolutely correct in his ruling and this Court's *de novo* review should result in the same ruling.

Dated this 8th day of March 2018.

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CERTIFICATE OF COMPLIANCE

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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. font and using Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 6,010 words.

This brief does not exceed 30 pages.

Finally, I hereby certify that I have read this Appellant 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 8th day of March, 2018

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 8th day of March, 2018, I served the following document(s):

RESPONDENTS ANSWERING BRIEF

I served the above-named document(s) by the following means to the person s as listed below:

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I declare under the penalty of perjury that the foregoing is true and correct.

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