IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant ,

v.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND JOLIN G. ZOBRIST, AS TRUSTEES OF THE GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND JULIE MARIE SANDOVAL GEGEN, AS TRUSTEES OF THE RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; and DENNIS A. GEGEN AND JULIE S. GEGEN, HUSBAND AND WIFE, AS JOINT TENANTS,

Respondents .

Supreme Court No.: 76198
District Court Case No.: A-17-765372-C

APPELLANTS' OPENING BRIEF

Appeal

From the Eighth Judicial District Court, Clark County
Honorable Mark Bailus

Appellants' Opening Brief

(Docket 76198)

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Disclosure Statement

Pursuant to NRAP 26.1, Appellants TRUDI LEE LYTLE; AND JOHN ALLEN LYTLE, AS TRUSTEES OF THE LYTLE TRUST ("Appellants") state that there is no parent corporation or publicly held company that owns ten percent (10%) or more of any stock in Appellants. Appellants are the Trustees for a trust and are not a corporation.

The attorneys and law firm that have appeared and expected to appear on behalf of Appellants are Richard E. Haskin of Gibbs, Giden, Locher, Turner, Senet & Wittbrodt, LLP.

DATED this 14th day of January, 2018.

GIBBS, GIDEN, LOCHER, TURNER, SENET & WITTBRODT, LLP

By: _____

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Jurisdictional Statement

The Supreme Court has jurisdiction via NRAP 3A(b)(1) and 3A(b)(3). On May 24, 2018, the district court granted Respondents SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND JOLIN G. ZOBRIST, AS TRUSTEES OF THE GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND JULIE MARIE SANDOVAL GEGEN, AS TRUSTEES OF THE RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; and DENNIS A. GEGEN AND JULIE S. GEGEN, HUSBAND AND WIFE, AS JOINT TENANTS' (collectively "Respondents") Motion for Summary Judgment or, in the Alternative, for Judgment on the Pleadings and Denying Countermotion for Summary Judgment, whereby the district court, in substantial part, prohibited 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. The foregoing Order also granted a permanent injunction in favor of Respondents prohibiting Appellants from recording judgments and liens against Respondents' 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. *See* Dockets 60657, 61308, 65721, 63942, 65294, 73039.

Issues Presented

1. Whether the district court erred in granting summary judgment in favor of Respondents based on the district court's finding that the Order Granting Summary Judgment in consolidated Case No. A-16-747800-C was "law of the case" and, therefore, bound the district court to find in favor of Respondents in this matter?

2. Whether the district court erred in granting summary judgment in favor of Respondents and 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 Order Granting Motion for Summary Judgment or, in the Alternative, Motion for Judgment on the Pleadings and Denying Countermotion for Summary Judgment (the "Order") 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 for Summary Judgment or, in the Alternative, Motion for Judgment on the Pleadings and

Denying Countermotion for Summary Judgment, Appellants' Index ("AA") AA000780 - 793.

Statement of Facts

A. 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"). Original CC&Rs, AA000147 - 150. 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. Respondents each own property within the Association. Complaint, AA000066 - 74.

The Original CC&Rs, in the first paragraph, defines Rosemere Estates as "Lots 1 through 9 of Rosemere Court, a subdivision…" Original CC&Rs, AA000147. The document adds:

> "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."
>
> WHEREAS, Subdivider hereby declares that all of the land described above is held and shall be held, conveyed, hypothecated, and encumbered, leased, rented, used, occupied, and improved subject to the following covenants, conditions and restrictions…

Id. Thus, the Association includes each lot, or unit, therein, and each owner within the community is bound by the Original CC&Rs and the Association.

Sometime after Appellants purchased their property, a group of homeowners formalized the "owners committee" specified in the Original CC&Rs by creating a legal entity. Articles of Incorporation, AA000359; *see also* Order Granting Motion for Summary Judgment, Finding of Fact ("FOF") Nos. 14, 15, AA000408 - 409. This legal formation is consistent with the Original CC&Rs which requires all owners to establish the committee. Original CC&Rs, AA000149.

B. The Unlawful Amendment of the CC&Rs

Without warning or consult with the homeowners, the Board for the Association, on July 2, 2007, presented the Amended and Restated Covenants, Conditions and Restrictions (the "Amended CC&Rs") to the Association membership. Order Granting Summary Judgment in NRED 1 Litigation, FOF Nos. 23, 24, AA000404 - 405. The Amended CC&Rs contained numerous and onerous new use restrictions including the drastic expansion of the powers, rights, and duties of the Association, a section entitled "Restrictions on Use, Alienation, and Occupancy," pet restrictions, parking restrictions, lease restrictions, the establishment of a Design Review Committee with unfettered discretion, and a new and expansive definition of "nuisance." *Id.* The Amended CC&Rs also contained a morality provision. *Id.* at FOF No. 26, AA000405. Finally, the Amended CC&Rs contained a construction timeline that would require Appellants, and only Appellants, to complete the

construction of a custom home on the lot within a mere *60 days* of receipt of approval from the proposed *Design Review Committee*—something never envisioned in the Original CC&Rs and impossible to adhere to. *Id.* at FOF No. 28, AA405. Failure to comply would cost Appellants $50.00 per day. *Id.* at 30, AA000405. Despite failure to obtain the consent of all homeowners, the Board unilaterally recorded the Amended CC&Rs on July 3, 2007, with the Office of the Recorder for Clark County, Nevada. *Id.* at FOF Nos. 34, 35, *see also* Amended CC&Rs AA000361 - 399.

Important to the case at hand, the Amended CC&Rs provide as follows:

> Section 1.1. "'Act' shall mean and refer to the State of Nevada's version of the Uniform Common-Interest Ownership Act, codified in NRS Chapter 116, as it may be amended from time to time, or any portion thereof."
>
> Section 1.14(e). "...the Property is a common interest community pursuant to the Act."
>
> Section 1.38. "'Property' shall refer to the Property as a whole, including the Lots and Common Elements, as restricted by and marketed and sold to third parties in accordance with this Declaration."
>
> Section 1.24. "'Governing Documents includes the Amended CC&Rs.
>
> Article 2: "The Association is charged with the duties and vested with the powers prescribed by law and set forth in the Governing Documents."
>
> Section 10.2(c). "An Assessment to pay a judgment against the Association may be made only against the lots in the Property at the time the judgment was entered, in proportion to the respective Liability for Common Expense."

Amended CC&Rs, AA000367, 368, 370 – 371, 381.

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C. The Underlying Litigation

After the Amended CC&Rs were adopted, the Association's membership voted to approve a Board proposal that, first, each member of the Association should be assessed $10,000.00 "in conjunction with [Appellants'] actions" in bringing the NRED 1 litigation and in pursuing litigation against Appellants for unarticulated and nebulous reasons, and, second, that "the Association should bring foreclosure proceedings against any lots with outstanding assessments due the Association." Order Granting Summary Judgment in NRED 2 Litigation, FOF No. 10, AA000466. The Association initiated non-judicial foreclosure proceedings against Appellants. *Id.* at FOF Nos. 11, 20, AA000466, 468. In addition to instituting the non-judicial foreclosure process afforded to it by NRS Chapter 116 and the Amended CC&Rs, the Board recorded additional, unlawful liens without right against Appellants. *Id.* at FOF Nos. 12 – 18, 22, AA000466 - 467. The total of the three (3) unlawfully recorded liens was $209,883.19. *Id.* at FOF Nos. 25, 26, AA000468.

A. NRED 1 Litigation

In 2007, Appellants filed an NRS 38.310 mandated non-binding arbitration before the Nevada Real Estate Division ("NRED"), naming the Association as respondent. Appellants sought a declaration that the Amended CC&Rs were unlawfully adopted, recorded and enforced by the Association against Appellants.

After the arbitrator found in favor of the Association, Appellants filed for a trial de novo in this District Court, case number A-09-593497-C, which was assigned to

Judge Michelle Leavitt in Department XII. The district court initially dismissed the case and affirmed the arbitrator's decisions, thereby affirming that the Amended CC&Rs were valid and the Association was a full-blown unit owners' association, subject to the entirety of Chapter 116. *See* Supreme Court Order, Docket No. 54886. Appellants had to post a $53,054.52 to appeal the case.

The Supreme Court ultimately reversed the district court's order and remanded the case back to district court. *See generally* Order of Reversal and Remand, Supreme Court Order, Docket No. 54886. After remand, Appellants ultimately prevailed, entirely, in the litigation, and the Court granted Appellants summary judgment on July 29, 2013. Order Granting Summary Judgment in NRED 1 Litigation, COL No. 11, AA000408. The court made the following pertinent findings:

- The Association is a limited purpose association as defined by NRS 116.1201. *Id.* at COL Nos. 13, 19, AA000408 - 409.
- The Amended CC&Rs were improperly recorded, were invalid, and the Amended CC&Rs were ordered released. *Id.* at COL Nos. 25, 26, AA000411.
- Most importantly, from July 3, 2007, through July 29, 2013, the Amended CC&Rs governed the Association and its members. *See generally id.*

The last finding is consistent with the district court's original dismissal of the case and affirmance of the arbitrator's decision whereby the district court, in effect,

ratified the Amended CC&Rs and status of the Association as a full-blown unit owners' association, subject to the entirety of Chapter 116.

The matter was once again appealed, and the Nevada Supreme Court affirmed the district court's Order granting Appellants summary judgment. The Supreme Court remanded the case to the District Court for redetermination of costs, attorneys' fees and damages on October 19, 2015. Supreme Court Order, AA000525 – 529.

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, the Amended CC&Rs and NRS 116.4117, recognizing that during the entirety of the NRED 1 Litigation, the Association as well as Respondents were governed by the Amended CC&Rs and entirety of Chapter 116. Order Awarding Attorneys' Fees in NRED 1 Litigation, AA000414 - 471.

On June 17, 2016, the Court awarded Appellants damages, after a prove-up hearing, in the amount of $63,566.93. Order Awarding Damages in NRED 1 Litigation, AA000419 - 420. 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.

Finally, on July 22, 2016, the Court awarded Appellants costs in the amount of $599.00. Order Awarding Costs in NRED 1 Litigation, AA000422 - 423. Previously, the Court had awarded $1,962.80 in costs.

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On September 2, 2016, Appellants recorded Abstracts of Judgment against each property within the Association pursuant to the law set forth herein. Abstracts of Judgment from NRED 1 Litigation, AA000174 - 179.

B. NRED 2 Litigation

On March 16, 2010, Appellants initiated another NRS 38.310 mandated non-binding arbitration before NRED, naming the Association as respondent (the "NRED 2 Litigation"). The purpose of the NRED 2 Litigation was to halt non-judicial foreclosure proceedings initiated by the Association against Appellants pursuant to NRS, Chapter 116 and the Amended CC&Rs. *See* Complaint in NRED 2 Litigation, AA000434 - 448. Appellants also sought an order from the Court directing the Association to comply with NRS Chapter 116 and the Amended CC&Rs where the Association had failed to comply, e.g. approval of budgets, conduct of meetings, etc. *Id.* In that arbitration, all parties stipulated the Amended CC&Rs were valid and enforceable for the purpose of the NRED 2 Litigation. Stipulation, AA000425 - 430.

After the Association prevailed in the Arbitration (in November 2010), Appellants promptly and timely filed a lawsuit (for trial de novo) on December 13, 2010. Complaint in NRED 2 Litigation, AA000434 - 448. The Association filed a counterclaim, seeking to enforce the assessments the Association levied against Appellants' property.

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Appellants included the following language in their Complaint:

> Pursuant to a stipulation and/or agreement between the Plaintiff TRUST and the Defendant ASSOCIATION in the NRED action, the parties to the NRED action agreed that the Amended CC and R's and Bylaws of the Defendant ASSOCIATION [were] valid and enforceable only for the purpose of the NRED action and because this is a trial de novo of the NRED action the Plaintiff TRUST once again agrees that for the purpose of this litigation only that the Amended CC and R's and bylaws of the Defendant ASSOCIATION are valid and enforceable.

Complaint in NRED 2 Litigation, ¶ 11, AA000436 - 437.

On November 14, 2011, the Court granted the Association's Motion for Summary Judgment. The Court also awarded the Association's Motion for Attorneys' Fees pursuant to NRS Chapter 116 and the Amended CC&Rs, with an amount to be determined at a subsequent hearing. The Court then entered two orders granting the Association's attorneys' fees pursuant to NRS 116.4117 and Section 16 of the Amended CC&Rs. Order Granting Association Fees in NRED 2 Litigation AA000453 – 457, *see also* Supplement Award of Attorneys' Fees in NRED 2 Litigation, AA000459 - 462. Therein, the district court held that the Association was "entitled to recover its attorneys' fees and costs pursuant to NRS 116.4117 and Section 16 of the Amended Covenants, Conditions and Restrictions." Order Granting Association Fees in NRED 2 Litigation AA000455 – 456. The district court then awarded the Association $23,409.32 in damages (for the liens recorded by the Association against Appellants' property), $79,483.65 in attorneys' fees, and $1,130.77 in costs. *Id.* at AA000456. Thereafter, the district court awarded an

additional $7,068.00 in attorneys' fees and $117.45 in costs against Appellants. *See* Supplement Award of Attorneys' Fees in NRED 2 Litigation, AA000461, 462.

The district court's order essentially found the provisions of the Amended CC&Rs and assessment and foreclosure statutes included in Chapter 116 provided the Association with the right to assess and, indeed, foreclose for failure to pay the assessment. Once again, the district court, in effect, sanctioned the Amended CC&Rs and status of the Association as a full-blown unit owners' association, subject to the entirety of Chapter 116. More importantly from a practical measure to Appellants, the district court's ruling coupled with the Association's vitriolic thirst to expel Appellants from the Association, compelled Appellants to post a $123,000.00 bond and incur years of additional litigation.

On July 16, 2012, Appellants filed a Notice of Appeal. On December 21, 2015, the Nevada Supreme Court vacated the Order Granting Summary Judgment and remanded this case back to this Court for determination. Supreme Court Order Re: NRED 2 Litigation, AA000521 – 522. Specifically, the Supreme Court held that the

> [Appellants'] actions during the NRED arbitration were sufficient to 'submit' their slander of title claim to the NRED arbitrator for the purposes of NRS 38.330(5). We also conclude that [Appellants] did not need to establish that they suffered monetary damages for their remaining claims to be viable.

Id. The Supreme Court also vacated the order awarding attorneys' fees, costs, and damages to the Association. *Id.* In the second footnote of the foregoing Supreme Court Order, and an item of importance to the present case, the Court noted that its

ruling was "premised in part on [Appellants'] stipulation as to the amended CC&Rs validity." *Id.*

Upon remand, the case was essentially thrust back to the beginning. On November 14, 2016, the Court granted Appellants' Motion for Summary Judgment as to each and every cause of action in Appellants' First Amended Complaint and against the Association's Counterclaim. *See* Order Granting Summary Judgment in NRED 2 Litigation, AA000464 - 478.

The district court then awarded Appellants the following: $274,608.28 in attorneys' fees, $4,725.00 in costs, and $823,824.84 in punitive damages pursuant to NRS 42.005. *See* Order Granting Attorneys' Fees and Costs in NRED 2 Litigation, AA000480 - 483; *see also* Order Granting Punitive Damages in NRED 2 Litigation, AA000485 - 488. Pursuant to the foregoing, the total amount of the judgment against the Association and in favor of Appellants in the NRED 2 Litigation, including attorneys' fees and costs, is $1,103,158.12.

C. NRED 3 Litigation

On April 2, 2015, Appellants filed an action against the Association in the Eighth Judicial District, Case No. A-15-716420-C, seeking an order from the Court that the Association hold an election, as it had not held such an election since March 24, 2010. *See* Complaint in NRED 3 Litigation, AA000490 - 497. On September 13, 2017, the Court granted Appellants' Motion for Summary Judgment in the NRED 3 Litigation, and ordered that election take place before a neutral third party. *See* Order

Granting Summary Judgment in NRED 3 Litigation, AA000499 - 506.

On November 7, 2017, the Court awarded Appellants $14,807.50 in attorneys' fees and $655.10 in costs. Order Granting Attorneys' Fees and Costs in NRED 3 Litigation, AA000508 - 511.

All of the foregoing orders in NRED 1, 2 and 3 Litigations are final and not subject to appeal, and all monetary orders are accruing interest.

D. Recording Of The Abstracts

Appellants recorded abstracts of judgment all stemming from the judgment issued in the NRED 1 Litigation against each unit (property) within the Association, including Respondents' properties. *See* Abstracts of Judgment from NRED 1 Litigation, AA000513 - 519. Appellants obtained an Abstract of Judgment in the NRED 2 Litigation as well, but at this time have only recorded that Abstract against the Association.

E. District Court Case No. A-16-747800-C (Supreme Court Dockets 73039)

Two homeowners, The Marjorie B. Boulden Trust ("Boulden Trust") and Jacques and Linda Lamothe Living Trust ("Lamothe Trust"), filed a lawsuit against Appellants 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, AA000019 - 25, Second Amended Complaint, AA000026 - 34. The Complaint and amendments thereto only

dealt with abstracts of judgment related to the NRED 1 Litigation. *See general id.*

On April 26, 2017, after a hearing, the Honorable Judge Timothy C. Williams, district court judge, granted the Boulden Trust and Lamothe Trust's Motion for Partial Summary Judgment on all claims. *See* Findings of Fact and Conclusions of Law and Order Granting Motion for Partial Summary Judgment, AA000051 - 58. Therein, the district court granted a permanent injunction against Appellants. *Id.* The district court also mistakenly entered an order granting summary judgment as to Respondents' slander of title claim. *Id.*

On May 16, 2017, Appellants 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. 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 Order"), withdrawing any findings related to Respondents' slander of title claim. Amended Order, AA000059 - 65.

Appellants appealed the district court's Amended Order in Supreme Court Docket No. 73039. On December 4, 2018, the Supreme Court entered an Order of Affirmance.

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F. Respondents' Lawsuit, District Court Case No. A-17-765372-C

Respondents filed a lawsuit on November 30, 2017, seeking to quiet title to their respective properties and setting forth claims for quiet title and declaratory relief. Complaint in District Court Case No. A-17-765372-C, AA000066 - 75. Respondents' claims address the same abstracts of judgment recorded by Appellants on Respondents' respective properties located within the Association. *See id generally.* The Complaint also addresses the judgments obtained by Appellants against the Association in NRED 2 and NRED 3 Litigation, for which abstracts of judgment were not recorded. *See id.* at ¶¶ 31 – 39, AA000071 - 72. Respondents' complaint sought declaratory relief as to whether Appellants could enforce the judgments in these cases against Respondents, even though no abstracts of judgment had been recorded. *See id.*

On February 27, 2018, the district court, Department XVIII, consolidated Case No. A-17-765372-C with Case No. A-16-747800-C. *See* Order Consolidating Cases, AA000081 - 86.

The parties each filed motions for summary judgment. The district court heard oral argument on the foregoing motions, initially on March 21, 2018. *See generally* March 21, 2018 Transcript of Proceedings ("March 21, 2018 Tran."), AA000751 - 770. Respondents, in both their briefs and during oral argument, urged the district court to apply the Amended Order in Case No. A-16-747800-C to the present case as "law of the case." *See* Respondents' Motion for Summary Judgment, AA000095 - 96; *see also* March 21, 2018 Tran. 8:9 – 22, 9:8 - 15 AA000758, 759. Initially, the district

court found that the Judge Williams' Amended Order was not law of the case. *Id.* at 12:22 – 13:2, AA000762 - 763 ("Obviously, another district court's ruling is not binding. There was a lot of briefing on the issue of preclusion, res judicata, law of the case. I don't think it's law of the case, it hasn't gone up to the Supreme Court and then been decided.")

On May 22, 2018, the district court granted Respondents' Motion for Summary Judgment, or, in the Alternative, Motion for Judgment on the Pleadings and Denying Countermotion for Summary Judgment. *See* Order Granting Motion, AA000780 - 793. The Order Granting Motion (at issue) holds Judge Williams' Amended Order in Case No. A-16-747900-C is "law of the case." Order Granting Motion, Conclusions of Law ("COL") No. 1, AA000786; *see also* Transcript from May 2, 2018 Hearing ("May 2, 2018 Tran."), 4:23 – 24, AA000774 ("I found that Judge Williams' Order was law of the case.") Hence, the Order Granting Motion mirrors Judge Williams' Amended Order per the district court's instruction to counsel. *Id.* at 5:12 – 20, AA000775.

Summary of Argument

The district court erred in granting Respondents Motion for Summary Judgment and, with it, a permanent injunction when the district court erroneously concluded that Judge Williams' prior Amended Order in Case No. A-16-747900-C was *law of the case*. Further, the district court erred in applying Judge Williams' prior order to the present matter with respect to the NRED 2 Litigation because in that litigation, the

parties stipulated that the Amended CC&Rs and the entirety of Chapter 116 applied to the NRED 2 Litigation.

Finally, principles of equity and fairness should guide this Court in its determination in this matter. Specifically, Appellants should be afforded the very same rights and remedies that were available to the Association during the course of the NRED 2 Litigation as set forth in the Amended CC&Rs and entirety of Chapter 116. The district court awarded damages, attorneys' fees and costs to Appellants citing the Amended CC&Rs and Chapter 116, but then strip Appellants of the collection rights included therein. Had the Association prevailed, it would have a plethora of oppressive remedies available to it, including the right to lien and foreclose on Appellants' property. To divest Appellants of collection rights afforded to creditors of unit owners' association is an inequitable, if not absurd, result.

Argument

I. THE COURT SHOULD APPLY A DE NOVO STANDARD OF REVIEW TO THE DISTRICT COURT'S GRANTING OF PERMANENT INJUNCTIONS

Where injunctive relief is granted by way of summary judgment, the Court applies a de novo standard of review. *A.L.M.N., Inc. v. Rowsoff*, 104 Nev 274, 277, 757 P.2d 1319, 1321 (1988); *Wood v. Safeway, Inc.*, 121 Nev 724, 729, 121 P.3d 1026, 1029 (2005).

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II. THE DISTRICT COURT ERRED IN FINDING THE PRIOR DISTRICT COURT ORDER WAS "*LAW OF THE CASE*"

Fundamental to the district court's granting of summary judgment and Order is its initial finding that "the Court's prior Order with respect to the Boulden Trust's and Lamothe Trust's Motion for Partial Summary Judgment, Case No. A-16-747900-C, is the law of the case, to the extent applicable to [Respondents'] claims." Order Granting Motion, COL N0. 1, AA000786; May 2, 2018 Tran., 4:23-24, AA000774 ("I found that Judge Williams' order was law of the case.") Consistent with this finding, the district court merely ordered Respondents' counsel to mirror Judge Williams' prior order in drafting the Order in this matter. *Id.*, AA 5:12 - 20. In fact, this was the district court's only substantive finding. *See generally id.*

Judge Williams' Amended Order in Case A-16-747800-C is not binding on the district court. Judge Williams' Amended Order, at the time of the district court's hearing and determination of this matter, was not final, rather it was partial and interlocutory. The Order Granting Motion was entered on May 22, 2018. See Order Granting Motion, AA000780. The Supreme Court's Order of Affirmance related to Judge Williams' Amended Order was entered nearly six (6) months later on December 4, 2018.

The doctrines of res judicata and issue preclusion are "triggered when judgment is entered." *Univ. of Nev. v. Tarkanian*, 1110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994). There must be a final determination by a court of competent jurisdiction. *Id.*

An order granting partial summary judgment is not a final order or judgment where issues of damages remain. *Mid-Century Ins. Co. v. Pavilkowski*, 94 Nev. 162, 576 P.2d 748 (1978), *see also Hallicrafters Co. v. Moore*, 102 Nev. 526, 528, 728 P.2d 441, 442 (1986). Further, there was no certification by the court that this was a final judgment under NRCP 54(b).

A "final order" resolves all claims against all parties, leaving nothing for further consideration except for post-judgment issues, *i.e.* attorneys' fees. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000); *see also Cox v. Gilcrease Well Corp.*, 2014 WL 2466229 (2014). The Order Granting Partial Summary Judgment was not a final order as claims remained in that case.

The law of the case doctrine "refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (*i.e.*, established as law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C.Cir.1995). "Normally, 'for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication.'" *Reconstruct Co. v Zhang*, 317 P.3d 814, 818 (2014) (quoting *Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. ——, ——, 223 P.3d 332, 334 (2010)), *see also Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44-46, 223 P.2d 332, 335 (2010) (holding that in order for the law-of-the-case doctrine to apply, the appellate court must specifically and actually address and decide the issue). A trial court's ruling

does not constitute law of the case. *Byford v. State* 116 Nev. 215, 232, 994 P.2d 700, 711-12 (2000). The issue must be adjudicated on appeal. *Id.*

Indeed, a court has the discretion to revisit prior rulings in the same case, provided such rulings and issues decided therein have not been decided by the appeal or Supreme Court. *Bejarano v. State*, 122 Nev. 1066, 1074-75, 146 P.3d 265, 271-72 (2006). Thus, in *Dictor*, supra, the Supreme Court held that a district court could entertain a renewed motion for summary judgment based on new and alternative statutory defenses that were not raised in a prior summary judgment motion.

In the present case, the district court had the jurisdiction and discretion to revisit all prior rulings, specifically Judge Williams' Amended Order. And initially, the district court indicated as much. March 21, 2018 Tran. 12:22 – 13:2, AA000762 – 763. However, without question, Judge Williams' Amended Order was not law of the case and not binding on the district court in this matter because the Order of Affirmance related to the Amended Order was not entered (and the appeal not decided by this Supreme Court) until December 4, 2018.

The district court made no independent substantive findings. Rather, it instructed Respondents to mirror Judge Williams' Amended Order (while deleting any parts that did not apply to this case). May 2, 2018 Tran., 5:12 – 20, AA000775.

Further, the district court's incorrect application of the law of the case doctrine is not *harmless error*. Misapplication of the rule prevented the district court from analyzing the factual distinction with the NRED 2 Litigation – specifically the

Stipulation entered into therein whereby Appellants and the Association agreed the Amended CC&Rs (and therefore Chapter 116) governed the legal issues in the case.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AND ORDERING A PERMANENT INJUNCTION AS TO THE NRED 2 LITIGATION

A. The Supreme Court's Order Of Affirmance In Docket 73039 Settles All Legal Issues Applicable To The NRED 1 And NRED 3 Litigation

Appellants will not address herein the matters already determined by the Supreme Court in Docket 73039. As set forth above, this docket applies to the NRED 1 Litigation, but the reasoning can equally apply to the NRED 3 Litigation.

However, there is an important factual and legal distinction with respect to the NRED 2 Litigation that distinguishes that case and provides Appellants with the right to enforce its judgment obtained therein pursuant to NRS 116.3117. Specifically, in that matter, Appellants and the Association stipulated at the outset of the litigation that the Amended CC&Rs and entirety of Chapter 116 applied throughout the course of the litigation. Indeed, the district court initially granted summary judgment in favor of the Association based substantially upon the Stipulation.

This is contrasted by the NRED 1 and NRED 3 Litigation wherein Appellants vehemently contended (1) the Amended CC&Rs were *void ab initio* as they were unlawfully adopted, and/or (2) the Association was a limited purpose association, whereby only limited provisions of Chapter 116 applied.

B. The Stipulation In NRED 2 Litigation Distinguishes That Case From The NRED 1 And NRED 3 Litigation

In the NRED 2 Litigation (and underlying Chapter 38 arbitration), Appellants and the Association stipulated the Amended CC&Rs were valid and enforceable for the purpose of the NRED 2 Litigation. Stipulation, AA000425 - 430. Indeed, in the Complaint in that action, Appellants included the following language in their Complaint:

> Pursuant to a stipulation and/or agreement between the Plaintiff TRUST and the Defendant ASSOCIATION in the NRED action, the parties to the NRED action agreed that the Amended CC and R's and Bylaws of the Defendant ASSOCIATION was valid and enforceable only for the purpose of the NRED action and because this is a trail de novo of the NRED action the Plaintiff TRUST once again agrees for the purpose of this litigation only that the Amended CC and R's and Bylaws of the Defendant ASSOCIATION are valid and enforceable.

Complaint in NRED 2 Litigation, ¶ 11, AA000436.

Indeed, for the purposes of that litigation only, the Amended CC&Rs unquestionably define the rights, liabilities and obligations of the parties. Appellants obtained a judgment in the NRED 2 Litigation in the total amount of $1,103,158.12, which amount was awarded pursuant to the Amended CC&Rs and NRS, Chapter 116.

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When this litigation was before the Supreme Court (after Appellants appealed an adverse ruling), the Supreme Court noted the importance of the foregoing Stipulation, stating that its ruling was "premised in part on [Appellants'] stipulation as to the Amended CC&Rs validity." Supreme Court Order Re: NRED 2 Litigation, AA000521 - 522.

C. The Amended CC&Rs Incorporate The Entirety Of Chapter 116 And Apply The Same To The Association And Every Unit Therein

The Amended CC&Rs provide, in pertinent part, as follows:

> Section 1.1. "'Act' shall mean and refer to the State of Nevada's version of the Uniform Common-Interest Ownership Act, codified in NRS Chapter 116, as it may be amended from time to time, or any portion thereof."
>
> Section 1.14(e). "...the Property is a common interest community pursuant to the Act."
>
> Section 1.38. "'Property' shall refer to the Property as a whole, including the Lots and Common Elements, as restricted by and marketed and sold to third parties in accordance with this Declaration."
>
> Section 1.24. "'Governing Documents includes the Amended CC&Rs.
>
> Article 2: "The Association is charged with the duties and vested with the powers prescribed by law and set forth in the Governing Documents."

Amended CC&Rs, AA000366, 367 – 368, 370 - 371.

Thus, the Amended CC&Rs, which were, without question, the document governing the rights, duties and liabilities of Appellants and the Association in the NRED 2 Litigation, incorporate and apply the entirety of Chapter 116, including NRS 116.3117. And, indeed, the district court therein awarded attorneys' fees pursuant to

the Amended CC&Rs and Chapter 116. Order Granting Attorneys' Fees in NRED 2 Litigation, AA000480 - 483.

D. Equity Demands Appellants Be Afforded The Same Rights And Liabilities Imposed Against Them By The Amended CC&Rs And Chapter 116

Bouvier Law Dictionary defines "equity" as follows:

> A power in the legal system to craft special remedies in appropriate disputes, or the prudence that should govern such remedies. Equity, in general, is the use of rightness, fairness, and equality to adjudicate a dispute. In the legal system, equity is both the determination of a legal dispute through general principles of right and the use of these principles to prevent overly strict applications of general laws in specific circumstances.
>
> Equity relies less on precedent and more on principle, and equity jurisprudence, now an arcane but still vital art, has broader principles for standing and for relief than are available in law, governed by flexible principles of decision, especially maxims.

"Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and 'good conscience' referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, the distinction of its two elements has blurred, and it has a secular rather than religious cast. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006) (finding that the court has flexible discretion to apply Federal rule of Civil Procedure 19 for the sake of equity, to achieve an appropriate, fair and equitable result) (citing, in part, *Montana v.*

Crow Tribe of Indians, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998).) As stated by the United States Supreme Court, "[e]quity fashions a trust with flexible adaptation to call of the occasion." *Adams v. Champion*, 294 U.S. 231, 237 (1935).

When a court considers a case in equity, it "must consider the equity of the circumstances that bear upon the equity," giving consideration to the totality of the circumstances. *Shadow Wood Homeowners Ass'n v. New Your Comty. Bancorp.*, Inc. 366 P.3d 1105, 1114 (citing *In re Petition of Nelson*, 495 N.W.2d 200, 203 (Minn. 1993).)

Such was the case in *Mackintosh v. California Federal Sav. & Loan Ass'n* (1997) 113 Nev. 393, 405-406, 935 P.2d 1154, 1162, where the Nevada Supreme Court applied equity to determine that a party who successfully defended a breach of contract action and ultimately led to the determination that such contract was void ab initio could enforce the attorney fee provision contained therein. In *Mackintosh*, the purchasers of real property sued a savings and loan association for rescission of a residential property purchase agreement. *Id.*, 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.

Although the contract was declared to, essentially, have never existed, the Court in *Mackintosh* determined that it would be inequitable for only the party seeking to enforce the contract to be afforded an award of attorneys' fees. Out of fairness, the remedy had to be mutual.

Appellants admittedly come to this Court contending with the Court's prior order in Docket 73039, whereby the Court found Appellants did not have a right to record a judgment lien derived from the NRED 1 Litigation on units within the Association because the Association is now a limited purpose association, whereby NRS 116.3117 does not apply. The fact that sets this matter apart, however, and demands a remedy in equity, is that Appellants and the Association stipulated the Amended CC&Rs, and entirety of Chapter 116 which is incorporated therein, were the governing documents by which those parties submitted the issues for adjudication.

Further, the district court initially granted the Association summary judgment, holding the assessment, foreclosure and attorney fee provisions all provided substantial relief to the Association. The district court's order left Appellants with an unenviable choice, post a substantial bond or lose their property to the Association via its foreclosure.

Appellants posted a $123,000.00 bond and spared their property (as well as other assets held by Appellants), ultimately prevailing in the matter after the Supreme Court reversed the district court's ruling. While the definitive rulings in the NRED 2 Litigation favored Appellants, the journey to achieve this result was arduous and costly. Now, the district court's Order at issue leaves Appellants with a meaningless remedy. While the district court afforded the Association all of the benefits of assessment, foreclosure and collection pursuant to the Amended CC&Rs and Chapter 116, it now blocks Appellants from the remedies provided by the Amended CC&Rs and Chapter 116 simply because Appellants were successful in voiding the governing document used by the Association to financially oppress them. The result is, at the very least, inequitable, and perhaps even absurd. While the district court in the NRED 2 Litigation awarded fees pursuant to the Amended CC&Rs and 116.4117, the district court now says Appellants cannot collect those fees using the very same Amended CC&Rs and NRS 116.3117. This is, frankly, an absurd result. It truly is as simple as understanding that had the Association prevailed, it could have, and indeed would have, exercised every right and remedy provided by the Amended CC&Rs and

Chapter 116. But because Appellants prevailed, the district court states they are without those very same rights and remedies.

Appellants contend few cases come before this Court more suited for the Court's sound, reasoned, and just determination based on principles of fairness and equity. Appellants simply seek an equal application of the rules – specifically, that the Amended CC&Rs and Chapter 116 be open to Appellants to utilize in enforcing the judgment in the NRED 2 Litigation.

E. THE PLAIN MEANING RULE SHOULD NOT APPLY TO THE COURT'S ANALYSIS OF CHAPTER 116

The Supreme Court, in its recent ruling in Docket 73039, states "the plain language of Chapter 116 cannot be expanded in the way Appellants urge." However, Chapter 116 is an incomplete and ambiguous statute with respect to limited purpose associations. Respectfully, this Court should not solely rely on the plain meaning of the statute because it fails to address obvious necessities. Where a statute is not clear or is ambiguous, the plain meaning rule has no application. *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); Robert E. v. Justice Court, 99 Nev. 443, 664 P.2d 957 (1983); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441, 1986 Nev. LEXIS 1609, *5, 13 Media L. Rep. 2066. An ambiguous statute can be construed "in line with what reason and public policy would indicate the legislature intended." *Robert E. v Justice Court of Ren Township*, 99 Nev.443, 445 (1983).

With due respect to the Nevada legislature, Chapter 116 is incomplete, ambiguous and often confusing with respect to the inclusion (or exclusion) of limited purpose associations. For example, while a limited purpose association must have a Board of Directors, there is no statutory mechanism for elections. NRS 116.1201, 116.31083, 116.31152. Pursuant to the provisions of Chapter 116 applicable to limited purpose associations, the Board must conduct noticed meetings at least once every quarter, review pertinent financial information, discuss civil actions, revise and review assessments for the common area expenses, establish adequate reserves, conduct and publish a reserve study, and maintain the common areas as required. NRS 116.31083 – 116.31152, 116.31073. But electing this Board is not dealt with anywhere in Chapter 116.

A limited purpose association is not required by Chapter 116 to obtain insurance for the common elements (NRS 116.3113, et. seq.), but a limited purpose association only stands to benefit from procuring such insurance. A limited purpose association is required to complete a reserve study and maintain adequate reserves (NRS 116.31152), but there are no provisions related to the funding of the reserves. Simply stated, Chapter 116 is, in some respects, poorly drafted and incomplete as it relates to limited purpose associations.

Because the plain meaning does not apply, the Court may use its discretion to interpret and apply the statute in line with equitable public policy. *Robert E.*, 99 Nev. at 445. *Mackintosh, supra,* tells us the Nevada Supreme Court is concerned with

equity, fairness, and equal application of contractual provisions even when the party asserting the invalidity of the contract prevails.

As set forth above, equity, and indeed public policy, should provide Appellants with the same rights and remedies available to the Association in the NRED 2 Litigation. The Association took full advantage of its powers to assess, lien, and foreclose as provided in both the Amended CC&Rs and Chapter 116 beginning in July 2007 and through July 2013. To illustrate the absurdity of a contrary holding, the district court awarded Appellants attorneys' fees pursuant to the Amended CC&Rs and NRS 116.4117. The district court did so citing *Mackintosh*. Order Granting Attorneys' Fees in NRED 2 Litigation, AA000480 - 483. Yet, the district court now strips Appellants of the right to collect the attorneys' fees in a manner provided in the Amended CC&Rs and Chapter 116. Principles of equity and application of public policy should enable Appellants to utilize the Amended CC&Rs and Chapter 116 to collect just as they were awarded damages, attorneys' fees and costs.

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

Should the Court determine that equity must apply and Appellants should be afforded the very rights and remedies available to the Association had it prevailed, Appellants seek to enforce the judgment against Respondents pursuant to NRS 116.3117.

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NRS 116.3117 provides, in pertinent part:

> 1. In a condominium or planned community:
>
> 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.").

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 Respondents' Motion for Summary Judgment, or in the Alternative, for Judgment on the Pleadings and the permanent injunction and remand that case back to the district court.

DATED this 14th day of January, 2019.

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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:

[ ] Does not exceed 30 pages; or

[**X**] Proportionately spaced, has a typeface of 14 points or more and contains **8,171** words.

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 14th day of January 2019.

Richard E. Haskin
Counsel for Appellants

CERTIFICATE OF SERVICE

1. Electronic Service:

I hereby certify that on this date, the 14th day of January 2019, I submitted the foregoing **Appellant's Opening Brief (Docket 76198)** 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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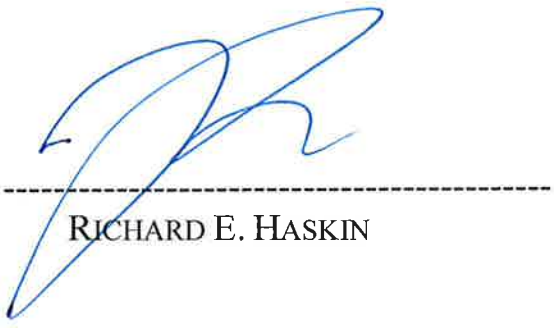

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