IN THE SUPREME COURT OF NEVADA

PATRICIA ANTHONY; and WILLIAM ANTHONY, Appellants, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent	Supreme Court Case No. 79284

Appeal from the Second Judicial District Court, Department VIII
The Honorable Barry L. Breslow, District Judge
District Court Case No. CV17-00843

RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Respondent Federal National Mortgage Association (**Fannie Mae**) is a Government-Sponsored Enterprise. Fannie Mae has no parent, subsidiary, or affiliate entities (corporate or otherwise) that have issued stock or debt securities to the public, and no publicly held entity (corporate or otherwise) owns 10% or more of its stock.

Fannie Mae has no parent, subsidiary, or affiliate entities (corporate or otherwise) that have a financial interest in the outcome of this litigation.

Dated: July 29, 2020.

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this matter under NRAP 3A(b)(1). The district court entered its Findings of Fact, Conclusions of Law and Judgment on August 16, 2019, finally resolving all issues. (AER 430-440). Appellants Patricia Anthony and William Anthony (the **Anthonys**) filed a premature notice of appeal from the Judgment on July 24, 2019 (AER 424-429) and then filed an amended notice of appeal on February 11, 2020. (AER 444-461).

ROUTING STATEMENT

This appeal is presumptively retained by this court because it raises a question of statewide public importance. *See* NRAP 17(a)(12).Fannie Mae disagrees with the characterization of the case described in the Anthonys' Routing statement. (AOB at 2). The case involves a properly conducted NRS Chapter 116 foreclosure sale of real property. Subsequent actions by the purchaser at the foreclosure, here the foreclosing beneficiary, do not retroactively change the character of the foreclosed upon property. Whether the Anthonys should recover a self-described "windfall" in damages stemming from their own conduct is resolved by established Nevada law about real property.

INTRODUCTION

This is an appeal of the district court's order that granted summary judgment for plaintiff-respondent Federal National Mortgage Association (**Fannie Mae**) on its claims for trespass against its former borrowers, defendants-appellants Patricia and William Anthony (the **Anthonys**). (AER 440; *see also* 420-423, 430–440). The district court also denied the Anthonys' motion for partial summary judgment on their counterclaims for damages under Article 9 of Nevada's version of the Uniform Commercial Code ("UCC"), NRS 104.9625, conversion, abuse of process/excessive attachment, and recoupment. (Id.). The Anthonys appeal the district court's denial of their counterclaims. (*See* AOB at 6). Based on the district court's application of the law to the admissible evidence, this court should affirm the judgment.

Fannie Mae brought the action for trespass against the Anthonys, for their refusal to vacate property Fannie Mae obtained at a nonjudicial foreclosure sale conducted under a deed of trust that secured a refinance loan. (AER 1-30). The district court found that the real property foreclosed upon included the land and real property improvements consisting of a 3,700 square foot residence, comprised of two manufactured homes (a 1996 Fuqua and 1997 Fuqua), which were permanently connected to each other to form one home. (*See* AER 435 ¶¶3, 4). The court found the Anthonys had trespassed on Fannie Mae's property by refusing to vacate after a foreclosure and after judgment was entered against them in a contested unlawful

detainer action. (*See* AER 435 ¶5). The Anthonys do not challenge the district court's judgment in favor of Fannie Mae on its claim for trespass, thereby waiving it on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329–30, 130 P.3d 1280, 1287–88 (2006) (appellant failed to address in his briefs the district court's dismissal of claims related to the issues presented on appeal, thereby "neglect[ing] his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims."). While Fannie Mae does not abandon its argument the Anthonys waived this challenge, assuming this court considers the district court's finding that the '96 Fuqua was a real property improvement under the deed of trust, this court can nevertheless affirm.

The Anthonys' counterclaims asserted that one of the attached manufactured homes, the 1996 Fuqua, was personal property that had not been converted to real property and therefore Fannie Mae's disposition of that portion of the residence violated the UCC or, alternatively, was unlawful conversion. (AER 31-42). The Anthonys also asserted counterclaims for abuse of process/ excessive attachment (*id.*) and argue they are entitled to recoupment if their counterclaims were time-barred. There is no dispute regarding the disposition of the land and the 1997 Fuqua. (*See* AOB; *see also* 268). The Anthonys concede the Residence was collateral for the loan and secured by a deed of trust. (AOB at 4).

The court correctly ruled against the Anthonys on their counterclaims. (AER 435 ¶6, 436-437¶¶15-17). It found Fannie Mae had properly foreclosed on the entire property, which included both attached and connected manufactured homes, as real property improvements permanently affixed to the land. (*See* AER 435, 436). Not challenged on appeal etc.

The court also ruled that, even if the attached manufactured homes were personal property, under Nevada law, where a security instrument includes both real property and personal property, a secured creditor may enforce its rights to real property without invoking the UCC. NRS § 104.9604(1)(b). (AER 435, 436; *see also* 437 ¶14). The district court found the single-family residence, comprised of the two attached and connected manufactured homes, was an "improvement" under the deed of trust and thus the foreclosure of the deed of trust complied with the UCC in the disposition of the entire property. (AER 435 ¶3; 435-436 ¶7; 437 ¶14).

The court also correctly determined the Anthonys' counterclaims were time-barred by the applicable three-year statute of limitations. (AER 435 ¶6, 436 ¶¶8-10, 11, 437 ¶14). The Anthonys brought their counterclaims in August 2017, more than four years after the foreclosure was conducted in April 2012, and after Fannie Mae obtained an unlawful detainer judgment against the Anthonys in November 2012 in a contested unlawful detainer action. (AER 360-67). The Anthonys' 2017 counterclaims asserting that the manufactured homes were personal property as of

March 2012, and not included in the foreclosure sale, was never asserted by a challenge to the foreclosure in the district court in 2012 or in the unlawful detainer action. (*See* AER 231 ¶1; AER 233-234 ¶5). The three-year statute of limitations for conversion and alleged violations of the UCC expired no later than November 2015, almost two years before the Anthonys raised them.

Finally, the district court also correctly found the claims barred by claim preclusion. (*See* AER 438¶¶18-439 ¶24). Any challenge to the judgment on that basis has been waived by the Anthonys' failure to address it in their opening brief. *Powell v. Liberty Mut. Fire Ins. Co.* (2011) 127 Nev. 156, 161, n. 3, 252 P.3d 668 ("Issues not raised in an appellant's opening brief are deemed waived.").

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined the '96 Fuqua manufactured home — attached and connected to another manufactured home which the Anthonys made as part of and a permanent improvement to the real property — was legally recovered by Fannie Mae at the April 2012 foreclosure occasioned by the Anthonys' loan default.

2. Whether the district court correctly found the Anthonys' counterclaims that had accrued in the November 2012 unlawful detainer action were time-barred, and correctly rejected their recoupment defense.

STATEMENT OF THE CASE

This is an action for trespass that follows from a nonjudicial foreclosure and subsequent unlawful detainer action. (*See* AER 1-30). The borrowers pledged their land and their single-family residence (which consisted of two connected manufactured homes) as collateral for a refinance loan in 2002. The borrowers defaulted on the loan obligation, and the beneficiary under the deed of trust, Fannie Mae, completed a foreclosure in April 2012. The Anthonys would not voluntarily vacate the property, forcing Fannie Mae to sue for unlawful detainer. Fannie Mae prevailed on the contested unlawful detainer action and obtained multiple writs of possession in an attempt to remove the Anthonys. The Anthonys still refused to vacate, so Fannie Mae had to sue them yet again for trespass. (AER 1-30).

The Anthonys answered in August 2017 and filed counterclaims for conversion, violation of Article Nine of the UCC, abuse of process/excessive attachment. (AER 31–42). The counterclaims are premised on the theory that a portion of the single family residence, one of the connected manufactured homes, was personal property and not sold or disposed of in the foreclosure sale. (AER 31–42). According to the Anthonys, Fannie Mae either violated the UCC when it changed title to itself in November 2015 or wrongfully converted that portion of the single family residence. (*See* AER 31–42). The Anthonys did not challenge Fannie

Mae's claims to the property in the foreclosure proceedings or in the eviction action, though they had the opportunity to do so. (*See* AER 31-42).

The district court granted summary judgment on Fannie Mae's claims for trespass and against the Anthonys on their counter claim. (AER 440). The Anthonys appealed before the judgment was filed on July 24, 2019. (AER 424-429). They filed a notice of amended appeal on February 11, 2020. (AER 444-461).

The Anthonys remain on the property, and they must make payments and pay taxes and insurance during the appeal.

STATEMENT OF FACTS

A. The Anthonys' Residence and Land Was the Real Property Collateral for The Refinance Loan

1. *The residence, made of two attached and connected manufactured homes, was a single-family home permanently on the land owned by the Anthonys*

The Anthonys purchased the unimproved land identified as 3705 Anthony Place in 1994. (*See* AER 262 ¶1). In late 2000, they purchased two separate manufactured homes from Trinity Homes, Inc., their employer of over thirty years. One manufactured home is the 1996 Fuqua Golden Eagle with serial no. 15233AC which and measured 38'6" x 66'8" (" the '96 Fuqua). (*See* AER 165-166 [Exhibit 1, Title and Report of Sale]; (AER 178 [Exhibit 4, Loan Application]). The second manufactured home is the 1997 Fuqua Eagle Ridge, with serial no. 15470 and that

measured 25'8" x 48' ("'97 Fuqua"). (*See* AER 165-166 [Exhibit 1, Title and Report of Sale]; (AER 178 [Exhibit 4, Loan Application]). The Anthonys connected the two manufactured homes together to form one single-family residence and physically attached it to 3705 Anthony Place, Sun Valley, Nevada. (*See* AER 187 [Appraisal at 179–201]). They signed an Affidavit of Conversion to Real Property under penalty of perjury purporting to convert both manufactured homes to real property which reflected that the two manufactured homes are connected as one unit. (AER 168). Though the Affidavit only identifies the year "1997", it includes the serial numbers for each unit (i.e., "15233 AC" and "15470") and includes the measurements for each unit ("38'6" x 66'8"" and "25'8" x 48"') . (*See* AER 167-169). The Affidavit was recorded November 22, 2000 and is a part of the chain of title for 3705 Anthony Place informing the world that the manufactured homes are attached and part of the real property. *See* NRS 247.190.1; *In re Crystal Cascades Civil, LLC*, 398 B.R. 23, 29 (Bankr. D. Nev. 2008), *aff'd*, 415 B.R. 403 (B.A.P. 9th Cir. 2009) (Nevada law provides that every document recorded in a county recorder's office gives notice to all persons upon recordation).

In late 2001, the Anthonys applied for a refinance loan for what they described as a single-family unit valued at $270,000, built in 1999 and acquired in 2000. (AER 177-178 [Exhibit 4, Loan Application]). They were seeking to refinance existing liens in the amount of $212,425 with no cash out. (*See id.*). With that application,

the Anthonys authorized an interior appraisal of the home. (AER 179-201 [Exhibit 5]). The appraisal described the entire residence as a manufactured home with multiple upgrades. (AER 179-201). The residence was 3,798 square feet. (AER 179-201). It included 7 bedrooms and 4 bathrooms, an attached porch, and crawl space underneath. (AER 179-201). Utilities were attached. (AER 179-201). The tongue and groove, "wheels, axles, and trailer hitches" were removed. (AER 185). According to the appraisal, the manufactured home was "permanently attached to the site." (AER 185; *see also* 179-201). The building sketch (AER 187) and photographs in the appraisal reflect the configuration of the residence as an "L-shape", reflecting the attachment of the two units, where outer walls from each unit are removed to create an open space where one could walk in between rooms throughout the entire residence without leaving the single family home. No wall separates the two units. (AER 187). They form one home with one address of 3705 Anthony Place. (AER 179-201). The overall property was valued at $268,000. (AER 179-201). The appraisal specifically noted that it did not include personal property in determining the value of the property. (AER 184).

In the loan application process, the Anthonys signed an "Occupancy Declaration" declaring under penalty of perjury they "will occupy the subject property as [their] principal residence as required by, and in compliance with, the terms of the Deed of Trust relating to the subject property." (AER 265 [Exhibit 15]).

2. *The deed of trust describes the trust property as the land* "together with *all the improvements now or hereafter erected on the property"*

Based on the application and the appraisal, the Anthonys were approved for a $214,400 loan in June 2002 from Capitol Commerce Mortgage Co. (AER 170-176 [Exhibit 3]). This was in line with the $268,000 value of the entire property as appraised. (AER 179-201 [Exhibit 5]). As security for the loan, the Anthonys signed a deed of trust dated June 21, 2002. (AER 202-215 [Exhibit 6]). In signing the deed of trust, the Anthonys granted to the trustee under the deed of trust the "power of sale" of:

> the following described property located in
>
> COUNTY OF WASHOE
>
> PARCEL 4 OF PARCEL 4 MAP 2908 ACCORDING TO THE MAP THEREOF, FILED IN THE OFFICE OF THE COUNTY RECORDER, WASHOE COUNTY, STATE OF NEVADA ON JUNE 2, 1995. AS FILE NO. 1897855. EXCEPT ALL THAT PORTION OF SAID LAN LYING WITHIN EL RANCHO DRIVE AS DEDICATED TO THE CITY OF SPARKS BY "DEDICATION MAP OF MOORPARK COURT AND EL RANCHO DRIVE" RECORDED JUNE 28, 1999 AS DOCUMENT NO. 2355346 TRACT MAP NO. 3713.

> which currently has the address of 3705 ANTHONY PLACE SUN VALLEY, NEVADA, 89433 ('Property Address')
>
> **TOGETHER WITH** *all the improvements now or hereafter erected on the property,* and all easements, appurtenances, and fixtures now or hereafter a part of the property. … All of the foregoing is referred to in this Security Instrument as the 'Property'. …

(AER 205 [Exhibit 6], 214, italics added; AER 102 [recorded as instrument number 2703700 in the Washoe County Recorder].)

B. Fannie Mae bought the property at the April 23, 2012 foreclosure sale, but the Anthonys refused to leave forcing Fannie Mae to recover possession in its November 2012 unlawful detainer action

The Anthonys concede they defaulted on the loan (*see* AOB at 4) and Fannie Mae, then beneficiary under the deed of trust, exercised the power of sale under the deed of trust. There is no dispute the foreclosure sale complied with the nonjudicial foreclosure statutes. (*See* AER 31-42). First, a notice of default was recorded May 2, 2011, declaring that the sums secured by the deed of trust, identified as instrument number 2703700, were "immediately due and payable" and that the beneficiary had "elect[ed] to cause the trust property to be sold to satisfy the obligations secured thereby." (AER 217-218 [Exhibit 7]).

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Next, a notice of sale was recorded March 30, 2012. (AER 219-221 [Exhibit 8]). The notice of sale notified the Anthonys they were "**IN DEFAULT UNDER A DEED OF TRUST, DATED JUNE 21, 2002,"** and that "**UNLESS [THEY] TAKE ACTION TO PROTECT [THEIR] PROPERTY, IT MAY BE SOLD AT PUBLIC SALE**." (AER 220, boldfaced capitalization in original). The notice of sale provided the instrument number of the deed of trust as 2703700 recorded in the County Recorder's Office and states the property to be sold is as described in the deed of trust. (AER 220). The notice of sale also stated the estimated debt secured by the deed of trust was approximately $249,256 as of March 30, 2012. (AER 220).

A foreclosure sale was completed on or about April 23, 2012. (AER 223-225 [Exhibit 9]). The debt at the time of the foreclosure was $246,400. Fannie Mae became the owner of the property by a credit bid in the amount of $245,678. (AER 223-225 [Exhibit 9]). The Trustee Deed Upon Sale was recorded April 26, 2012. (AER 223-225 [Exhibit 9]).

After the foreclosure sale, Fannie Mae, through its agent, initiated an unlawful detainer action by posting a three-day notice to quit on the Anthonys' home. (*See* AER 262-263 [Exh. 14]; *see also* 250-265). The Anthonys responded to the Notice to Quit, with handwritten comments disputing the ownership, and attached miscellaneous documents concerning their claims to the property. (*Id.*). One of the documents was titled "Notice of Property Interest By … Anthonys" ("Notice"). (*See*

AER 262-263; *see also* 250-265). In this Notice, the Anthonys concede the manufactured homes were improvements to the property and security for the loan, while also stating the manufactured homes are personal property. (AER 262 ¶4). Their signatures to this Notice were notarized on March 14, 2012. (*Id.*).

Fannie Mae filed its unlawful detainer action on June 6, 2012. (*See* AER 226–235 [Case no. 12-SCV-0936]). In the unlawful detainer complaint and in the action itself, the Anthonys were notified that Fannie Mae claimed title to the property by way of the April 2012 foreclosure and sought possession of the premises. (*See* AER 227). The Anthonys appeared in the unlawful detainer action and had a chance to challenge Fannie Mae's title of the Property, but failed to do so. In ruling on Fannie Mae's motion for judgment on the pleading, the unlawful detainer court found:

(1) "While the Anthonys have taken evey opportunity to send statements and documents concerning their political beliefs and jurisdiction of [the unlawful detainer court] or any court to hear matters concerning their property … they have never directly addressed in their answer or other documents the fact that a foreclosure was held in this case, and a Deed of Trust was presented to the [unlawful detainer court] showing tha the property in question was deed to Federal National Mortgage Association on April 23, 2012." (AER 231).

(2) The Anthonys had appeared. (AER 231-232).

(3) "[Fannie Mae] met its burden of proof, pursuant to NRS 40.255 and 40.300, which allows for unlawful detainers following foreclosure. Pursuant to NRS 40.300 the bank is obligated to set forth facts explaining why they are seeking to recover the property. [Fannie Mae] set forth its allegations to show that pursuant to NRS 40.255, they have perfected title, provided appropriate notice, and the time for holding that title had expired. [Fannie Mae] has proferred a copy of the duty recorded title, has alleged that they have possession of such a title, and the [Anthonys] never challenged that they do so." (AER 232 ¶4).

(4) "The Anthonys answer failed to counter [Fannie Mae]'s claims or deny them, but indeed in many instances seems to have admitted them." (AER 232 ¶5).

(5) The Anthonys failed to respond to the motion for judgment on the pleadings. (AER 233 ¶6).

The unlawful detainer court ordered, inter alia, that "The Anthonys never directly addressed the underlying foreclosure or recording of the deed transferring their former property to [Fannie Mae]. Failing to respond or deny those averments deems them admitted." (AER 233-234 ¶5). Though Fannie Mae has obtained multiple writs of restitution, the Anthonys refuse to vacate the property. (*See* AER 237-240).

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C. Procedural History

Because the Anthonys refused to vacate the property, on May 2, 2017, Fannie Mae filed the action below to obtain an order of trespass and injunctive relief to prevent the Anthonys from interfering with the removal of their personal belongings from the property and to prevent the Anthonys from re-entering the premises or interfering with Fannie Mae's quiet enjoyment. (AER 1-30). On August 21, 2017, the Anthonys filed their counterclaim for Violation of Article Nine of the UCC, Conversion, and Abuse of Process/ Excessive Attachment. (AER 31-42). The Anthonys asserted the attached '96 Fuqua was not part of the property at the foreclosure and Fannie Mae wrongfully took action regarding the '96 Fuqua when it had the title changed to itself in November 2015 with the Department of Business and Industry, Manufactured Housing Division ("Manufactured Housing Division").

Fannie Mae moved for summary judgment and the Anthonys moved for partial summary judgment for UCC damages under NRS 104.9625 and conversion. (Exs. 11, 12, 14; Exs. 10, 13, 15.) After a long argument on the motions on July 8, 2019, the court took the matter under submission. (AER 462-507 [Ex. 21, Reporters' Transcript of Proceedings]). The court issued an order on July 10, 2019, granting Fannie Mae's motion for summary judgment on its claim for trespass and against the Anthonys on their counterclaims (AER 420-423). The court denied the Anthonys'

partial motion. The court issued and signed a Findings of Fact and Conclusion of Law on August 16, 2019. (AER 430-440).

The district court found the following:

- Fannie Mae obtained title to the property in April 2012 via the foreclosure sale under the deed of trust. In signing the deed of trust, the Anthonys permitted the trustee under the deed of trust to sell the property, which included all improvements to the land. Plaintiffs MSJ at Ex. 6. The improvements included the entire home (the connected manufactured homes). (AER 435 ¶3; see also ¶6; 435-436 ¶7).
- The undisputed evidence demonstrates the manufactured homes were the purpose and collateral of the loan. Plaintiffs MSJ at Ex. 4, 5. (AER 435 ¶4).
- Fannie Mae properly foreclosed on the property, including the manufactured homes, which where permanently attached to the property and therefore constituted real property. (AER 436 ¶7).

The court also found that:

- [T]he UCC permitted the sale of the manufactured homes even if the manufactured homes did constitute personal property. Where a security agreement covers both personal and real property, a secured party may proceed '[a]s to both the personal properly and the real property in

accordance with the rights with respect to the real property, in which case the other provisions of this part do not apply." NRS 104.6404(1)(b). There was no violation of the UCC. (AER 437 ¶14; *see also* 436 ¶7).

The court also found the claims stem from the foreclosure and accrued no later than the November 2012 judgment of possession. (AER 437 ¶¶12-14). The court denied the abuse of process/ excessive attachment claim for failure to establish any of the elements: Fannie Mae argued it had title to the property, the Anthonys did not challenge Fannie Mae's title and did not appeal in the eviction action, and Fannie Mae did not have an improper purpose in its belief it had title to the property at the foreclosure. (AER 437-438 ¶¶15-16). The court also found this claim time barred as it stemmed from the foreclosure. (AER 438 ¶17).

The district court found the claims barred by claim preclusion as the Anthonys' claims are logically related to those brought in the unlawful detainer, a final judgment was obtained in the unlawful detainer and the same parties were involved in both actions. (AER 438-439 ¶¶18-24). The district court also ruled it inequitable for the Anthonys to delay bringing their claims. (AER 439 ¶24).

The Anthonys appealed on July 24, 2019 (AER 424-429) and amended the notice of appeal on February 11, 2020 (AER 444-461). The court stayed enforcement of the judgment while the appeal is pending provided the Anthonys make payments, pay the property taxes and insurance, and maintain the property. (*See* AER 441-443).

SUMMARY OF ARGUMENT

The court should affirm the district court's summary judgment order. The substantial evidence established that Fannie Mae obtained title to the property, which included two manufactured homes (the '96 Fuqua and a '97 Fuqua), connected to each other as a single family residence and connected to the Anthonys' land as permanent real property improvements, when it bought the property at the April 2012 foreclosure. (AER 435, 436). This finding was not challenged on appeal. It is determinative for the Anthonys' counterclaims concerning the disposition of the '96 Fuqua based on their contention that the '96 Fuqua was personal property, either secured or unsecured in the deed of trust. Thus, this court need not reach the Anthonys' arguments on appeal that Fannie Mae either violated the UCC or converted the '96 Fuqua in its post-judgment administrative actions with the Manufactured Housing Division November 2015.

The district court also found that the Anthonys' claims are barred by claim preclusion. (AER 438-439). This finding was also not challenged on appeal. (See AOB.). This court can affirm on this basis as well because the court's correct finding disposes of the Anthonys' counter claims concerning the disposition of the property, including the '96 Fuqua. The claims should have been brought in their unlawful detainer action, but were not.

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Even assuming This court considers the Anthonys' claims on appeal, despite their failure to challenge the underlying determinative issue relevant to their claims,[1] This court can affirm the district court judgment based on the district court's alternative findings that: (1) even if the '96 Fuqua was personal property, the UCC did not apply where the deed of trust described the real property and personal property and the secured party elected its real property remedy (i.e., foreclosure); and (2) the claims were otherwise time-barred.

First, the evidence established that, assuming the '96 Fuqua was personal property, it was part of the collateral for the loan, it was described in the deed of trust as an improvement, and Fannie Mae elected to pursue its real property remedy via a non-judicial foreclosure in April 2012. (AER 436 ¶7, 437 ¶14). ***Second***, the evidence established that the Anthonys' claims accrued at the foreclosure, or at the latest, in the unlawful detainer action in November 2012. The district court rejected the Anthonys' argument that the disposition of the property accrued in 2015 when Fannie Mae had the title changed to itself and converted the '96 Fuqua to real property. (*See* AER 437 ¶¶12-14).

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[1] Fannie Mae does not abandon its argument that the claims are waived by the failure of the Anthonys to challenge the district court's finding. It addresses the Anthonys' arguments in the event this Court considers the arguments despite the Anthonys' waiver, over Fannie Mae's objection.

The Anthonys present no argument, evidence or authority showing the district court erred in granting summary judgment for Fannie Mae and against the Anthonys. This court should affirm the district court's judgment.

STANDARD OF REVIEW

The district court entered both findings of fact and conclusions of law. As for legal conclusions, this court reviews de novo a district court's decision to grant summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id*. (quotation and alteration omitted). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* at 731, 121 P.3d at 1031.

As to the trial court's findings of fact, such findings can be set aside only when clearly erroneous and unsupported by substantial evidence. *Pandelis Constr. Co. v. Jones-Viking Assoc.*, 103 Nev. 129, 734 P.2d 1236 (1987). The labels the district court assigns to its conclusions do not definitively establish the appropriate standard of review. *See Bowman v. Tisnado*, 442 P.2d 899, 900 (Nev. 1968).

Unless a point of error is properly raised in the district court, this court will decline to address such a point of error because it has not been preserved in the court

below. *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52 623 P.2d 981 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also In Re Amerco,* 127 Nev. 196, 217, n. 6, 252 P.3d 681, 697, n. 6 (2011) (declining to consider an issue raised for the first time on appeal).

ARGUMENT

A. The Anthonys' opening brief establishes no prejudicial error; the district court correctly granted summary judgment for Fannie Mae and against the Anthonys' counterclaims

The opening brief makes no showing to overturn the judgment. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (appellants' burden to present authority or facts on which to base its claim that issues were improperly decided on summary judgment). This court need not consider conclusory arguments which fail to address the issues in the case. *Id.; see also Edwards v. Emperor's Garden Restaurant,*122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (It is the parties' responsibility to cogently argue, and present relevant authority, in support of their arguments." (internal quotations omitted)).

The Anthonys identify no triable issue of fact that the '96 Fuqua, connected to the '97 Fuqua and to Anthonys' land, was anything but real property sold at the April

2012 foreclosure. This finding by the district court was supported by substantial evidence in the record and not disputed on appeal. (See AER 435 ¶¶3, 4, 436 ¶7). The substantial evidence at the trial court also established the Anthonys knew about the 2012 foreclosure and that Fannie Mae claimed title and possession of the entire property, including the attached '96 Fuqua, stemming from the 2012 sale, in November 2012 at the latest. (AER 436 ¶¶7, 9, 10). When the burden of production and persuasion shifted to them on summary judgment, they failed to set forth specific facts supported by admissible evidence demonstrating the existence of a genuine fact about the nature of the '96 Fuqua, connected to the other manufactured home as a single family residence, and permanently affixed to the land, when Fannie Mae sold its security for the defaulted loan at the April 2012 foreclosure sale.

The Anthonys must meet this burden on de novo review that a triable issue of fact existed. They fail to do so. The district court correctly determined that Fannie Mae obtained the '96 Fuqua — both connected to the '97 Fuqua and permanently affixed to the land securing the loan — at the nonjudicial foreclosure sale occasioned by the Anthonys' loan default. (*Id.*). The Anthonys did not challenge the district court's finding on appeal, and did not challenge the dismissal based on claim preclusion, thus waiving any challenges. *Bongiovi v. Sullivan,* 122 Nev. 556, 570 n. 5, 138 P.3d 433, 444 n. 5 (2006) (Issues not raised in their opening brief are considered waived); *Kahn v. Morse & Mowbray,* 121 Nev. 464, 480, 117 P.3d 227,

238 (2005); *see also* NRAP 28(a)(8); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329–30, 130 P.3d 1280, 1287–88 (2006) (appellant failed to address in his briefs the district court's dismissal of claims related to the issues presented on appeal, thereby "neglect[ing] his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims.").

1. *The district court correctly found that the '96 Fuqua was a real property improvement described in the deed of trust*

As noted above, the Anthonys do not challenge the district court's finding that the '96 Fuqua, connected to a second manufactured home, a '97 Fuqua to form one single family home, and permanently attached to the land, was a real property improvement described in the deed of trust. (See AOB). On this basis, the district court found Fannie Mae obtained title to the property, including the '96 Fuqua, at the foreclosure sale. (AER 436 ¶7). The Anthonys failure to challenge this finding on appeal constitutes a waiver of any claim of error. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329–30, 130 P.3d 1280, 1287–88 (2006) (appellant failed to address in his briefs the district court's dismissal of claims related to the issues presented on appeal, thereby "neglect[ing] his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims."). Assuming arguendo this court considers the district court's

ruling that the '96 Fuqua was a real property improvement under the deed of trust, this court can nevertheless affirm.

Real property is defined as "coextensive with lands, tenements and hereditaments." NRS § 10.075. In the "ordinary use 'land' or 'lands' not only mean the soil but everything attached thereto as well, the trees, shrubs, buildings and fixtures." *Bruno v. City of Long Branch*, 35 N.J. Super. 304, 311, 114 A.2d 273, 277 (App. Div. 1955), *aff'd*, 21 N.J. 68, 120 A.2d 760 (1956). "Land is something distinct from the buildings, fences, and other improvements placed thereon by man's work, whereas real property is all-inclusive and contemplates both land and improvements." *Krouser v. San Bernardino County*, 178 P.2d 441, 29 Cal.2d 766.

This court has found that "the term 'improvements' in the broad sense includes buildings and fixtures of all kinds." *Flyge v. Flynn*, 63 Nev. 201, 229, 166 P.2d 539, 551 (1946) (internal quotations omitted). Improvement to real property has been defined as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Integrity Floorcovering, Inc. v. Brona-Nutone, LLC.*, 521 F 3d 914, 917-918 (8th Cir. Minn. 2008). "Relevant criteria for determining what constitutes an improvement to real property include: whether the addition was meant to be permanent or temporary; whether it became an integral component of the overall

system; whether the value of the property was increased; and whether the use of the property was enhanced." 2 Tiffany Real Prop. § 606 (3d ed.).

There is no genuine issue of material fact that the deed of trust described the trust property as land with the address of 3705 Anthony Place, Sun Valley, Nevada, 89433 and the improvements and fixtures attached on it. (*See* AER 204 ¶G, 205). Applying the factors from *Integrity Floorcovering, Inc.* and Tiffany Real Property, the '96 Fuqua was a permanent real property improvement.

1) Both manufactured homes, attached to each other, and to the land, are permanent improvements to the real property by removal of the tongue, groove, wheels, and hitch. And they are attached to each other and placed on a pier foundation, with crawl space, attached utilities and a porch. (AER 177-201).

2) The '96 Fuqua is inseparable from the '97 Fuqua. It is permanently attached by the removal of an exterior wall to allow the two units to exist as a single-family home, and one can easily move within the two units into different rooms of the units without exiting either unit. There is only one physical address. (AER 179-201 [Ex. 5]). The units cannot be separated without physically detaching the '96 Fuqua from the '97 Fuqua, replacing the hitch, tongue and groove and removing a portion of the porch and utilities from the foundation for just that portion of the single-family home.

3) The single-family home enhances the capital value of the land. The Anthonys state they bought the unimproved land for $40,000 in 1994. (AER 262 ¶1.) The appraisal shows the value of the entire property increased to $270,000 in 2002 by adding and affixing the large home that was built in 1999 and purchased in 2000 to the unimproved lot. (*See* AER 178, 184). The Anthonys agree the manufactured homes were improvements to the property and they expended at least $203,287 on the improvements. (AER 262 ¶4). The property is useful as a family home and is in an area with other single-family residences. (*See* AER 180-201). The '96 Fuqua enhanced the total value of the property by increasing the square footage and adding rooms and space to the home.

Courts have applied a similar analysis to a manufactured home made permanent and not servable from the land on which it rests. *Griswell v. Columbus Fin. Co.*, 220 Ga. App. 803, 803, 470 S.E.2d 256, 257 (1996) (holding mobile homes are personal property, not real property, *except* mobile homes permanently attached to realty as here); *Matter of Colver*, 13 B.R. 521, 524–525 (Bankr. D. Nev. 1981) (mobile homes not severable from the land are real property). In *Matter of Colver*, the court looked to these factors to determine whether the mobile home was real property: (1) whether the creditor had a security interest in the land on which the mobile home was situated or only for the purchase of the mobile home; (2) how the

creditor sought to enforce his remedies (i.e., the creditor's intent); (3) whether the mobile home was on owned property or leased space; and (4) whether the mobile home was made permanent or remained mobile. *Id.*

The court found the mobile home in *Matter of Colver* was personal property. How so? Because, unlike here with Fannie Mae, the creditor there had an installment contract for the purchase *only* of the mobile home, it sued for replevin (no foreclosure involved), and the mobile home was in a park where space was leased and the mobile home could readily be replaced with wheels.

Applying the same factors analyzed in *Matter of Colver* to the '96 Fuqua here even more forcefully supports the district court's finding that the '96 Fuqua is real property. Fannie Mae has a deed of trust and promissory note for the land and the improvements on the land. (*See* 177-201, 171-176, 203). It is not a note for the purchase of either manufactured home. Fannie Mae exercised its rights to recover its security interest by proceeding with a judicial foreclosure, establishing that it considered the '96 Fuqua to be real property. (AER 217). Both manufactured homes, attached and connected to each other, were also attached and made permanent to the Anthonys' land by the removal of the tongue and groove, wheels, the hitch, and placing utilities, crawl space, a porch and placed on a pier foundation. (AER 179-201).

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The attributes of the '96 Fuqua are in stark contrast to the attributes noted in *Matter of Colver* that moved that court to conclude that the mobile home at issue was personalty. The '96 Fuqua is not an independent unit that can be moved by the replacement of the wheels. It is inseparable from the '97 Fuqua. (AER 187). It is permanently attached by the removal of a portion of two exterior walls to allow the two homes to exist as a single-family home. (*Id.*).One can easily move into different rooms within the attached units and without exiting either. (*Id*.).It has a single address. (AER 193). The units cannot be separated without physical damage to each unit; the hitch, tongue, and groove would require substantial reinstallment, and the porch and utilities removed from one portion of the single-family home that supports both connected units. (*See* AER 185, 187).

The Anthonys' reliance on *Erdmann v. Rants*, 442 441, 443 (N.D. 1989), for the proposition that manufactured homes are personal property and a secured creditor must pay statutory damages where a sale is not commercially reasonable does not help them. (*See* AOB at 12). In *Erdmann*, there was no dispute concerning the characterization of the mobile home. Unlike the '96 Fuqua here, permanently attached to a second manufactured home and made permanent to the land as a real property improvement, the parties in *Erdmann* did not dispute that the mobile home was a consumer good. The secured creditor was enforcing a loan made for the purchase of the mobile home and the parties had entered contract for sale of the

mobile home itself. The mobile home had been repossessed and abandoned and sold to other parties. The court in *Erdmann* awarded damages for the sale of the mobile home, even though the court found the sale was commercially reasonable, because the debtor did not have notice. *Erdmann v. Rants*, 442 N.W.2d at 443. *Erdmann* is completely inapplicable to the issues here.

Because there is no genuine material issue of fact that the '96 Fuqua was a real property improvement attached to the '97 Fuqua and to the land, Article 9 did not apply. *See* NRS § 104.9109(4)(k) & com. 10. Fannie Mae exercised its options under the deed of trust to proceed by a nonjudicial foreclosure. (AER 217). The trial court properly entered judgment against the Anthonys on their counter claim for damages for purported violations of the UCC. (AER 436-437 ¶11-14). This court should affirm the trial court's judgment against the Anthonys on their claim for damages under NRS 104.9625.

2. ***Any failure by the Anthonys to convert the '96 Fuqua to real property for tax purposes under the Revenue & Tax Code does not affect the '96 Fuqua's status as a real property improvement***

The Anthonys suggest the '96 Fuqua was personal property because it was purportedly not converted to real property for tax purposes until 2015. (AOB at 4-5; *see also* AOB 17). They provide no authority for this position other than a recitation of NRS 361.244 requirements for converting a manufactured home to real property

for tax purposes. "It is the parties' "responsibility to cogently argue, and present relevant authority, in support of" their arguments." *Edwards v. Emperor's Garden Restaurant,*122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Any prior failure by the Anthonys to comply with their tax obligations and convert a portion of their home to real property for tax purposes does not affect the characterization of the '96 Fuqua under the deed of trust.[2] Similarly, Fannie Mae's actions in 2015 to convert the '96 Fuqua to real property is not evidence that the '96 Fuqua was retroactively personal property for purposes of its description under the deed of trust.

NRS 361.035 defines real property for tax assessment purposes as "[a]ll houses, buildings, fences, ditches, structures, erections, railroads, toll roads and bridges, or other improvements built or erected upon any land" and manufactured homes are placed on the tax roll. *See* NRS § 361.035; 361.244. NRS 361.244 requires a manufactured home to be placed on the real property tax roll. Generally, the assessor must receive verification from the Housing Division that the manufactured home has been converted to real property, the personal property tax has been paid, an affidavit of conversion from personal to real property has been record and the owner has delivered to the Division a copy of the recorded affidavit of conversion

[2] As was discussed at the hearing on the motions, the Anthonys' decisions regarding the property taxes on the residence, or a portion of it, has nothing to do with Fannie Mae's intent to pay the taxes for the entire property, including the '96 Fuqua which is already attached to the '97 Fuqua and the land as real property. (AER 476).

and all documents relating to the manufactured home in its former condition as personal property. *See* NRS 361.244(2)(a)-(d). Neither NRS § 361.015 nor § 361.244 define what is a real property improvement under a deed of trust. Adding a manufactured home to the definition of real property for tax purposes allows the mobile homeowners to pay their fair share of real estate taxes which support the municipal services**.** *See Frontier Park v. Assessor of Town of Babylon*, 707 N.Y.S.2d 808 (Sup. Ct. 2000) (considering the validity of including mobile homes to definition of real property for the real property tax law). Nothing more.

The situation here is unique because two manufactured homes are inextricably connected to each other and permanently attached to the land. (AER 187). Only part of the attached property is at issue here, the '96 Fuqua, because the Anthonys do not contend Fannie Mae did not obtain title to the land and the attached '97 Fuqua. (*See* AOB; *see also* 268:2-7). The Anthonys recorded an affidavit of conversion in 2000 that both manufactured homes were converted to real property, both serial numbers, dimensions for each manufactured home, and identification of each manufactured home were provided in the attestation recorded in 2000. (AER 168). Whether this would sufficiently convert the entire property for tax purposes is not at issue, yet the Anthonys apparently seek to benefit from their failure to properly report the total size of their home to the county assessor. The Anthonys have worked in the manufactured home business for over 30 years. (AER 178). The '96 Fuqua

was not a separate manufactured home sitting on the property at any distance from the '97 Fuqua. (AER 187). It was not a later added addition to their home; the '96 and '97 Fuqua were connected to each other in 2000. (AER 178). This evidence was substantial for the district court to find they were real property improvements. (*See* AER 435 ¶3). Any failure to pay property taxes on the full size of the home, the '96 Fuqua portion, if true, does not affect whether the '96 Fuqua was a real property improvement under the deed of trust.

The only evidence produced below suggesting the '96 Fuqua was not real property under the deed of trust were the records from the Manufactured Housing Division. (AER 107-144). Within those documents is Fannie Mae's 2015 application to convert the '96 Fuqua to real property for tax purposes. Fannie Mae's actions in converting the tax status of the '96 Fuqua to real property after it acquired it at the trustee sale is not evidence the '96 Fuqua was not a real property improvement under the deed of trust. Rather, it is an effort to comply with tax obligations, a compliance requirement ignored by the Anthonys who apparently now seek to take advantage of their own wrong in failing to pay taxes for the entire residence, the two connected manufactured homes. (*See* fn. 2). As Fannie Mae confirms in the application for duplicate ownership certificate, Fannie Mae acquired the '96 Fuqua at the foreclosure sale that included the land and the entire home. (*See* AER 117-118). That a portion of the home had not apparently converted for tax purposes does not change how

Fannie Mae acquired it or its description under the deed of trust as a real property improvement.

3. *Even if the '96 Fuqua was a personal property improvement under the deed of trust, Fannie Mae still did not violate the UCC*

a) The deed of trust provided Fannie Mae with a secured interest in the land and the family residence, which included the '96 Fuqua, all of which was sold at the foreclosure

As discussed, *supra,* the trial court properly found the '96 Fuqua was a real property improvement, permanently attached to the '97 Fuqua as a single home and made permanent to the land, and was sold as part of the property in April 2012 foreclosure sale. (*See* AER 435, 436). The Anthonys failure to challenge this finding on appeal constitutes a waiver of any claim of error. Thus, this court need not reach the Anthonys' claims that Fannie Mae either violated the UCC or converted the '96 Fuqua in its disposition of it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329–30, 130 P.3d 1280, 1287–88 (2006) (appellant failed to address in his briefs the district court's dismissal of claims related to the issues presented on appeal, thereby "neglect[ing] his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims.").

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Assuming this court considers the district court's finding that the '96 Fuqua was a real property improvement under the deed of trust, this court can nevertheless affirm on the district court's alternative findings. The district court found based on the substantial evidence presented in the trial court that the even if the '96 Fuqua is personal property, the April 2012 sale complied with the UCC because the '96 Fuqua was described in the deed of trust as an improvement. (AER 436 ¶7; 436-437 ¶¶11-14). ¶

When a security agreement covers both personal and real property, a secured party may proceed "[a]s to both the personal property and the real property in accordance with the rights with respect to the real property, *in which case the other provisions of this part do not apply*." NRS 104.9604(1)(b), emphasis added; *see also* NRS 104.9109(4)(k)(4) (UCC applies when security agreements cover both real and personal property). Generally, a security interest attached to collateral if value has been given, the debtor has rights in the collateral and the debtor has authenticated a security instrument that identifies the collateral. NRS 104.9230. Under Nevada law, a security agreement need only describe the collateralized property so it is "reasonably identified" (NRS § 104.9108 ["description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described"], and "objectively determinable" (NRS § 104.9108).

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There is no credible factual dispute in the evidence that the '96 Fuqua, as attached to the '97 Fuqua to form a single-family residence, and the land, were collateral for the Anthonys' $214,400 refinance loan. (*See* AER 171-215). The Anthonys concede the "Residence" was collateral for the loan and Residence was secured by a deed of trust. (*See* AOB at 4). The deed of trust described the secured property as the land and the improvements to the land. (AER 204 ¶G, 205). Improvements generally described as buildings on the property. The '96 Fuqua is "objectively determinable" in the deed of trust as a building on the property, attached to the '97 Fuqua to form one large single-family home. The chain of title includes the recorded Affidavit of Conversion, which includes descriptions of both manufactured homes. (AER 168). Thus, the '96 Fuqua, attached to the '97 Fuqua as an improvement was described in the deed of trust.

Fannie Mae elected to enforce its real property remedy. "When the grantor defaults on the note, the deed-of-trust beneficiary can select the judicial process for foreclosure pursuant to NRS 40.430 or the 'nonjudicial' foreclosure-by-trustee's sale procedure under NRS Chapter 107." *Nevada Land & Mtge. v. Hidden Wells*, 435 P.2d 198, 200 (Nev. 1967). Fannie Mae chose a nonjudicial foreclosure sale. The other provisions of the UCC, such as UCC notice provisions, did not apply. NRS 104.9604(1)(b).

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In a nonjudicial foreclosure, the trustee may sell the property to satisfy the obligation only after certain statutory requirements are met. NRS 107.080. The trustee must first give notice by recording a notice of default and election to sell and serving the grantor (here, the Anthonys) with a copy of that notice. NRS 107.080(2)(c). The grantor then has a certain number of days in which to make good on the deficiency. NRS 107.080(2)(a) and (b). After three months have passed since recording the notice of default, the trustee must give notice of the sale. NRS 107.080(4). The duty to provide notice under NRS 107.080 imposes a substantial compliance standard, and not a strict compliance standard. *Schleining v. Cap One, Inc.*, 326 P.3d 4, 8 (Nev. 2014). "[S]ubstantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice." *Id*.

The Anthonys' argument that the foreclosure of the "Residence" did not include an attached portion of the home, the '96 Fuqua, is not supported by any credible evidence, let alone sufficient evidence to meet their burden on appeal for at least three reasons. *First,* even assuming the '96 Fuqua were personal property (it is not), the district court correctly found Fannie Mae elected to dispose of the property by nonjudicial foreclosure. The deed of trust describes the property as the land and the improvements. (AER 205). Improvements include the family home, which is the attached manufactured homes. (*See* AOB at 4).

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Second, the Anthonys do not, because they cannot, credibly argue they did not know the '96 Fuqua, connected to the '97 Fuqua and attached to the property, was secured property described in the deed of trust. Why? They pledged their entire Residence as collateral for the loan. (AER 178). They concede it. (See AOB at 4). The evidence was undisputed that the loan application, the appraisal and the Affidavit of Conversion reflect that both homes are attached as one and together, with the land, were the security described in the deed of trust. (*See* AER ¶4; AER 168, 178, 179-201).

Third, the recorded foreclosure documents reflect that the property to be sold at the foreclosure included the entire home, which included the '96 Fuqua. Fannie Mae recorded a notice of default and election to sale which stated the property under the deed of trust would be sold. (AER 217). This triggered the nonjudicial foreclosure for the property under the deed of trust. The UCC provisions would not then apply to the disposition of the manufactured home that may have been personal property. NRS 104.9604(1)(b). Next, the notice of notice of trustee sale advises the Anthonys (and the world) of the sale date, that the Anthonys may lose their property if they take no action, that they should review the deed of trust for a description of the property to be sold at the trustee sale, and the amount of the outstanding debt. (*See* AER 220).

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The Anthonys new argument on appeal that the trustee deed upon sale indicates that only "real property" was sold at the foreclosure (*see* AOB at 14-16) should be disregarded by this court. The Anthonys did not make this argument in the trial court, thus waiving it here on appeal. *See In Re Amerco,* 127 Nev. 196, 217, n. 6, 252 P.3d 681, 697, n. 6 (2011) (declining to consider an issue raised for the first time on appeal). Without abandoning its own waiver argument, and only in the event this court considers the Anthonys' new argument, the Anthonys' argument is not sufficient to overcome their burden on appeal. The totality of the foreclosure documents show that the entire property described in the deed of trust was sold. (See AER 217, 218). The notice of default and the notice of sale advise the Anthonys and the world that the property described in the deed of trust would be sold at the trustee sale. (AER Ex. 7 & 8, 217-221). The notice of sale advises that as of March 30, 2012, the property under the deed of trust would be sold and the debt under the deed of trust, including estimated costs and interest, totaled approximately $249,256. (AER 220). The property described in the deed of trust was sold and the trustee deed reflects the debt as of on or about April 23, 2012 the debt was $246,400 and the grantee (Fannie Mae) paid $245,678. (AER 223). The Anthonys did not provide any evidence at the trial court to create a triable issue of fact that the foreclosure sale did not include the '96 Fuqua, attached to the '97 Fuqua to form one single family residence, and the land. Indeed, they did not make this argument anywhere, to

challenge the foreclosure or in the unlawful detainer action, because they knew Fannie Mae took title to the entire home and land at the foreclosure. Moreover, the Anthonys are not prejudiced by any alleged errors in the notice. They knew what was secured by the deed of trust, their home.

Because the deed of trust included the real property, and even if the '96 Fuqua was personal property, the UCC provisions did not apply to the disposition of the '96 Fuqua at the foreclosure. NRS 104.9610(1)(b). Fannie Mae's administrative actions in 2015 post-foreclosure and post unlawful detainer judgment does not alter the trial court's judgment denying the Anthonys' claim for NRS damages. As the district court correctly found, the deed of trust was the security instrument for the land and the improvements. (AER 204 ¶G, 205; AER 436 ¶7). The Anthonys pledged their home and the land as collateral for the loan. Because the security instrument covered the real property, and the '96 Fuqua (if it were considered personal property instead of real property), the "other provisions" of the UCC did not apply. *See* NRS 104.9604(1)(b). Fannie Mae was not required to comply with provisions such as NRS 104.9614, NRS 104.9613 and NRS 104.9610, describing the contents required for a notice of sale of personal property. (*See* AOB at 10-12).

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b) Assuming the '96 Fuqua is personal property secured by the deed of trust, the Anthonys' claims for damages for purported violations of the UCC in the disposition of the '96 are time barred

The trial court found that even if the manufactured homes were personal property, the UCC claims were time barred because they accrued in November 2015, at the very latest, three years after Fannie Mae obtained judgment of possession of the entire property, including the single family home (the connected manufactured homes). (AER 436-437 ¶¶11-13).

The statute of limitations for a claim for violating Article 9 of the UCC is 3 years. NRS 11.190(3)(a)[3]. The Anthonys argue the sale occurred in November 2015 at the transfer because the '96 Fuqua was not included in the 2012 foreclosure. This argument is not supported by the record. Fannie Mae claimed title to the property and obtained a judgment in November 2012 recognizing its right to possession. (AER 226-235). The Anthonys' claims that plaintiff violated the UCC by acquiring the property at a private sale (104.9610, AER 38 ¶44), failing to properly notice the

[3] A claim based on a statute, like the alleged violations of the UCC here, is subject to the three-year statute of limitations with no specific limitation period providing otherwise. While Nevada's version of the UCC specifies several limitation periods (*see*, *e.g.*, NRS § 104.5115, 1 year), there is no limitation period for a violation of Article 9 for secured transactions. *See* NRS 104.9101, et seq. So, the three-year limitation period under NRS 11.190(1) applies.

sale (104.9614, AER 38 ¶45) and filing a statement of transfer of title of the 1996 Fuqua in 2015 (104.9619, AER 38 ¶41) all failed in the trial court for the same reasons. The sale occurred in April 2012. (AER 217, 220, 223). The notice of sale was recorded March 30, 2012. (AER 220). While title transfer was filed in 2015, as defendants note, the transfer request turned on the ownership Fannie Mae alleged it acquired at the foreclosure sale. Again, it is the foreclosure sale itself, and judgment of possession at the latest, which triggered the statute of limitations. *See Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 440 (1998) ("cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought. An exception to the general rule has been recognized by this court and many others in the form of the so-called "discovery rule." Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action.").

The Anthonys had actual notice that Fannie Mae claimed to obtain title of the property, including the manufactured homes, in April 2012 and used that title to obtain possession of the property in November 2012. (AER 227-235, 251-263). Even assuming for sake of argument Fannie Mae had to comply with the UCC's provisions related to personal property, the Anthonys knew, or should have known, that the sale was allegedly not proper in no later than November 2012, and had to

bring their claims within 3 years, or by November 2015. The Anthonys' August 2017 counterclaims are almost two years too late.

c) The Anthonys failed to present evidence for their claims for damages.

The Anthonys seek damages under NRS 104.9625(3)(B) for the alleged improper sale of the '96 Fuqua. (AOB at 7, 15-16). The Anthonys presented no evidence at the district court of the amount of a loan extended for the purchase of the '96 Fuqua or even on appeal it that were proper, which it is not. (*See* AOB at 7; *s*ee Ex. 10). The damages they seek are based on a loan they conceded was extended for the refinance of their "Residence". (*See* AER 170-176, 180-221). If the '96 Fuqua was not included in the "residence', then the Anthonys did not obtain a loan for the '96 Fuqua. (See AER 178). They fail to establish UCC damages. If the '96 Fuqua is included in the loan they obtained for the entire "Residence", they fail to establish that any portion of the loan was for the purchase of the '96 Fuqua alone. (See AER 178). Either way, because their damages claim is premised solely on this statute, their failure to present any evidence in the trial court provides them with no relief even if there were a violation, which Fannie Mae denies.

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B. The District Court Correctly Denied the Claim for Conversion

1. *Fannie Mae obtained title to the property at the nonjudicial foreclosure in April 2012*

"Conversion exists where one exerts wrongful dominion over another's personal property or wrongful interference with the owner's dominion." *Larsen v. B.R. Enters., Inc.*, 104 Nev. 252, 254, 757 P.2d 354, 356 (1988) (internal quotation marks omitted) (emphasis added); *Evans v. Dean Witter Reynolds, Inc.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) ("a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein *or* in derogation, exclusion, or defiance of such title or rights.").

The district court correctly found that Fannie Mae acquired title to the property at the foreclosure. (AER 435-436 ¶7). In so finding, the district court necessarily found the security instrument described the '96 Fuqua. (See AER 435 ¶3, 436 ¶7). As discussed *supra*, the deed of trust included the land and improvements to the land. (*See* AER 435-436 ¶7). This included both manufactured homes, connected and attached to each other, and made permanent to the land. (AER 435 ¶3). Under the deed of trust, Fannie Mae proceeded with a nonjudicial foreclosure and was the purchaser at the sale. (AER 203-225). Thus, Fannie Mae has taken no wrongful control or dominion of the Anthonys' property pledged in the

deed of trust, which included the attached '96 Fuqua, because it obtained the property at a properly conducted foreclosure sale. (*Id*.).

The Anthonys do not challenge the district court's finding that the '96 Fuqua was a real property improvement described by the deed of trust, as such, This court need not reach the Anthonys' claims that Fannie Mae wrongfully converted the '96 Fuqua. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 329–30, 130 P.3d 1280, 1287–88 (2006) (appellant failed to address in his briefs the district court's dismissal of claims related to the issues presented on appeal, thereby "neglect[ing] his responsibility to cogently argue, and present relevant authority, in support of his appellate concerns. Thus, we need not consider these claims.").

Even should this court consider the Anthonys' argument the '96 Fuqua was unsecured, it is not supported by the substantial evidence. The evidence was not disputed that the Anthonys pledged the single-family home, which included the attached '96 Fuqua as collateral for the loan. (*See* AER 435 ¶4). The loan application reflects that the Anthonys sought to refinance their entire home built in 2000 and the appraisal reflects that the entire home was 3,700 square feet and consisted of 13 rooms. (*See* AER 178-201). The appraisal shows that the entire home, including the connected '96 Fuqua, was pledged as security for the loan by the Anthonys, not just part of it. And the Anthonys had recorded the Affidavit of Conversion in 2000, notifying the world that both manufactured homes were connected to each other and

were real property. (AER 168). Finally, the Anthonys acknowledge their loan agreements were specific to the manufactured homes as improvement to the property.[4] (AER 262). The trial court was correct to find that the Anthonys pledged their home (and land) in exchange for the loan. The deed of trust reflects that agreement between the parties. (AER 205). The property, including the attached '96 Fuqua, was sold at the foreclosure. (AER 205, 206, 217, 220, 223).

2. ***The counter claim for conversion is time barred by the three-year statute of limitations***

The trial court found any claim for conversion accrued when Fannie Mae bought the property at the foreclosure and the Anthonys knew Fannie Mae's claims to the property by the November 2012 unlawful detainer. (AER 436 ¶¶7-11).

A cause of action for conversion accrues with the unauthorized sale/conversion of property. *See* NRS § 11.190(3)(c) and (3)(d); *Palludan v. Bergin*, 375 P.2d 544, 78 Nev. 441 (1962) (action for conversion barred by the statute of limitations where it was not commenced until over three years after alleged unauthorized sale of the property). Based on the evidence, the trial court found any claim expired in November 2015. (AER 436 ¶¶8-11).

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[4] The Anthonys here claim that the manufactured homes were improvements to the land, though identify them as personal property.

The Anthonys argue the claim is not time-barred because Fannie Mae did not exercise wrongful dominion or control of the property at the foreclosure or in obtaining a judgment of possession of the entire property; instead, Fannie Mae's wrongful act of conversion purportedly occurred when the Manufactured Housing Division issued a Certificate of Title to Fannie Mae on November 23, 2015. (*See* AOB at 18).

The conversion cause of action arose in April 2012 at the earliest and November 2012 at the latest when the sale was completed and judgment of possession entered for Fannie Mae. (*See* AER 222-240). The evidence shows Fannie Mae served a three-day notice to quit and started eviction proceedings, the three-day notice to quit advised the Anthonys to vacate the premises because a foreclosure sale had been completed and the Anthonys now wrongfully "occupied" the property. (AER 251-263). The notice was posted on the Anthonys' home and they acknowledged receipt of it. *See id.* The Anthonys acknowledged Fannie Mae was trying to seek possession. Fannie Mae obtained judgment for possession in November 2012. (AER 227-235). The Anthonys' counterclaims concede that Fannie Mae's attempted removal of them from the premises was an act in furtherance of their claim for conversion. (*See* AER 36 ¶55).

While Fannie Mae took administrative action concerning the '96 Fuqua in 2015, it does not erase the fact that Fannie Mae interfered with the Anthonys'

purported rights in the property three years earlier, in the November 2012 foreclosure. (*Id.*).

In a hopeless attempt to support their conversion counterclaim, the Anthonys try to characterize the '96 Fuqua as personal property collateral, unsecured under the UCC. (*See* AOB at 16). The Anthonys rely on *Countrywide Home Loans, Inc. v. Titchener*, 192 P.3d 243 (Nov. 2008), to support their claim for damages for the loss of the portion of the property, the '96 Fuqua. (*See* AOB at 16). In *Titchener,* a lender foreclosed on deed of trust, but the deed of trust was for a different property than that purportedly sold by the lender. In securing the property in the belief that it acquired title at the sale, the lender wrongfully disposed of the owner's personal belongings they claimed exceeded the market value of the property. The *Titchener* court discussed the measure of damages in such circumstances, which included evaluating factors such as the property's original cost, the quality and condition of the property at the time of the loss, and the cost of reproduction. The court noted that evaluating these factors, and excluding "subjective considerations of sentimental value," ensures that the amount of special damages will be objectively assessed, and thereby *accords with a plaintiffs burden to present competent evidence to support a reasonably accurate amount of damages*". *Id.* at 736, emphasis added. Here, to the extent the Anthonys preserved any claim for damages, which Fannie Mae disputes, the Anthonys presented zero evidence in the trial court, much less

enough to create a triable issue of fact, to support any claim for damages. (See Ex. 10).

C. The District Court Correctly Denied the Defense of Recoupment.

The district court properly rejected the Anthonys' argument for recoupment. First, the Anthonys did not assert an affirmative defense for recoupment or seek leave to amend their answer. (*See* AER 31-42; AER Ex. 21, 462-507). The court did not have to consider the affirmative defense. Even if the affirmative defense were properly pleaded and at issue, the Anthonys fails to meet their burden to show the trial court erred in not applying it.

The Anthonys argue recoupment is available to save their time-barred claims because a statute has passed on affirmative recovery of statutory damages, relying on *Coxson v. Commonwealth Mortgage Company*, 43 F.3d 189, 194 (5th Cir. 1995). District Courts in the Ninth Circuit have overwhelmingly disapproved of *Coxson. See, e.g., Patino v. Franklin Credit Mgmt. Corp.*, No. 16-CV-02695-LB, 2017 WL 2289192, at *5 (N.D. Cal. May 25, 2017) (collecting cases) [5]. Any claim for

[5] *Patino*, at 5: *Lima v. Wachovia Mortg. Corp.*, No. C09-04798 TEH, 2010 WL 1223234, at *5 (N.D. Cal. Mar. 25, 2010) (collecting cases); *see also Harris v. Wells Fargo Home Mortg.*, No. CV10-09496 ODW (CWx), 2011 WL 1134216, at *3 (C.D. Cal. Mar. 23, 2011) ("[t]he general rule is that when the debtor hales the creditor into court, the claim by the debtor is affirmative rather than defensive," and, "[s]pecifically, in non-judicial foreclosure cases, federal district courts in California conclude that non-judicial foreclosures are not 'actions' as contemplated by TILA") (internal quotations and citations omitted); *Alakozai v. Valley Credit Union*, No. C10-02454 HRL, 2010 WL 5017173, at *3 (N.D. Cal. Dec. 3, 2010) ("insofar as [the

recoupment for an offset for damages, if applicable, should have been brought in the district court when the foreclosure occurred or in the unlawful detainer action. It was in those same actions Fannie Mae improperly sold the property, according to the Anthonys, and when Fannie Mae obtained a judgment of possession. They cannot credibly avoid the statute of limitations barring their counterclaim for recoupment.

CONCLUSION

Under the legal principles correctly applied, the district court's judgment for Fannie Mae and against the Anthonys should be affirmed in full.

Dated: July 29, 2020.

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plaintiff] asserts recoupment in response to defendant's non-judicial foreclosure, his claim is not properly deemed a 'defense' to an 'action' for purposes of avoiding the applicable statute of limitations"); *Parcray v. Shea Mortg. Inc.*, No. CV-F-09-1942 OWW/GSA, 2010 WL 1659369, at *17–*18 (E.D. Cal. Apr. 23, 2010) (denying plaintiff's argument that "her TILA claim is pled defensively to reduce or set-off the amount she owes Defendant"); *Carillo v. Citimortgage, Inc.*, No. CV 09-02404 AHM (CWx), 2009 WL 3233534, at *3 (C.D. Cal. Sept. 30, 2009) ("A foreclosure action is not an 'action to collect debt' within the meaning of the recoupment exception."); *Ortiz*, 639 F. Supp. 2d at 1165 ("[N]on-judicial foreclosures are not 'actions' as contemplated by TILA.") (collecting cases).

CERTIFICATE OF COMPLIANCE

1. I hereby certify 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 11,143 words excluding the parts exempted by NRAP 32(a)(7)(C).

3. Finally, 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 this brief complies with all 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.

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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: July 29, 2020.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on July 29, 2020, the foregoing **RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen
An employee of AKERMAN LLP