IN THE SUPREME COURT OF THE STATE OF NEVADA

REZA ZANDIAN, A/K/A GOLAMREZA ZANDIANJAZI, A/K/A GHOLAM REZA ZANDIAN, A/K/A REZA JAZI, A/K/A J. REZA JAZI, A/K/A G. REZA JAZI, A/K/A GHONOREZA ZANDIAN JAZI, an individual,

Appellant,

vs.

JED MARGOLIN, an individual,

Respondent.
_____/

Supreme Court Case No. 82559
District Court Case No. 09OC005791B

On Appeal from *Order Granting Plaintiff's Motion To Void Deeds, Assign Property, For Writ Of Execution And To Convey*
dated January 19, 2021
in the First Judicial District Court, Carson City
The Honorable James T. Russell Presiding

APPELLANT'S REPLY BRIEF

Mark Forsberg (SBN 4265)
Rick Oshinski (SBN 4127)
OSHINSKI & FORSBERG, LTD.
504 E. Musser St., Suite 202
Carson City, Nevada 89701
Telephone 775-301-4250
Attorneys for Appellant

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SUMMARY OF REPLY

This Court has jurisdiction over this appeal because the order under review is a special order pursuant to NRAP 3A(b)(8). The order affects the rights of "some party to the action, growing out of the judgment previously entered" and "affects rights incorporated in the judgment." Despite Respondent's claim, this appeal does not challenge the default judgment itself but asserts that the judgment became unenforceable when the judgment creditor failed to comply with the statutory requirement that an affidavit of judgment be recorded at the time the judgment was recorded.

Caselaw establishes that this Court may consider a matter which was not raised in the court below if the error results in a miscarriage of justice. In particular, appellate review is appropriate where a statute which is controlling was not applied by the court below. In this case, NRS 17.150(4) was not applied by the district court and that failure has resulted in manifest injustice.

Finally, Respondent's interpretation of NRS 17.150(2), if adopted by this Court, would render Subsection (4) of the statute meaningless. Subsection (4) provides that "in addition to recording the information described in subsection 2, a judgment creditor who records a judgment or decree for the purpose of creating a lien upon the real property of the judgment debtor pursuant to subsection 2 ***shall*** record at that time an affidavit of judgment…" By use of the word "shall," the

legislature expressed its intent that the above provision is not merely advisory, it is mandatory. If the legislature had intended that recording of a judgment was all that was necessary to create a judgment lien, it would not have included subsection (4) in the statute.

ARGUMENT

A. The Order Appealed From is a "Special Order" under *Gumm v. Mainor.*

Presently, the rule regarding appealable special orders entered after final judgment is found at NRAP 3A(b)(8). It makes appealable "a special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment." The exception is not applicable here. Therefore, under *Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220 (2002), the order of the district court ordering the conveyance of property owned in part by Appellant to the Respondent here was a special order appealable under the rule. The order, in fact, affected the rights of both parties: it affected the rights of Respondent by permitting him to execute on the real property, and it affected the rights of Appellant by allowing execution when the Respondent failed to follow the statutory obligations imposed upon him for the perfecting of a lien. In *Gumm,* a lien holder sought to have the appeal dismissed on jurisdictional grounds based on earlier cases decided by this Court that the order distributing the judgment proceeds was not appealable

because it did not affect both parties to the underlying action. The court reviewed its jurisprudence with respect to what constitutes a special order and concluded that a special order, to be appealable, must be an order affecting the rights of "some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment." *Id. at 914.* This Court found that the order appealed from did not affect the rights of the judgment creditor, but did affect the rights of Gumm, who had obtained the judgment. Referring to its previous holding in *Wilkinson v. Wilkinson*, 73 Nev. 143, 311 P.2d 735 (1957), this Court stated there was no justification for the reasoning in *Wilkinson* that in order to be an appealable special order, the order appealed from must affect the rights of both parties to a lawsuit, not *any* party to the lawsuit. The *Gumm* court held:

> The *Wilkinson* interpretation is at odds with the rule's language, as well as with the precedent the case relies upon in formulating the definition, and with the cases that have allowed a party to appeal from a post-judgment order adjudicating an attorney's lien and awarding attorney fees and costs.
>
> This lack of clarity violates the fundamental principle that jurisdictional rules should be simple and clear. Therefore, we take this opportunity to clarify that what constitutes a special order made after final judgement, which is independently appealable under NRAP 3A(b)(2). We reject the *Wilkinson* interpretation, and we adopt the *Montana* interpretation first endorsed in *Tardy*.
>
> A special order made after final judgment, to be appealable under NRAP 3A(b)(2), must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting the rights incorporated in the judgment.

Id. at 118 Nev. 919-920.

Moreover, contrary to the assertions of Respondent, NRS 17.150(4), offers protection for judgment creditors by requiring that certain steps, including the recording of an affidavit of judgment, be accomplished at the time the judgment is recorded in order to perfect a judgment lien. Here, it is undisputed that Respondent, the judgment creditor, failed to meet those statutory requirements for perfecting a lien by recording an affidavit of judgment at the time the judgment was recorded. And, as also set forth in the Opening Brief, those provisions of the statute require strict compliance. In the absence of strict compliance, no lien is created and the judgment creditor cannot execute on the property. Zandian's right to strict compliance with the statutory scheme with respect to his property is not imaginary and nonexistent as asserted (without supporting authority) by Respondent.

B. Appellant is Not Challenging the Default Judgment Itself.

Respondent's second argument regarding jurisdiction is without merit as it is based on a faulty premise: that Appellant is challenging the default judgment itself. That is simply not the case. Rather, Appellant asserts that the judgment became unenforceable when the judgment creditor failed to comply with statutory requirement that an affidavit of judgment be recorded at the time the judgment was recorded. And, because strict compliance is required, Respondent cannot cure his

noncompliance by recording the affidavits of judgment in 2021, during the pendency of this appeal and some seven years after the judgment was recorded.

C. This Court Should Consider Appellant's NRS 17.150(4) Argument for the First Time on Appeal to Prevent Plain Error.

Respondent argues that the district court did not abuse its discretion by granting Respondent's motion to void deeds because Appellant did not oppose it in the district court and should not be allowed to raise the argument on appeal. However, this is the kind of case and the kind of circumstances in which this Court previously has considered an appeal notwithstanding the failure of the appellant to articulate the basis for the appeal in the district court. For example, in *Bradley v. Romeo*, 102 Nev. 103, 716 P.2d 227 (1986), this Court stated:

> The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. See, e.g., Western Indus., Inc. v. General Ins. Co., 91 Nev. 222, 230, 533 P.2d 473, 478 (1975). Such is the case where a statute which is clearly controlling was not applied by the trial court.

Id. at 106. Bradley has been cited by this Court dozens of times since it was decided. *See, e.g., Torres v. Farmers Ins. Exchange*, 106 Nev. 340, 793 P.2d 839 (1990), citing *Bradley* and holding that an error is "plain" if the error is so unmistakable that it reveals itself by a casual inspection of the record." In *Torres*, the absence of insurance policies in the record where the terms of those policies were at issue was such a glaring error.

Here, Respondent moved the district court for an order in furtherance of its execution on a judgment recorded in 2013 without providing the district court with any evidence that it had complied with the mandates of NRS 17.150(4) to establish that a judgment lien had been created. This failure to establish compliance with the statute was made more egregious by the context of Respondent's motion in the district court: Respondent informed the district court that the judgment it was seeking to execute upon had been declared void *ab initio* by the bankruptcy court and affirmatively represented to the district court that that order would be appealed. For reasons Respondent has yet to explain, Respondent submitted the motion for decision after the bankruptcy case was dismissed, and without revealing or explaining to the district court his non-compliance with NRS 17.150(4), which he knew was an issue, having raised the bankruptcy court decision in the motion.

This case, like *Bradley*, is one in which a statute which is clearly controlling was not applied by the court below. Respondent does not dispute that NRS 17.150(4) is applicable in this case. Ironically and disingenuously, Respondent argues both that the requirement for the recording of an affidavit of judgment at the time the judgment is recorded is not mandatory, while drawing to the court's attention in his motion to take judicial notice, that he had complied by recording the affidavits of judgment during the pendency of this appeal. Respondent's conduct in this regard supports Appellant's argument that NRS 17.150(4) ***does*** require an affidavit of

judgment to be recorded at the time the judgment is recorded and his recognition that he had not complied with the statute at the time the judgments were recorded. Respondent plainly recognizes that the statute is applicable, that it was not complied with and that the district court failed to consider the effects of the statute. Otherwise, there would be no reason for him to record the affidavits of judgment seven years after the default judgment was recorded nor to seek this Court's judicial notice of the fact that they were recorded at all.

Thus, this case is, as it was in *Bradley*, one in which this Court should consider, *sua sponte*, the NRS 17.150(4) issue, as it is a case where a statute which is controlling was not applied by the court below. Furthermore, this Court may consider plain error even in the absence of an objection if the error resulted in a miscarriage of justice. *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299-300, 757 P.2d 361 (1988). An injustice occurs where the record as a whole makes it probable a different outcome may have been reached but for the error. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214 (2008). Here, it is clear that Respondent succeeded in obtaining an order of the district court transferring property owned by Appellant to Respondent without recording affidavits of judgment. If, as argued in Appellant's Opening Brief, this Court determines that the timing requirements of the statute must be strictly adhered to, the

record below will result in a different outcome: a denial of the motion and order from which this appeal is taken.

Nevada is far from alone in determining that it is appropriate to review issues not raised in the courts below. *See, Sea & Sage Audubon Society, Inc. v. Planning Com.*, (1983) 34 Cal. 3d 412, 417, holding that an exception to the rule that issues not raised in the trial court cannot be raised and will not be considered on appeal exists where the issue raised belatedly is a "pure question of law which is presented on undisputed facts" that relate to an important issue of public policy. Here, the issue before the court is purely a question of law and is an issue of important public policy relating to how that statute is to be applied. In *Roberts v. American Family Mut. Ins. Co.*, 144 P.3d 546 (Colo. 2006), the court held that "with regard to matters having broad impact or directly affecting the validity of judgments, such as the constitutionality of statutes and related issues, we have at times found it appropriate to address even claims that were never presented to the trial courts." *Id. at 550.* The court found that it was within its discretion to address an error appearing in the record and found it important that the issue was not brought to the lower court's attention so that it could be properly addressed. Here, notwithstanding the fact that Appellant was not a participant in the motion to reconvey the deeds, the Respondent failed to properly bring the NRS 17.150(4) issue to the attention of the district court. Therefore, it is appropriate for this Court to address the issue and, as in *Roberts,*

supra, this Court is not constrained by the failure of a party to specifically identify an issue and bring it to the trial court's attention.

See also, Nutraceutical Dev. Corp. v. Summers, 373 P.3d 946, fn 1 (2011) in which the court restated the proposition that issues are waived unless they constitute plain error, and citing *Bradley, Id*., and *Thomas v. Hardwick*, 126 Nev. 16, 231 P.3d 1111 (2010) for the proposition that reversible error not brought to the lower court's attention is reversible if it affects a party's substantial rights.

D. Respondent's Interpretation of NRS 17.150(2) Would Render Subsection (4) Meaningless.

Respondent contends that he created a judgment lien against several properties merely by recording a copy of the judgment in the county where the properties were located. Respondent relies upon subsection (2) of NRS 17.150 for this position. According to the Respondent, once he records the judgment, a lien attaches without any further action on the part of the judgment creditor. To accept this interpretation, one must necessarily ignore subsection (4) of the same statute which provides, in pertinent part, "In addition to recording the information described in subsection 2, a judgment creditor who records a judgment or decree for the purpose of creating a lien upon the real property of the judgment debtor pursuant to subsection 2 shall record at that time an affidavit of judgment…" stating certain information intended to identify the judgment debtor and the property, and which

must include a statement, made on personal knowledge, that the judgment creditor has confirmed that the judgment debtor is the legal owner of that real property. Subsection (4) expressly states that it is for the purpose of "creating a lien upon the real property of the judgment debtor pursuant to subsection 2" and that the affidavit "shall" be recorded at the same time the judgment is recorded. This provision is clear and unambiguous because it unmistakably requires the affidavit to be recorded at the same time as the judgment and unmistakably requires the identifying information required by the statute which addresses the legislature's concerns and intent behind the statute. *See Opening Brief at pp. 19-24.* This provision is not merely advisory, it is mandatory. Respondent completely ignores this portion of the statute.

When analyzing a statute, this Court begins with the plain meaning rule. *Clark Co. v. Southern Nevada Health District*, 289 P.3d 212, 215 (2012), citing *We The People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008). If the legislature's intention is apparent from the face of the statute, there is no room for construction and this Court will give the statute its plain meaning. *Id.*, citing *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117 (1998). Statutes should be read as a whole so as to not render superfluous words or phrases or make provisions nugatory. *Id.*, citing *Southern Nevada Home Builders v. Clark County,* 121 Nev. 446, 449, 117 P.3d 171 (2005). If the statute is ambiguous, meaning that

it is capable of two or more reasonable interpretations, this Court will look to the provision's legislative history and the scheme as a whole to determine what the framers intended. *Id.*, citing *We The People, supra*, 124 Nev. at 881, 192 P.3d at 1171. And the Court will examine "the context and spirit of the law or the causes which induced the legislature to enact it." *Id.*, citing *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

When interpreting the meaning of a statute, the term "may" is construed as permissive and "shall" is construed as mandatory unless the statute demands a different construction to carry out the clear intent of the legislature. *Givens v. State*, 99 Nev. 50, 54 (1953) [internal citations omitted]; *see also Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1288-89 (2011); *Washoe Medical Center v. State*, 122 Nev. 1298, 1303-04 (2006); *Leyva v. National Default Service*, 125 Nev. Adv. Op. 40 (2011), 255 P.3d 1275, 1277-78 (Nev. 2011).

Subsection (4) of the statute is clear and unambiguous. If a judgment creditor desires to create a judgment lien, he must record a copy of the judgment in the appropriate county and "shall" also record an affidavit of judgment "at that time." Respondent does not explain why this section of that statute should be ignored under the circumstances of this case.

Should this Court decide that subsection (4) is ambiguous or susceptible to more than one meaning, then it must apply its normal rules of statutory construction.

As set forth above, it is well settled that statutes must be construed as a whole and that a statute should not be interpreted in such a manner as to render a portion of the statute meaningless or a nullity. Under the interpretation urged by Respondent, that is exactly what he is asking this Court to do. Surely, if the legislature had intended that recording of a judgment was all that was necessary to create a judgment lien, it would not have included subsection (4) in the statute.[1]

Respondent asserts that the Court of Appeals' decision in *Secured Holdings, Inc. v. Eighth Jud. Dist. Court of State*, Nev. App. 2017, No. 73158, does not support Appellant's position with respect to NRS 17.150(4). Respondent misses the point. As set forth in Appellant's Opening Brief, the Nevada Court of Appeals merely held that petitioner therein "failed to demonstrate that dismissal was required by clear authority, and thus, that writ relief is warranted on this basis." *Id. at 3-4*, citing *International Game Technology, Inc. v. Second Jud. Dist. Court,* 124 Nev. 193, 197-98, 179 P.3d at 558-59. The Court of Appeals noted in a footnote that "Petitioner does not assert that writ relief is warranted based on an important issue of law needing clarification and we therefore do not address that issue further." *Id. at p. 4,*

[1] Respondent claims that Appellant's argument that the district court erred because it was on notice of the bankruptcy court's order when it granted the motion to void deeds is specious. Respondent relies on the fact that the bankruptcy court's order was ruled *void ab initio* and all bankruptcy proceedings were dismissed prior to the district court's order being entered. *Answering Brief* at 15-16. There is nothing in the record showing that these facts had any influence on the district court's decision. However, there is ample evidence in the record that the court was on inquiry notice that the judgment liens were not perfected. A person is put on inquiry notice when he or she should have known of facts that would lead an ordinarily prudent person to investigate the matter further. *Winn v. Sunrise Hospital,* 128 Nev. 246, 252, 277 P.3d 458 (2012).

fn 1. Here, the Appellant contends that this Court has not yet addressed the effect of a failure to strictly comply with the statutory requirements for perfecting a lien under NRS 17.150(4). Appellant contends that this is an important issue of law needing clarification from this Court and is properly before the Court as set forth in Appellant's pro per docketing statement filed March 11, 2021.

Similarly, Respondent's claim that this Court's decision in *Leven v. Frey* is not analogous to this case is unpersuasive. In *Leven*, this Court held that statutes allowing for a "reasonable time" to act are subject to interpretation for substantial compliance, but those with set time limitations are not. *123 Nev. 399 at 408.* The *Leven* court's interpretation of NRS 17.214's timing requirement and its conclusion that those requirements must be complied with strictly was consistent with the general tenet that "time and manner" requirements are strictly construed, whereas substantial compliance may be sufficient for "form and content" requirements. *Id.* Here, subsection (4) of NRS 17.150 states that a judgment creditor who records a judgment or decree for the purpose of creating a lien upon real property of the judgment debtor "shall record at that time an affidavit of judgment…" As set forth above, use of the word "shall" is mandatory. Furthermore, the statute's requirement that the affidavit be recorded "at that time" sets forth a timing requirement, which, as in *Leven,* must be strictly construed. *See also Worsnop v. Karam*, 458 P.3d 353 (2020). It is undisputed in this case that Respondent failed to record an affidavit of

judgment at the time he recorded the judgment itself. To the extent any affidavits were filed at all, they were filed years later and only during the pendency of this appeal. The *Leven* court observed that with respect to NRS 17.214, "the legislature did not provide for any deviations from this [timing] requirement, and we perceive no reason to extend this period in contravention of the legislature's clear and express language." *Leven, 123 Nev. at 409.* Again, the same logic applies here. The legislature clearly set forth its intent that the affidavit of judgment "shall" be recorded at the same time as the judgment in order to create a judgment lien against real property. The arguments of Respondent do nothing to change this analysis.

Instead, Respondent alleges that Appellant's Opening Brief made a false statement of fact with regard to the filing and/or recordation of Respondent's affidavit of judgment. Respondent alleges that Appellant stated to this Court that the affidavit of judgment was never "recorded anywhere" and then relies upon its motion to take judicial notice (filed concurrently with the Answering Brief) to support this claim. However, Respondent's motion for the court to take judicial notice was denied and it is therefore inappropriate for Respondent to rely on its failed motion as authority. In any event, it is clear that Appellant never made that statement. What the Appellant did say was "…notwithstanding the **filing** of the untimely affidavit of judgment, there is no evidence **in the record** that the untimely affidavit of judgment was **recorded** anywhere in compliance with NRS 17.150(4)." *Opening Brief at p.*

11 [emphasis added]. This is an accurate statement because there is no evidence in the record on appeal proving that the Appellant recorded an affidavit of judgment and Respondent does not cite to any portion of the record to demonstrate that the affidavit was in fact recorded. *See also Opening Brief at p. 5* ("In fact, the record on appeal contains no evidence that such an affidavit of judgment was recorded at the time the default judgment was recorded.")

Finally, the Respondent argues that the legislative history of NRS 17.150(4) does not support Appellant's interpretation of the statute. Respondent contends that the legislative history demonstrates that the amendments to the statute were designed to protect consumers. Appellant agrees. *Opening Brief at 23-24*.[2] The legislative history demonstrates that the purpose of the amendments was to protect or benefit clerks and recorders, judgment debtors **and** consumers. The legislature sought to ensure that a particular judgment be accurately tied to a particular piece of property, and to prevent situations where a judgment lien would wrongfully burden the property of an innocent third person. For example, subsection (4) of the statute requires, among other things, that the affidavit of the judgment creditor state, based upon personal knowledge, that the property being liened is actually owned by the

[2] "Again, Carson City Clerk-Recorder Glover testified that the purpose of the bill would be to ensure that the information in the affidavit of judgment is for the right person and the right piece of property and that the information was on all necessary documents to record a lien. He testified that the amended provisions would benefit consumers."

judgment debtor. Respondent does not explain how this public policy could be advanced or that the intent of the legislature could be realized by allowing a judgment creditor to record the affidavit of judgment several years after recording the judgment, or not recording the affidavit at all. Respondent merely claims that he knew who owned the property at issue. *Answering Brief at p. 23-24.* However, there is no evidence in the record that Respondent demonstrated to the public at large that the property being liened was actually owned by the judgment debtor because Respondent simply failed to record his affidavit of judgment at the time he recorded the judgment itself.[3]

CONCLUSION

For the reasons stated above, Appellant urges this Court to reverse the order of the District Court that allowed execution on a judgment for which no lien was perfected in the manner prescribed by NRS 17.150(4) because no affidavit of judgment was recorded. Appellant requests that in doing so, the Court clarify that perfection of a lien on real property by judgment creditors requires strict compliance with the timing and recording provisions of NRS 17.150(4).

[3] Respondent contends that the legislative history's "commentary" reflects an acknowledgment that recording the judgment alone creates a valid lien and NRS 17.150(4) is being created to clarify the identity of the judgment debtor "(if known)". Respondent does not cite to the record or the legislative history to support this claim and, even if true, Respondent does not explain why the legislature did not intend for the affidavit to be recorded at the same time as the judgment.

Respectfully submitted this 4th day of November, 2021.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq., NSB 4265
Rick Oshinski, Esq., NSB 4127

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:

1. This brief has been prepared using Microsoft Word with a Times New Roman font (proportional spacing) with a 14 point font size.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4631 words.

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 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 4th day of November, 2021.

OSHINSKI & FORSBERG, LTD.

By /s/ Mark Forsberg, Esq.
Mark Forsberg, Esq., NSB 4265
Rick Oshinski, Esq., NSB 4127

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Oshinski & Forsberg, Ltd., and that on November 4, 2021, I filed a true and correct copy of the foregoing **Appellant's Reply Brief** with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

Arthur A. Zorio
Matthew Francis
Brownstein Hyatt Farber Schreck
5371 Kietzke Lane
Reno, NV 89511
Attorneys for Respondent

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

Executed on this 4th day of November, 2021, in Carson City, Nevada.

/s/ Linda Gilbertson
Linda Gilbertson