IN THE SUPREME COURT OF THE STATE OF NEVADA

PARDEE HOMES OF NEVADA, INC., A NEVADA CORPORATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE,
Respondents,
and
DEAN WILLETT; SONJA WILLETT; ROGER S. BAUM; CHARLENE S. BAUM; ANGELO M. BIONDO; MARY BIONDO; JEFFREY BRADLEY; REGINA BRADLEY; LOLITA DAVID; PATRICIO DAVID; KELLY L. BUTLER; HILDA NAVARRO-CARLSON; SHAUN CARLSON; JENNIFER CARTER; GLENN P. DAVIS; JAN K. HUGO-DAVIS; MARY J. DUNN; LOS CAMINOS DE LA VIDA TRUST; ORIANA FANUIEL-GREEN; JERRY GARRETSON; ELANOR GARRETSON; CARLOS E. TIRET-GIRON; LILLIAN TIRET-GIRON; SHARON C. HAMMOND; RONALD HAMMOND; SHAWN M. HICKEY; TANYA WOJTASZCZYK; MONTE D. HOUK; KAREN S. HOUK; ANTHONY D. IWATSURU; BRYAN JACQUET; TARA JACQUET; JAMES M. JARVIS, JR.; DIANE E. JARVIS; CHERYL Y. MARSHALL; PETER M. MCGAVIN; CAMILLE L. MCGAVIN; JOHN MCINTEER; MICHAEL MIZNER; BRANDI MIZNER; PATRICK L. PERRY; CYNTHIA PERRY; JOSUE RIVERA;

No. 70710

FILED

SEP 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

16-29874

ELIZABETH CHEVERE; PRISCILLA ROCHA; DAVID WILLIAMS; JOSEPHINE WILLIAMS; JOHN I. WILSON, JR.; JOY C. WILSON; CHRISTOPHER M. WOOLEY; JONATHAN E. ZALL; MARILU AVELAR; DENNIS BUSICKIO; JAMES CELESTE; SUAEN CELESTE; PAUL DACKOW; JULIE COLE-DACKOW; FRANCIS L. DALOG, SR.; GILBERTO DECASTRO; EMILIA DECASTRO; ARTURO DIAZ; MARTHA DIAZ; KJERSTINA ELLIS; BORD D. ELLIS, JR.; ANGELA FINDLEY; FLORIMON GACAD; ELEANOR GACAD; MICHAEL HERBERT; NANCY HERBERT; ESTEBAN HERNANDEZ; ROMSLIN HERNANDEZ; L. B. HUGHES; LAVERNA HUGHES; ROBERT MCDERMOTT, JR.; ANITA MCDERMOTT; MICHAEL MCGRATH; ANTHONY MCKENZIE; CHARMIONE MCKENZIE; SAYLOR FAMILY REVOCABLE LIVING TRUST; ON WANG; JENNESE WANG; JAMARIO CASTLEBERRY; DAVID RUTTENBERG; COURTNEY SCHROEDER; CHARLES E. DAVIS; GINGER M. DAVIS; GOLDBERRY GROUP, LLC; MARGARET MILLER; KEVIN MILLER; JUAN ESPIONO; FATIMA ESPIONO; THOMAS HERBERT; JAMIE HERBERT; TERI DAVIS-JOHNSON; KEITH JOHNSON; ANTOINE JOHNSON; KELLY JOHNSON; STEVE NEWMAN; JAYNE NEWMAN; WILLIAM PETERS; DAI PETERS; ALAN REZA; LAURA REZA; RUDY RODRIGUEZ; VANESSA RODRIGUEZ, F/K/A VANESSA GORDON; KENT D. ROSE TRUST;

LORRAINE STALIANS; RUSSELL STELZNER; BRIAN WATKINS; DAVID WESTPY; AND ANN WESTPY,
Real Parties in Interest.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

This original petition for a writ of mandamus and prohibition challenges district court orders denying a motion for summary judgment and granting leave to amend a counterclaim in a declaratory relief and construction defect action.

Having reviewed the petition and supporting documents, we are not persuaded that our extraordinary and discretionary intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). While the issues presented in this petition and the petition in Docket No. 71051 are novel and of potential statewide significance, the arguments raised in the petitions were not, for the most part, raised or adequately vetted in the district court. Mandamus lies to correct clear error or an arbitrary or capricious abuse of discretion by the district court, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008), a standard that requires adequate presentation of the issue to the district court for decision in the first instance. *See United States v. U.S. Dist. Court*, 384 F.3d 1202, 1205 (9th Cir. 2004) (declining to consider as a basis for mandamus an argument not presented to the district court because a district court's decision cannot be "so egregiously wrong as to constitute clear error where the purported error was never brought to its attention"); *cf. Califano v. Moynahan*, 596 F.2d 1320, 1322 (6th Cir. 1979) ("We decline

to employ the extraordinary remedy of mandamus to require a district judge to do that which he was never asked to do in a proper way in the first place."). Thus, although many of these new arguments are legal and not fact-driven, they still needed to be presented to and decided by the district court.[1] *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("[A] de novo standard of review does not trump the general rule that a point not urged in the trial court . . . is deemed waived and will not be considered on appeal." (quotation omitted)); *cf. Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-80 (2011) (observing that the above-mentioned general rule applies to situations other than appeals from final judgments because "[a] contrary holding would lead to the inefficient use of judicial resources and allow parties to make an end run around [the lower tribunal]"). Having considered the arguments pertaining to the April 25, 2016, order that *were* presented to the district court, we are not persuaded that the district court committed clear error or arbitrarily or capriciously abused its discretion so as to warrant the issuance of a writ of mandamus.[2] *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *Pan*, 120 Nev. at 228, 88 P.3d at 844.

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[1]For example, petitioner argues that based on *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. 593, 260 P.3d 408 (2011), the homeowners' original notice of construction defect was void ab initio. But because this argument was not raised in district court, neither the homeowners nor the district court have had the opportunity to address the argument, which necessarily hinders our review of the issue.

[2]Nor is a writ of prohibition warranted with respect to the April 25, 2016, order because petitioner did not ask the district court in the first instance to apply the "reasonable threshold test" to the homeowners'

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With respect to the district court's June 16, 2016, decision, we likewise conclude that our extraordinary and discretionary intervention is not warranted. *Smith*, 107 Nev. at 677, 679, 818 P.2d 849 at 851, 853. As a threshold matter, petitioner has not provided this court with a written, file-stamped order from the district court, which, in itself, precludes our review of the district court's decision. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). Moreover, even if we were to consider the merits of petitioner's challenges to the June 16, 2016, decision, those challenges suffer from the same shortcomings discussed above. Most notably, in its writ petition, petitioner contends that the district court erred in determining that the previously unnamed homeowners were sufficiently involved in the NRS Chapter 40 process by virtue of the original notice of construction defect. In district court, however, petitioner not only failed to make this argument, but essentially conceded that "[t]he act of serving [petitioner] with the common notice arguably tolled the unnamed claimants' repose periods as of the February 18, 2015 date of the [original] notice."[3] *Cf. Schuck*, 126 Nev. at 437, 245 P.3d at 544 ("[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." (quotation omitted)). Thus, in light of petitioner's concession that the newly added homeowners' repose periods were tolled as of February 18,

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amended notice of construction defect as it related to the pre-AB 125 version of NRS Chapter 40.

[3]Although petitioner used the term "arguably," petitioner did not proceed to make an argument as to why the unnamed claimants could not benefit from the original notice.

2015, it follows that the applicable repose periods were those in effect as of that date—i.e., the pre-AB 125 periods. While we recognize that some of the newly added homeowners' claims may still be untimely under the pre-AB 125 repose periods, we decline to address that issue in the first instance. In light of the foregoing, we

ORDER the petition DENIED.[4]

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Jerry A. Wiese, District Judge
Koeller Nebeker Carlson & Haluck, LLP/Las Vegas
Canepa Riedy Abele & Castello
Eighth District Court Clerk

[4]Petitioner's motion for a stay is denied as moot.