IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PETRA DRILLING AND BLASTING, INC., A CALIFORNIA CORPORATION AUTHORIZED TO DO BUSINESS IN NEVADA, Appellant, vs. U S MINE CORP, A NEVADA CORPORATION, Respondent.	No. 78709-COA
PETRA DRILLING AND BLASTING, INC., A CALIFORNIA CORPORATION AUTHORIZED TO DO BUSINESS IN NEVADA, Appellant, vs. U S MINE CORP, A NEVADA CORPORATION, Respondent.	No. 79230-COA

FILED

AUG 11 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Petra Drilling and Blasting, Inc., appeals from district court orders releasing a mechanic's lien and awarding attorney fees and costs. First Judicial District Court, Storey County; James E. Wilson, Judge (Docket No. 78709-COA), and James Todd Russell, Judge (Docket No. 79230-COA).

CEMEX Construction Materials, Pacific LLC (Cemex) leased Sierra Stone Quarry ("the Property") from Storey County Properties LLC (SCP) via a long-term lease for the mining and production of aggregate.[1] Cemex contracted with U S Mine Corp (US Mine) to produce and move

[1]We do not recount the facts except as necessary to our disposition.

aggregate from the Property so that Cemex could sell it. US Mine in turn subcontracted with Petra Drilling and Blasting, Inc. (Petra), to drill and blast large rock faces in the quarry and break them down into movable aggregate. Petra performed substantial work on the property but was not fully paid.

In March 2019, Petra recorded a mechanic's lien on the Property. US Mine, under its contract with Cemex, filed a motion for an order to show cause why the lien should not be released. The district court granted US Mine's motion and filed an order for Petra to show cause why the lien should not be released or reduced. Following Petra's response and a hearing on the matter, the district court concluded that SCP, as property owner, did not have actual notice of Petra's right to lien, and SCP's interest in the property would be adversely affected if Petra proceeded with a foreclosure sale of Cemex's leasehold interest. Thus, Petra's lien was invalid as a matter of law and made without reasonable cause. Subsequently, pursuant to NRS 108.2275(6), the district court awarded attorney fees and costs to US Mine. On appeal, Petra argues the district court erred in determining that Petra's lien was invalid because a claimant can have a valid lien on a leasehold interest, and Cemex had actual knowledge of Petra's improvements on the property, and therefore had actual knowledge of Petra's right to lien. Further, Petra avers that the district court abused its discretion by awarding fees and costs because it failed to address the *Brunzell*[2] factors properly, and US Mine's billing records and evidence of its costs were insufficient.

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[2]*Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

First, we consider whether the district court erred by concluding that Petra's lien was invalid and made without reasonable cause because Petra failed to comply with the statutory notice provisions. Petra argues the district court erred by finding its lien against the Property invalid because its lien was only against Cemex's leasehold interest and Cemex had actual knowledge of Petra's right to lien. US Mine counters that because Petra did not serve notice of its right to lien on the property owner SCP, Petra failed to substantially comply with NRS 108.245 and Petra's lien was invalid.

Mechanic's liens "are remedial in nature and should be liberally construed to protect the rights of claimants and promote justice." *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1204 (2013). Under NRS 108.2275,

> The debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the notice of lien is excessive, may apply by motion to the district court . . . for an order directing the lien claimant to appear before the court to show cause why the relief requested should not be granted.

NRS 108.2275(1). "After a hearing, the district court shall make one of three determinations: (1) that the notice of lien is frivolous and made without reasonable cause, (2) that the lien amount is excessive, or (3) that the notice of lien is not frivolous or excessive and made with reasonable cause." *J.D. Constr., Inc. v. IBEX Int'l Grp.*, 126 Nev. 366, 372, 240 P.3d 1033, 1038 (2010) (citing NRS 108.2275(6)(a)-(c)). If the district court determines that the lien is frivolous and made without reasonable cause, it must enter an order releasing the lien. NRS 108.2275(6)(a).

A mechanic's lien is invalid as a matter of law when a lien claimant fails to fully or substantially comply with the mechanic's lien statute. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010). "Where a claimant is seeking to place and enforce a lien, NRS 108.245 requires that the claimant serve all parties whose interest it is seeking to affect." *Id.* at 541, 245 P.3d at 1158. However, "the service of one owner is not adequate to give notice to other owners of the potential claim." *Id.* A lien against a leasehold interest is valid if the parties whose interests the claimant is trying to affect have knowledge of the existence and identity of contractors who contracted with the lessee. *Id.* at 542, 245 P.3d at 1158; *see Able Elec., Inc. v. Kaufman*, 104 Nev. 29, 32, 752 P.2d 218, 220 (1988) (where a sub-contractor held liens over multiple leasehold interests). "[T]he burden is on the lien claimant to prove the lien *and* the amount claimed." *J.D. Constr.*, 126 Nev. at 369, 240 P.3d at 1036 (emphasis added).

Here, a review of the notice of lien supports the conclusion that Petra's actions affected the interests of SCP, the property owner, as the district court found. Specifically, at the hearing Petra acknowledged that it, or some other bidder at the time of the foreclosure sale on the leasehold interest, would step into the shoes of the lessee, thereby affecting the lease entered into between Cemex and the property owner. We note that the lease itself is not part of the record. However, it is reasonable to conclude, as the district court did here, that the property owner's profitability would necessarily be affected by a change in the lessee, especially if the lessee who purchased the interest in the leasehold on the courthouse steps did not have the credentials to operate a mine. Thus, SCP's property rights would be affected as a result of the foreclosure process described by Petra at the

hearing. Further, although Petra substantially complied with most of the notice requirements, Petra's notice of lien clearly lists the Property at issue, names Cemex as owner, and makes no mention of a leasehold, or that it was only intending to affect the leasehold interests. In addition, even if it had, Petra clearly understood that a foreclosure proceeding on the leasehold would affect the parties to the lease, and ultimately, SCP's property interests.

Therefore, while it is correct that, as a matter of law, a lien against a leasehold interest can be valid against only a leasehold, in this case, because Petra's notice of lien names Cemex as the property owner and identifies the Property itself, it necessarily implicates the interests of the property owner. "A mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process." *J.D. Constr.*, 126 Nev. at 376, 240 P.3d at 1040 (quoting *Connolly Dev., Inc. v. Superior Court of Merced Cty.*, 553 P.2d 637, 644 (Cal. 1976)).

Further, Petra's notice of lien states that Cemex is an owner under NRS 108.22148(1)(e). NRS 108.22148(1)(e) states that an owner can be "a person who claims an interest in or possesses less than a fee simple estate in the property." Thus, Petra's notice evinces an intent to encumber the interest of the owner, not merely the interests of the tenant. Moreover, its notice expressly identifies the interest to be encumbered not as a leasehold, but rather an interest "less than fee simple," which is distinguishable from a leasehold. An interest in land less than a fee simple estate is a freehold estate. *See Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 31 Nev. 348, 348, 102 P. 963, 966 (1909). "A freehold estate is distinguished from other forms of estates in that it is

of indeterminate duration. But an estate for years is not . . . a free hold estate. . . . Notwithstanding the fact that a lease is a present possessory interest in land, there is no question that as a nonfreehold estate it is a different species of interest from a freehold estate. . . . A leasehold is not an ownership interest . . . ." *Auerbach v. Assessment Appeals Bd. No. 1*, 137 P.3d 951, 956 (Cal. 2006). This fits with Black's Law Dictionary, which states a leasehold interest is "[a] tenant's possessory estate in land or premises, the four types being the tenancy for years, the periodic tenancy, the tenancy at will, and the tenancy at sufferance. Although a leasehold has some of the characteristics of real property, it has historically been classified as a chattel real." *Black's Law Dictionary* (11th ed. 2019). Because Petra's lien seeks an ownership interest under a freehold estate, the notice of lien would affect the property owner's interest. Therefore, SCP was required to receive notice of Petra's lien because foreclosure on the lien would affect its property interest.

Additionally, the claimant bears the burden of serving notice on all parties whose interest they are seeking to affect. Even though Cemex and US Mine had actual knowledge of Petra's right to lien, there is no evidence that Petra served SCP with notice or that SCP had actual notice that its interest in the Property would be affected. Further, as noted above, notice to Cemex and US Mine does not suffice as notice to SCP. Thus, the district court did not err by finding Petra failed to comply with NRS 108.245.

Next, we consider whether the district court abused its discretion by awarding attorney fees and costs to US Mine, incurred as the result of moving to release the lien for Petra's failure to serve SCP with notice of the lien. An award of attorney fees is generally reviewed for an

abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014); *see also Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). Under NRS 108.2275(6)(a), the court must award costs and reasonable attorney fees to the debtor of a lien that was found to be frivolous and made without reasonable cause. Reasonable attorney fees are determined by evaluating the *Brunzell* factors. *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005) (citing *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33). Under *Brunzell*, when courts determine the appropriate fee to award in civil cases, they must consider various factors, including the qualities of the advocate, the character and difficulty of the work performed, the work actually performed by the attorney, and the result obtained. *Miller*, 121 Nev. at 623, 119 P.3d at 730. We conclude that the award of attorney fees was appropriate.

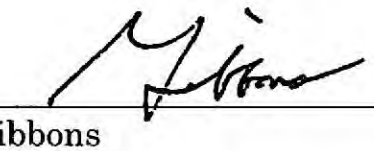
First, under NRS 108.2275(6)(a), if the district court finds that a notice of lien was "frivolous and was made without reasonable cause," the court "shall" award costs and reasonable attorney fees against the party filing the lien. The supreme court has held "[t]he plain language of [NRS 108.2275] requires the district court to determine the material facts in order to make a ruling as to whether the lien is frivolous or excessive." *J.D. Constr.*, 126 Nev. at 375, 240 P.3d at 1040. "The plain language of NRS 108.2275(6) is clear that if the district court determines that a mechanic's lien was made 'without reasonable cause,' then the lien is frivolous and the district court may expunge the lien." *Id.* at 379, 240 P.3d at 1042. Here, the district court determined that the lien was invalid as a matter of law as it was made without reasonable cause due to the failure to serve SCP with the notice of lien under NRS 108.245. Thus, the court ordered the lien

released. Once the court released the lien, it was required to award attorney fees in accordance with NRS 108.2275(6)(a). As we concluded above that the notice of lien was frivolous and without reasonable cause, we therefore conclude that the award of attorney fees under NRS 108.2275(6)(a) was not an abuse of discretion.

Second, Petra's argument that the district court failed to make proper findings under *Brunzell* is incorrect. Although not fully addressed at the hearing, the order clearly analyzes the award of attorney fees under *Brunzell*. Petra also argues that if we determine the district court's findings under *Brunzell* to be proper, there was insufficient evidence to support the amount awarded by the district court because US Mine used block-billing to show its fees and failed to show its costs were reasonable, necessary, and actually incurred. We disagree. The district court identified the *Brunzell* factors in its order, rejected the block billing arguments, and determined that the attorney fees were reasonable for the work performed by the attorneys for US Mine, which is sufficient for an award. *Brunzell*, 85 Nev. at 349-50, 455 P.2d at 33. Thus, we affirm the award of attorney fees and costs as required under NRS 108.2275(6)(a) and pursuant to *Brunzell*.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

TAO, J. , concurring:

I join the principal order, but write separately to further explore the nuances of NRS 108.2275, and particularly the relationship between the district court's conclusion that the lien was frivolous and its award of fees and costs.

I.

The Legislature wrote a complex statute in NRS 108.2275, but a perfectly good one that represents a deliberate and conscious choice between two reasonable but competing policy preferences. Making difficult choices between alternative policy outcomes is exactly what the Framers designed the legislative branch to do, and courts have no constitutional power to second-guess that choice and substitute our own policy preferences instead. So long as the statute does not conflict with the Constitution and so long as it represents a valid exercise of legislative power, the only option permitted to us is to honor the choice embodied within the text of the statute by faithfully applying its plain words as those words would have been publicly understood at the time of enactment.

Here, NRS 108.2275 touches upon some fundamental rights. The right to own property is central to the American concept of democratic freedom; it's the individual right most frequently mentioned in the U.S. Constitution (and, not coincidentally, it's the first right attacked by communist theory). *See* U.S. Const. amend. III (protecting "any house"); amend. IV (protecting "houses" from unreasonable search and seizure); amend. V (prohibiting deprivation of life, liberty or "property" without due process of law, and preventing "private property" from being taken without just compensation); amend. XIV (prohibiting deprivation of life, liberty, or "property" without due process of law). In feudal times, all land belonged

to the sovereign and citizens could only own land at the whim of the King. In contrast, a central guarantee of our Constitution is that citizens can own land free of governmental interference except to the extent expressly permitted by the text and original public understanding of the Constitution.

On the other hand, a lien is a statutorily created exception to the sanctity of property ownership. Mechanic's liens "are remedial in nature and should be liberally construed to protect the rights of claimants and promote justice." *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1204 (2013). But they are burdens on property. "A mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process." *J.D. Constr. v. IBEX INt'l Group*, 126 Nev. 366, 369, 240 P.3d 1033, 1036 (2010) (quoting *Connolly Develop., Inc. v. Sp. Ct. of Merced Cty.*, 17 Cal.3d 803, 132 Cal.Rptr. 477, 553 P.2d 637, 644 (1976)).

So how such liens should be handled requires a choice, or at least some kind of balance, between two competing policies, one recognizing the sanctity or property ownership and the other recognizing the rights of claimants against the property. As the Nevada Supreme Court has described the balance, "we recognize that the owner has a significant interest in having his or her property be free of encumbrances. We also recognize that the state has a significant interest in securing payments for those who improve the owner's property." *J.D. Constr.*, 126 Nev. at 378, 240 P.3d at 1041.

II.

With this framework in mind, let's examine the overall statutory scheme. A lien is a method of collecting on a debt by permitting judicial foreclosure upon and sale of the liened property in order to satisfy

the debt. *See* NRS 108.239 ("Action to enforce notice of lien"). Because a lien represents a significant encumbrance on property, NRS 108.222 through 234 lays out a series of procedural requirements that must be followed in order to record, perfect, and enforce a lien. The procedures are detailed and full of conditions and exceptions, but in general they require a claimant to provide multiple notices, including a notice of intent to lien the property followed by a notice of the lien itself. *See* NRS 108.226 (kinds of notices); NRS 108.227 (notices must be served on all owners). A mechanic's lien that fails to comply with these statutory procedures is invalid as a matter of law. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010). After a lien has been properly noticed, recorded, and perfected, the lienholder may initiate an action in district court to enforce the lien, and if the court agrees that the lien is valid, "the court shall cause the property to be sold in satisfaction of all liens." NRS 108.239(10).

When someone places a lien on property that the property owner believes to be erroneous, the Legislature has provided the property owner (or another applicant with legal standing) with multiple methods to challenge it or remove it. Most commonly, the applicant may assert defenses to the lien in the lienholder's action to enforce the lien. NRS 108.239(7); NRS 108.229(2). It may post a surety bond in exchange for the release of the lien. NRS 108.2415. In some cases, the merits of the matter may be submitted to binding arbitration. NRS 108.239(9).

Alternatively, if the property owner or applicant does not wish to wait for the lienholder to initiate an action to enforce the lien and believes the lien is so outright frivolous that it ought to be quickly expunged without the need for a full-blown trial, then the applicant may file a motion pursuant

to NRS 108.2275. NRS 108.2275 is an expedited mechanism that does not contemplate a jury trial including witness testimony and cross-examination on contested factual questions relating to the merits of the underlying debt. Rather, it's a summary mechanism requiring the court to conduct a hearing within 30 days of the filing of the motion. NRS 108.2275(3). During the hearing, the court's review is generally limited to affidavits and documentary evidence, although the district court has discretion to expand the scope of evidence to include some witness testimony as well. *J.D. Constr.*, 126 Nev. at 378, 240 P.3d at 1041 ("an evidentiary hearing is not mandatory"). The only question at stake in the hearing is whether the lien is frivolous and without reasonable ground or if the amount is excessive, not whether the lien might be valid or invalid in a way short of being frivolous. NRS 108.2275(1); *J.D. Constr.*, 126 Nev. at 377-78, 240 P.3d at 1041. "Frivolous" in this context means "without reasonable cause." *J.D. Constr.*, 126 Nev. at 379, 240 P.3d at 1042 ("The plain language of NRS 108.22275(6) is clear that if the district court determines that a mechanic's lien was made 'without reasonable cause,' then the lien is frivolous and the district court may expunge the lien."). The supreme court has stated that if the court determines that a lien is frivolous, then it does not have to determine whether its amount was excessive. *I. Cox. Constr. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1206 (2013). NRS 108.2275(7) specifies that pursuing this expedited process does not forfeit the right to later file (and defend) a full-blown trial to enforce the lien during which the merits of the underlying debt dispute may be explored in more detail, and it also does not impair the lienholder's access to other alternative remedies such as a simple suit for breach of contract rather than a lien.

Thus, if the property owner or applicant believes that the lien is so frivolous that its lack of merit can be addressed expeditiously based only upon limited documentary evidence presented within 30 days, then this statute is the right one to invoke. But if the property owner or applicant believes that the lien is incorrect in a more complex way, such as being based upon a contested underlying debt that requires discovery and cross-examination to flesh out, then it should probably utilize another avenue instead such as the full trial mechanism of NRS 108.239.

III.

As the majority notes, Petra did work on the mine at the request of a subcontractor (US Mine) who was, in turn, hired by the tenant, Cemex. Petra alleges that it was not paid for its work, and filed a notice of lien against the property. It expressly liened an interest in the mine "less than a fee simple," which means that it liened a freehold estate. *See Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 31 Nev. 348, 348, 102 P. 963, 966 (1909). The problem is that the owner of the liened interest — the freehold estate — was not the party who owed Petra money. The party who owed Petra money was Cemex, and Cemex was a mere tenant on the property (it held a mere "leasehold"). A leasehold (otherwise known as a "tenancy for years") is not a freehold estate. "A freehold estate is distinguished from other forms of estates in that it is of indeterminate duration. But an estate for years is not . . . a free hold estate. . . . Notwithstanding the fact that a lease is a present possessory interest in land, there is no question that as a nonfreehold estate it is a different species of interest from a freehold estate. . . . A leasehold is not an ownership interest . . . ." *Auerbach v. Assessment Appeals Bd. No. 1*, 137 P.3d 951, 956 (Cal. 2006).

The owner of the freehold estate was SCP (which actually owned the property in fee simple), not Cemex. Thus, Petra liened the property interest of a party that did not owe it any money. Further, it liened that interest without giving notice to the party (SCP) who owned it.

US Mine filed a motion in district court challenging the lien as frivolous and without reasonable ground under NRS 108.2275. The district court granted the motion, released the lien, and awarded fees and costs, citing NRS 108.2275(6) as the basis for the award.

IV.

The text of NRS 108.2275 states, in pertinent part, as follows:

> NRS 108.2275 Frivolous or excessive notice of lien: Motion; hearing; consequences of failure to appear; effect on action to foreclose; order; appeal; recording of certified copy of order releasing or reducing notice of lien.
>
> 1. The debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the notice of lien is excessive, may apply by motion to the district court for the county where the property or some part thereof is located for an order directing the lien claimant to appear before the court to show cause why the relief requested should not be granted.
>
> [Sections 2-5 omitted]
>
> 6. If, after a hearing on the matter, the court determines that:
>
> (a) The notice of lien is frivolous and was made without reasonable cause, the court shall make an order releasing the lien and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(b) The amount of the notice of lien is excessive, the court may make an order reducing the notice of lien to an amount deemed appropriate by the court and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(c) The notice of lien is not frivolous and was made with reasonable cause or that the amount of the notice of lien is not excessive, the court shall make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the motion.

7. Proceedings conducted pursuant to this section do not affect any other rights and remedies otherwise available to the parties.

[Sections 8 and 9 omitted]

The statute is long and has several parts, but the scheme it lays out is pretty simple. Suppose someone puts a lien on property and the property owner doesn't think it belongs there, and it's so blatantly wrong that it can addressed through an expedited process without the time and expense of discovery and a full trial. If the property owner believes either that the lien should not have been imposed because it was frivolous (colloquially, there is no basis for the lien) or it was excessive (colloquially, there is a basis for some kind of lien but the lien actually imposed states the wrong amount owed), then NRS 108.2275(1) permits the owner to bring a motion challenging the lien. NRS 108.2275(2) articulates what such a motion must include. NRS 108.2275(3) through (5) set forth certain notice and scheduling requirements. Both parties agree that these requirements have all been met or are not at issue. This appeal revolves around the next section, section (6).

Section (6) sets forth what the district court does with such a motion. It provides three options, labeled (a), (b), and (c). Option (b), not at issue here, permits the district court to reduce the amount of an excessive lien. At issue in this appeal are options (a) and (c), and they are both cost-shifting statutes that contemplate two opposite conclusions. If the notice of lien was frivolous and made without reasonable cause, then option (a) requires the district court to release the lien and award costs and fees to the property owner for having to bring the successful motion. If the notice of lien is not frivolous and was made with reasonable cause, then option (b) requires the court to award costs and fees to the lienholder for having to defend the unsuccessful motion.

Both options (a) and (c) are mandatory: they both state that if the lien is frivolous or not frivolous, then the court "shall" impose costs and fees upon the losing party. "The use of the word 'shall' in the statute divests the district court of judicial discretion. This court has explained that, when used in a statute, the word 'shall' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute." *Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) (internal citations omitted). "It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory." *Nev. Comm'n on Ethics v. JMA/Lucchesi,* 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994). "[T]his court has stated that 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *Pasillas v. HSBC Bank USA,* 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (quoting *S.N.E.A. v. Daines,* 108 Nev. at 19, 824 P.2d at 278) (internal quotation marks omitted). "'[S]hall'

is mandatory and does not denote judicial discretion." *Johanson v. Eighth Judicial Dist. Court,* 124 Nev. 245, 249–50, 182 P.3d 94, 97 (2008) (alteration in original) (quoting *Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006)).

For purposes of this appeal, there are three important points here. First, a finding of "frivolity" is a requirement not merely to award fees and costs, but the predicate to releasing the lien. The district court cannot either release the lien or award costs and fees unless the lien is frivolous, meaning without reasonable ground. Therefore, if we affirm the district court's release of the lien, we must necessarily be affirming its conclusion that the lien was frivolous and without reasonable ground. If we do not agree that the lien was frivolous and without reasonable ground, then there is no statutory basis to release the lien.

Second, the two things go hand in hand. Section (6) states quite plainly that if the lien is frivolous, then the district court "shall" do two things, not just one: it must release the lien and it must award fees and costs to the applicant. Either both things must be done, or neither; but one cannot be done without the other. Consequently, if we affirm the release of the lien, we must also affirm the accompanying award of fees and costs.

Third, there is no outcome under which nobody is awarded fees and costs. Rather, whenever a property owner files a motion under NRS 108.2275, someone must always be awarded costs and fees, and the only question is whom. If the lien is frivolous and without reasonable ground, then the court "shall" award costs and fees to the property owner. If the lien is not frivolous and was with reasonable ground (and was not excessive), then the court "shall" award costs and fees to the lienholder. Either way, someone must be awarded costs and fees. Once NRS 108.2275

is triggered, the statute permits no outcome under which no costs and fees are awarded to someone. Consequently, regardless of whether we decide that the lien is frivolous and without reasonable ground or it was not frivolous and had reasonable ground, someone must be awarded fees and costs. The statute does not permit us to affirm the release of the lien but reverse the award of fees and costs. The two things stand together. We can affirm both, or we can reverse both, but we cannot try to be Solomon and split the baby.

I note that this a somewhat unusual outcome; rarely does the Legislature structure a statute to always require an award of both fees and costs to one party or the other. Some Nevada statutes require an award of fees to a prevailing party. *See, e.g.*, NRS 18.020. But most Nevada statutes give courts discretion to decide whether fees are appropriate. *See, e.g.*, NRCP 11 ("the court may impose"); NRS 18.010 ("the court may"); NRS 69.050 ("the district court is authorized to award"); but see NRS 7.085 ("the court shall require").

It's even more unusual to create an automatic "loser pays" kind of motion, somewhat akin to the English model of litigation in which whoever loses must always pay the other party's fees and costs and there is no option for the default American model of typically requiring each party to bear its own fees and costs. Unusual as it may be, it's what the statute says, and we must apply it as the Legislature enacted it.

If I were forced to guess what the Legislature had in mind behind the text, I can come up with some pretty good reasons. It's relatively cheap and easy to impose a lien upon property; non-lawyers do it all the time by just filling out a few pages of paperwork and paying a minimal filing fee to record it in the appropriate local land records. But it can be quite

expensive and time-consuming to have one removed, even one that's blatantly wrong or even phony, usually requiring the services of a knowledgeable attorney and extensive motion practice if not a full-blown jury trial. Even when a lien is obviously frivolous in some way and can be easily expunged, it's still likely going to take considerable time and money to do so. Even when the expedited procedure of NRS 108.2275 are invoked, the attorney still has to review the statutory requirements, draft the motion, compile the necessary affidavits and other supporting exhibits, file the motion, serve it on the lienholder(s), and then conduct a hearing before the district court that the court has the discretion to expand into an evidentiary hearing with witnesses and cross-examination.

All in all, it might only cost a couple hundred dollars to file an erroneous lien, but it's probably going to cost many thousands of dollars to get rid of it. The question — the policy choice that the Nevada Legislature faced when it enacted NRS 108.2275 — is which party should bear those costs. NRS 108.2275(6) is, in part, a cost-shifting statute that says when a lien is so frivolous and unreasonable that it can be expunged easily by motion without the need for a jury trial to sift through any complex factual disputes, then it's the liening party, rather than the property owner, who must bear those costs. On the other hand, if the property owner forces the lienholder to defend the lien without discovery through an expedited process and it turns out that the lien wasn't frivolous (it might or might not be valid, but it wasn't frivolous), then the property owners bears the costs of rushing the process with a lien whose merit would have been better left for a full trial under NRS 108.239 (see NRS 108.2275(7), which states that the expedited process does not affect the right to still pursue a full trial to enforce the lien).

Whatever I, or any judge, might think of this idea, it represents a reasonable balance between two competing policy choices: on the one hand, recognizing the importance of mechanics liens as a tool for encouraging improvement to real property and enforcing any debts that arise from doing so; and, on the other hand, deterring obviously wrongful encumbrances upon property rights. NRS 108.2275 represents a reasonable accommodation of both, and we must respect the Legislature's choice without second-guessing it.

V.

One question that the statute doesn't make quite clear is whether the "frivolity" requirement of section (6) is factual, requiring the district court to make appropriate findings of fact that the lien is frivolous before it can award fees and costs, or rather whether it represents a question of law.

J.D. Construction says that, in determining whether a lien was frivolous and had any reasonable ground, the district court must consider evidence of good faith and weigh any conflicting factual evidence against the standard of "preponderance of the evidence." 126 Nev. at 375, 240 P.3d at 1042. But it does not say that the determination of frivolousness is itself a factual finding rather than a conclusion of law. Rather, *J.D. Construction* only says that the ultimate conclusion of frivolousness and lack of reasonable ground (whether itself a factual or legal conclusion) must be based upon an examination of facts and evidence to the standard of preponderance of the evidence. Just because the outcome must be based upon facts does not necessarily make the outcome itself an inherently factual question. Quite the opposite, as the law recognizes many situations in which courts must sort out underlying factual disputes in order to reach

ultimate conclusions of law. For example, whether a contract exists is a question of fact, but once it is determined to exist as a factual matter then assessing its scope and meaning become questions of law. *Galardi v. Naples Polaris LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013); *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011). Similarly, under NRCP 56 whether summary judgment was properly granted is a question of law that we review on appeal de novo, yet whether judgment was properly entered depends upon comparing the underlying evidence and affidavits to the appropriate burden of proof. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1029 (2005). Just because an ultimate legal conclusion may depend upon the resolution of underlying facts does not mean that the conclusion itself must be factual and require "findings" to support it.

So to answer this question we must look at the statute using our usual tools of interpretation. When the Legislature uses established terms of art, we presume that the Legislature intended to adopt the accepted meaning associated with those terms. *See Samantar* v. *Yousuf*, 560 U. S. 305, 320, n. 13 (2010) ("Congress 'is understood to legislate against a back-ground of common-law . . . principles'"). Moreover, when the Legislature uses the same word in statutes that address similar subject matter, "[the] word or phrase is presumed to bear the same meaning throughout [the] text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170, 174 (2012) (footnote omitted) (Canons 25 and 26). Statutes addressing "the same subject matter" should be read "as if they were one law." *Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972); *see* Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory*

Construction, sec. 51.2 (7th ed. 2019). *Cf.* Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 Wash. & Lee L. Rev. 177, 182 (2020).

The words "frivolous" and/or "without reasonable ground" are used in many statutes relating to the award of fees and costs, for example NRCP 11, NRS 18.010(2)(b), and NRS 41.670(2). In those rules and statutes, the terms are never used to refer to factual findings, but always to legal conclusions. Indeed, the word "frivolous" is used in NRAP 38 to permit the award of sanctions on appeal, and appellate courts by their very nature cannot engage in fact-finding. *See Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172-173 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance") (citing 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding.")).

Moreover, as a general matter whether a lien is valid or not is a question of law, not fact. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010) (a mechanic's lien that fails to comply with statutory procedures is invalid as a matter of law). It follows, then, that the most reasonable way to read NRS 108.2275 is that the question of whether a lien is invalid because it is frivolous and without reasonable ground is also a question of law, not fact.

Consequently, I would conclude that the phrases "frivolous" and "without reasonable ground" are conclusions of law that we review de novo, and indeed that we ourselves can evaluate on appeal. I would certainly conclude, as a matter of law, that this lien qualifies as one that was "frivolous" and lacked "reasonable ground." It was filed against the wrong property interest (a freehold estate instead of a leasehold), it identified the

wrong entity, and notice was never given to all owners whose rights it affected. If this lien is not frivolous, then I truly do not know what would be.

VI.

For the foregoing reasons, I respectfully concur and add these thoughts and observations.

_____, J.
Tao

cc: Hon. James E. Wilson, District Judge
Hon. James Todd Russell, District Judge
McDonald Carano LLP/Reno
Gunderson Law Firm
Storey County Clerk