IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NONA TOBIN, AN INDIVIDUAL,
Appellant,
vs.
BRIAN CHIESI, AN INDIVIDUAL; DEBORA CHIESI, AN INDIVIDUAL; QUICKEN LOANS, INC.; JOEL A. STOKES, AN INDIVIDUAL; JOEL A. STOKES AND SANDRA F. STOKES, AS TRUSTEES OF THE JIMIJACK IRREVOCABLE TRUST; JIMIJACK IRREVOCABLE TRUST; RED ROCK FINANCIAL SERVICES; AND NATIONSTAR MORTGAGE, LLC,
Respondents.

No. 82294-COA

FILED

JUN 30 2022

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

*ORDER OF AFFIRMANCE*

Nona Tobin appeals from a district court order dismissing a complaint in a real property matter. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Tobin filed the underlying action against respondents, asserting claims for quiet title, unjust enrichment, and declaratory relief. In relevant part, Tobin sought a ruling confirming that she is the rightful owner of real property previously sold by respondent Red Rock Financial Services—acting on behalf of nonparty Sun City Anthem Community Association (the HOA)—at a foreclosure sale conducted pursuant to NRS Chapter 116. She also claimed entitlement to "the excess proceeds of the unlawful foreclosure sale."

Red Rock filed a motion to dismiss Tobin's complaint in its entirety on grounds of claim preclusion, arguing that Tobin had already litigated these issues in her capacity as trustee of the Hansen Trust—the

owner of the subject property at the time of the foreclosure sale—in a prior action that resulted in a judgment confirming the validity of the foreclosure sale and the extinguishment of the trust's interest.[1] Specifically, Red Rock argued that sufficient privity existed between the parties to the first action and the parties to the underlying action such that Tobin is bound by the prior judgment. The other respondents—Brian and Debora Chiesi, the current record titleholders, and their lender, Quicken Loans, Inc. (collectively the Chiesi parties); Joel A. Stokes, as an individual, Joel and Sandra F. Stokes, as Trustees of the Jimijack Irrevocable Trust, and the trust itself (collectively the Jimijack parties), which previously held title to the property; and Nationstar Mortgage, LLC, the beneficiary of a deed of trust on the property—subsequently joined Red Rock's motion. Tobin opposed, largely ignoring the concept of privity and arguing that the district court in the prior action prevented her as an individual and Red Rock from being joined as parties such that the instant action was necessary to decide her rights as an individual. Tobin pointed to the fact that the Hansen Trust had quitclaimed whatever interest it had in the property to her during the pendency of the prior action and that the district court nevertheless rejected her attempts to participate in the action as an individual.

At the hearing on the motion to dismiss, the district court stated that it was granting the motion on grounds of claim preclusion. However, before entering a written order reflecting that ruling, the district court entered orders granting motions for attorney fees and costs filed by both the Jimijack and Chiesi parties, concluding that Tobin's claims were groundless

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[1]This court affirmed that judgment on appeal. *Tobin v. Stokes*, No. 79295-COA, 2021 WL 1401498 (Nev. Ct. App. Apr. 12, 2021) (Order of Affirmance).

and constituted a needless multiplication of the prior action. The district court later entered its written order granting the motion to dismiss, and this appeal followed.

Tobin argues on appeal that the district court erred in applying the doctrine of claim preclusion to dismiss the underlying case. She also argues that the district court abused its discretion in awarding attorney fees and costs to the Jimijack and Chiesi parties. We address each of these arguments in turn.

With respect to claim preclusion, we review a district court order dismissing an action on such grounds de novo. *Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 136 Nev. 235, 237, 464 P.3d 104, 107 (2020). Following the entry of a valid final judgment, claim preclusion "ordinarily bars a later action based on the claims that were or could have been asserted in the first case." *Id.* (internal quotation marks omitted). Our supreme court has adopted a three-part test for determining whether an action is barred by claim preclusion: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id.* at 238, 464 P.3d at 107 (internal quotation marks omitted).

Because Tobin fails to properly challenge the district court's application of claim preclusion to her attempt to quiet title to the property in herself as against all other parties, we necessarily affirm the dismissal to that extent.[2] *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161

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[2]Although Tobin was granted leave to file a supplemental opening brief in pro se after her counsel withdrew, she fails to provide any cogent explanation in that brief as to why she believes the quiet title claims are not

n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."). Moreover, because Tobin concedes in her opening brief that the prior action ended in a valid final judgment, we need not address that prong of the claim-preclusion analysis. However, Tobin does contend that the district court erred in applying claim preclusion because neither she as an individual nor Red Rock were parties to the first action, as the district court presiding over that case prevented them from being joined as such, and that they should have been joined so that the court could adjudicate Tobin's claim to the excess proceeds from the foreclosure sale.[3] Respondents counter that claim preclusion applies because Tobin was in privity with the Hansen Trust and Red Rock was in privity with the HOA—which was a party to the prior action—such that Tobin's claims in

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precluded by the judgment in the prior action, especially in light of our discussion of privity below. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument). And insofar as Tobin raises issues for the first time in her reply brief, those issues are waived. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (providing that issues raised for the first time in a reply brief are deemed waived).

[3]To the extent Tobin argues that the district court's refusal to join Red Rock as a party in the prior action constitutes a "good reason" for its absence therein under the doctrine of nonmutual claim preclusion, we need not reach this point, as we conclude that Tobin's claims are precluded under the standard formulation of claim preclusion set forth in *Rock Springs*, 136 Nev. at 238, 464 P.3d at 107. *See Weddell v. Sharp*, 131 Nev. 233, 241, 350 P.3d 80, 85 (2015) (providing that, even where the parties or their privies are not the same in the subsequent action, the action may still be precluded where "the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so" (internal quotation marks omitted)).

the instant action were or could have been brought in the first case. We agree with respondents.

As an initial matter, we note that Tobin does not meaningfully dispute the existence of privity between the relevant parties; instead, she summarily contends that Red Rock—not the HOA—holds the excess proceeds in which she alleges to have a personal interest as the successor in interest to the Hansen Trust. In light of her failure to cogently explain why she believes these circumstances negate the element of privity or cite any authority in support of that position, we need not further address her arguments on this point. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (providing that the appellate courts need not consider claims unsupported by cogent argument or relevant authority). Nevertheless, her arguments likewise fail on the merits.

In *Mendenhall v. Tassinari*, our supreme court discussed the historical development of the concept of privity in our jurisdiction, noting that "Nevada law previously limited the concept . . . to situations where the individual acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." 133 Nev. 614, 618, 403 P.3d 364, 369 (2017) (internal quotation marks omitted). The court further noted its prior adoption of the Restatement (Second) of Judgments § 41 (Am. Law Inst. 1982), which recognizes privity where a person adequately represented a litigant's interests in the prior suit. *Id.* And it proceeded to explain that "contemporary courts . . . have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion," such as where "there is substantial identity between the

parties" and "sufficient commonality of interest." *Id.* (alteration and internal quotation marks omitted). Accordingly, in recognizing that privity does not lend itself to clear definition, the court held that "determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case." *Id.* at 619, 403 P.3d at 369.

Under the facts and circumstances of this case, Tobin and Red Rock share a relationship of privity with the Hansen Trust and the HOA, respectively. *See id.* In litigating the prior action in her capacity as trustee of the Hansen Trust, of which she as an individual was a beneficiary, Tobin the trustee sufficiently represented her own individual interests in the prior suit for privity to attach. *See id.* at 618, 403 P.3d at 369; *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481-82, 215 P.3d 709, 718 (2009) (citing the Restatement (Second) of Judgments § 41 in support of the notion that trustees adequately represent trust beneficiaries). Additionally, to the extent the Hansen Trust, through Tobin the trustee, quitclaimed whatever interest it had in the property to Tobin individually while the prior suit was pending, she is a successor in interest in privity with the trust under the traditional understanding of the concept. *See Mendenhall*, 133 Nev. at 618, 403 P.3d at 369; *see also* NRCP 25(c) ("If an interest is transferred, the action may be continued by or against the original party . . . .").

Turning to Red Rock and the HOA, Tobin does not allege or provide any reason to believe that Red Rock, in conducting the foreclosure proceedings on behalf of the HOA and retaining the excess proceeds from the sale, was acting outside the scope of its agency relationship with the HOA. And because the HOA as principal could be held liable for the actions of Red Rock as its agent, Tobin fails to demonstrate that Red Rock is not in privity with the HOA for purposes of the underlying action. *See Nev. Nat'l*

*Bank v. Gold Star Meat Co.*, 89 Nev. 427, 429, 514 P.2d 651, 653 (1973) ("A principal is bound by acts of its agent while acting in the course of his employment . . . and . . . is liable for those acts within the scope of the agent's authority."); *L.A. & Salt Lake R.R. Co. v. Umbaugh*, 61 Nev. 214, 243, 123 P.2d 224, 237 (1942) (relating privity and agency); Restatement (Second) of Judgments § 51(1), cmt. a (Am. Law Inst. 1982) (providing that where two persons have a relationship giving rise to vicarious liability, such as a principal and agent for matters within the scope of the agency, a judgment against the claimant in an action against one of them may preclude a subsequent action against the other).

In light of the foregoing, Tobin fails to show that her claim to the excess proceeds in the underlying action could not have been litigated between the relevant privies in the prior action. And to the extent Tobin argues that the district court in the prior action dismissed the excess-proceeds claim without prejudice for failure to mediate under NRS 38.310 and then wrongly rejected her attempt to join Red Rock and assert the claim against it following mediation, she fails to show that relief is warranted on this point. Indeed, she failed to develop this argument in opposition to the motion to dismiss below or even provide copies of the supposed dismissal without prejudice or any order denying leave to amend to the district court.[4] *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and

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[4]Notably, before transferring the appeal to this court, the supreme court struck a large portion of Tobin's appendices containing filings from the prior action on grounds that "appellant fail[ed] to confirm that the district court in this case specifically considered the documents she propose[d] to include in her appendix." *Tobin v. Chiesi*, No. 82294 (Nev. Oct. 21, 2021) (Order Granting Motion).

will not be considered on appeal."); *see also Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal."). And Tobin fails to explain why she could not have sought to reinstate the claim against the HOA in her capacity as trustee, which is how she originally asserted the claim. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Thus, insofar as Tobin contends that her excess-proceeds claim could not have been brought in the prior action, we reject her argument, and we discern no error in the district court's order dismissing the underlying action on grounds of claim preclusion.[5] *See Rock Springs*, 136 Nev. at 237, 464 P.3d at 107.

We turn now to the district court's orders awarding attorney fees and costs to the Jimijack and Chiesi parties. As a preliminary matter, to the extent Tobin summarily argues that there was no basis to award fees and costs because the district court should not have granted Red Rock's

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[5]We note that, in their answering brief, the Chiesi parties argue that "Tobin would not be entitled to the excess proceeds as it is undisputed that the two loans secured by the Property had balances in excess of the Property's fair market value at the time of the HOA Foreclosure Sale," and that "[a]ny excess proceeds would [therefore] go to junior lienholders." Tobin fails to address this argument in her reply brief, and we may treat her silence on the issue as a concession of its merit. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position"). Moreover, Tobin fails to offer any explanation whatsoever as to why she is supposedly entitled to the excess proceeds outside of her general contention that the foreclosure sale was invalid, which is plainly precluded by the judgment resolving the prior action.

motion to dismiss, we reject that argument for the reasons discussed above. Additionally, while Tobin argues on appeal that neither group of parties provided sufficient documentation to warrant awards of costs, she failed to raise this argument below, and it is therefore waived. *See Old Aztec*, 97 Nev. at 52, 623 P.2d at 983.

We review a district court order awarding attorney fees for an abuse of discretion. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 554, 429 P.3d 664, 668 (Ct. App. 2018). With respect to the award of attorney fees to the Jimijack parties, we cannot conclude that the district court committed any such abuse in determining that Tobin's claims against the Jimijack parties were groundless and constituted a needless multiplication of the prior action. *See* NRS 18.010(2)(b) (providing that a court may award attorney fees to a prevailing party "when [it] finds that the claim . . . of the opposing party was brought or maintained without reasonable ground"); EDCR 7.60(b)(1), (3) (providing that a court may award attorney fees when a party "[p]resents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted" or "[s]o multiplies the proceedings in a case as to increase costs unreasonably and vexatiously"). In defense of her claims, Tobin points to the fact that she was not allowed to participate in the previous action in her individual capacity. But in light of our discussion above, Tobin was plainly in privity with herself as trustee of the Hansen Trust—and with the trust itself as its successor in interest—such that her title claims in this action were duplicative of her claims against Jimijack in the prior action. And although Tobin further argues that the district court failed to consider all of the *Brunzell*[6] factors as

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

required to determine a reasonable amount for the fee award, *see O'Connell*, 134 Nev. at 555, 429 P.3d at 668, her contention is belied by the record, as the district court's written order explicitly states that all of the factors were considered.[7] We therefore affirm the award of attorney fees to the Jimijack parties.

Finally, with respect to the award of attorney fees to the Chiesi parties, Tobin repeats her argument that her claims were reasonable because she was excluded as an individual from the first case. But this argument fails for the reasons stated above, as she is bound by the prior judgment under basic privity principles, and the Chiesi parties are plainly in privity with the Jimijack parties as their successors in interest. Tobin also takes issue with the amount of time expended on the underlying case by the Chiesi parties' counsel, contending that little time or effort were needed to simply join Red Rock's motion to dismiss. But this is a matter left to the district court's sound discretion, *see O'Connell*, 134 Nev. at 554, 429

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[7]Specifically, Tobin contends the Jimijack parties failed to provide sufficient information or evidence with their motion for attorney fees concerning their counsel's qualities as an advocate. *See O'Connell*, 134 Nev. at 555, 429 P.3d at 668. But a court may award attorney fees at the conclusion of a case even "without written motion and with or without presentation of additional evidence," NRS 18.010(3), and the court is entitled to base its evaluation of the *Brunzell* factors on "what [it] readily observed." *O'Connell*, 134 Nev. at 563, 429 P.3d at 674. Moreover, although Tobin contends the Jimijack parties improperly sought and were awarded fees that were "anticipated" at the time of their motion in addition to those already incurred, she fails to cite any authority prohibiting such a request or award, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38, and a movant is entitled to "provide a fair estimate" of its fees in its motion. NRCP 54(d)(2)(B)(iii). Finally, although Tobin contends the Jimijack parties failed to differentiate between paralegal and attorney time in their description of the work performed, a review of counsel's declaration in support of the request demonstrates that they were only requesting fees for attorney time.

P.3d at 668, and we discern no abuse of that discretion here, especially in light of the Chiesi parties' argument that neither they nor their counsel participated in the prior action such that counsel needed to spend substantial time familiarizing herself with the proceedings. Accordingly, we affirm the award of attorney fees to the Chiesi parties.

In short, for the reasons set forth herein, we affirm the district court's order dismissing the underlying case on grounds of claim preclusion, as well as its orders granting attorney fees and costs to the Jimijack and Chiesi parties.

It is so ORDERED.[8]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Susan Johnson, District Judge
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