IN THE COURT OF APPEALS OF THE STATE OF NEVADA

3105 COLEMAN, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
SMS FINANCIAL STRATEGIC INVESTMENTS, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Respondent.

No. 84807-COA

ORDER OF AFFIRMANCE

3105 Coleman, LLC (Coleman), appeals from a district court order granting summary judgment in favor of respondent SMS Financial Strategic Investments, LLC (SMS), in a breach of contract action. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.[1]

In June 2008, Tropeco Plaza Equity Partners, LLC (Tropeco), borrowed $2.2 million from Centennial Bank to purchase a commercial property located at 3105 Coleman Street in North Las Vegas.[2] The loan was to be repaid in 15 years. SMS is the successor in interest to Centennial Bank. Iran and Nuri Mohsenin were members of Tropeco and signed the promissory note for the loan as Tropeco's partners. Iran and Nuri were also the guarantors of the loan. Several days after Iran and Nuri signed the promissory note and signed commercial guarantees, they also signed a deed of trust, which transferred Tropeco's interest in the property to the bank.

[1]The Honorable Carolyn Ellsworth, Senior Judge, presided over the hearing on the motion to grant summary judgment, and the Honorable Jessica K. Peterson, District Judge, signed the order granting summary judgment.

[2]We recount the facts only as necessary for our disposition.

Both the promissory note and the deed of trust (collectively, the contract) stated that the death of a guarantor was an event of default. The contract also stated that, in the event of a default, the lender would be allowed to immediately increase the interest rate by five percent and declare both the unpaid balance of the principal and the unpaid interest immediately due. Additionally, the contract allowed the lender to collect all legal fees and expenses related to the collection of the loan. Finally, the contract allowed the lender to delay enforcement of its rights without losing its rights. At the time Iran and Nuri signed the contract, they were 78 and 84 years old, respectively.

Iran died in 2009. SMS's predecessor in interest did not explicitly address this default event at the time. In 2014, Nuri signed an "Assumption Agreement and Amendment to Loan Documents" (Assumption Agreement). In this agreement, Coleman replaced Tropeco as the borrower. Additionally, Redbook Residential, LLC, as well as Trust A, Trust B, and Trust C of the Mohsenin Family Trusts, with Nuri serving as the trustee, were made additional guarantors. Nuri was the only guarantor that signed the document. The Assumption Agreement did not change the terms of default from the promissory note. A payment guaranty was also signed the same day as the Assumption Agreement. Nuri signed the guaranty as both a manager for Redbook Residential and the trustee for the Mohsenin trusts.

In June 2018, Nuri died. Several months later, SMS provided a notice of incurable default to Coleman. The letter identified the deaths of Iran and Nuri as the "Incurable Event of Default." SMS demanded that Coleman immediately repay the loan and the interest, which had begun accruing at the default interest rate. The property, 3105 Coleman St., had been listed for sale in June 2018, before the SMS demand letter was sent.

The property was sold before July 2019.[3] In April 2019, SMS sent Coleman a demand letter and demanded that the principal balance on the loan, the accrued interest, and SMS's attorney fees be paid. In total, SMS demanded that Coleman pay $2,133,471.79. Coleman authorized that the amount demanded by SMS be released from the escrow proceeds from the sale of the property but signed the demand letter stating, "Pending Litigation."

In January 2019, Coleman filed a lawsuit against SMS alleging breach of contract, wrongful foreclosure, and slander of title, and seeking declaratory and injunctive relief. SMS removed the case to federal court and filed a motion to dismiss.[4] The federal district court dismissed all of Coleman's claims except the contract claim. Coleman filed a motion to voluntarily dismiss the remaining contract claim against SMS because it had sold the property. The federal district court granted Coleman's motion and dismissed the remaining claim without prejudice.

In July 2020, Coleman filed a complaint against SMS in state court, alleging that SMS had breached the contract with Coleman. Coleman also claimed that SMS had converted no more than $74,000 by improperly taking money to cover legal costs and "unadjudicated default interest."[5] Coleman also sought declaratory relief and requested that the district court declare the rights of the parties under the contract. SMS filed a motion to

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[3]The record does not clearly identify the date of the sale.

[4]Coleman is a Nevada LLC while SMS is an Arizona LLC.

[5]We note that this amount appears to have been selected to avoid reaching the amount in controversy necessary for the federal courts to have diversity jurisdiction. *See* 28 U.S.C. §1332(a) (2018) (stating that federal district courts "have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000").

dismiss. This was denied by the district court because the court found that discovery was necessary.

In March 2022, SMS filed a motion for summary judgment. Coleman opposed the motion. The district court granted SMS's motion for summary judgment on the following independent grounds at issue in this appeal: (1) the contract unambiguously states that the death of a guarantor is an event of default, (2) the voluntary payment doctrine, and (3) the economic loss doctrine.

Coleman now appeals and argues that (1) the district court erred in granting summary judgment because it improperly interpreted the contract to mean that the death of a guarantor was an incurable default, (2) the district court's summary judgment order violates public policy, (3) the district court erred in not finding that SMS materially breached the contract by not giving Coleman a chance to cure the default, (4) the district court erred in finding the voluntary payment barred Coleman's claims, and (5) the district court erred in finding that the economic loss doctrine barred Coleman's conversion claim. We disagree that the district court improperly interpreted the contract, that the summary judgment order violates public policy, and that SMS materially breached the contract.[6]

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[6]The economic loss "doctrine bars unintentional tort actions when the plaintiff seeks to recover purely economic losses." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 73, 206 P.3d 81, 86 (2009) (internal quotation marks omitted). Conversion is an intentional tort. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 609-10, 5 P.3d 1043, 1050 (2000); *see also Conversion, Black's Law Dictionary* (11th ed. 2019). Nevertheless, we need not determine whether the district court erred in applying the economic loss doctrine in this case, because this was an alternative and independent ground for granting summary judgment. We affirm based on the district court's proper interpretation of the contract, and separately, application of the voluntary payment doctrine.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. And "[i]n evaluating the propriety of a summary judgment, we review the evidence in the light most favorable to the party against whom judgment was rendered." *Epperson v. Roloff*, 102 Nev. 206, 208, 719 P.2d 799, 801 (1986).

The district court properly interpreted the contract

Coleman argues that the contract does not state that the death of the guarantors was an uncurable default, and the only reasonable interpretation of the contract "is that having the loan secured by separate guaranties was material to the parties' negotiations." (Emphasis omitted.) Coleman argues that this court could conclude that the contract was ambiguous and should construe any ambiguity in Coleman's favor.[7] Finally, Coleman argues that the district court's interpretation of the contract was unconscionable. SMS responds that the contract explicitly states that the death of a guarantor is an event of default. SMS also argues that the contract is not ambiguous or unconscionable.

We review contract issues de novo. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). Additionally, we will

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[7]We note that Coleman never states how the contract is ambiguous or what portions of the contract are ambiguous. Instead, Coleman merely states "[i]f the Court believes an ambiguity exists[,] . . . any such ambiguity must be construed against the Respondent."

enforce contracts as written if the language in the contract is clear and unambiguous. *Elk Point Country Club Homeowners' Ass'n v. K.J. Brown, LLC*, 138 Nev., Adv. Op. 60, 515 P.3d 837, 840 (2022). A contract is ambiguous if it can reasonably be interpreted in more than one way. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). However, a contract is not ambiguous merely because the parties disagree over its interpretation. *Id.*

The promissory note specifically provides that a default event occurs if "any Guarantor dies." The deed of trust also specifically states that a default event occurs if "any Guarantor dies" or if "any member withdraws from the limited liability company, or any other termination of the Guarantor's existence as a going business or the death of any member." It is undisputed that both Iran and Nuri died. It is also undisputed that they were both guarantors, and that Nuri was a member of Redbook Residential, LLC, which became a guarantor after Iran died. Accordingly, we conclude that the contract unambiguously states that the death of Nuri was a default event.

Both the promissory note and the deed of trust allow for a grantor to attempt to cure the default *if it is possible to cure the default*. The district court found that death was not curable. While Coleman argues that the contract should be interpreted to mean that Coleman should have been granted an opportunity to appoint a replacement guarantor for Nuri, that is neither allowed by the contract, nor is it reasonable to read such a clause into the contract. The contract clearly states in two places that the death of a guarantor is a default event. The contract notably provides no provision for the replacement of a guarantor. Admittedly, SMS's predecessor in interest did allow for an additional guarantor to be named after Iran's death, but both the promissory note and deed of trust include provisions that allow the lender

to temporarily waive its rights without losing the right to enforce their position in the future. Additionally, the contract documents do not explicitly state that the additional guarantor is being named to replace Iran. In fact, the Assumption Agreement, which adds additional guarantors, does not mention that Iran had died five years prior to the signing of the Assumption Agreement.

Coleman also argues that the contract materially required only that there be a guarantor and that it was not material if the guarantor was Iran or Nuri. Coleman relies on the declaration of Iran and Nuri's son, Darius Mohsenin, to support this interpretation.[8] SMS responds that even Coleman agrees that the deaths of the guarantors are events of default. SMS also argues that the contract explicitly provides that the death of a guarantor or member is an event of default.

In his declaration, Darius states that the primary purpose of identifying guarantors in the promissory note was to ensure payment of the loan. Darius went on to state that the underlying contract allows for the substitution of guarantors and that Iran's death was cured by adding additional guarantors. Finally, Darius states that the original guarantors were elderly and not expected to survive the loan's 15-year term. Darius was not a party to the original contract, and he never explained how he had any personal knowledge of the circumstances surrounding the original negotiations and signing. Further, the plain language in the contract does not support Darius's interpretation. As discussed above, the contract provides only that a default event may be cured if it is *possible* to cure the default. The contract provides no process for replacing a guarantor and does

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[8]We note that none of the original parties to the contract are involved in the current litigation.

not provide that the death of a guarantor may be cured. Additionally, nothing in the record indicates that Darius participated in negotiating or signing the contract. Darius is notably listed only as a manager for both Tropeco and Coleman in the Assumption Agreement. Accordingly, we conclude that Coleman's argument is unpersuasive. Since the contract contains no provision for the replacement of a guarantor and death is undeniably final,[9] we conclude that the contract unambiguously provides that Nuri's death was an incurable default.

Coleman argues that the district court interpreted the contract to mean that Iran and Nuri were guaranteeing they would live for another 15 years and that such an interpretation is unconscionable. Coleman fails to cogently argue this point; therefore, we need not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Notably, Coleman challenges the district court's interpretation of the contract as unconscionable but does not challenge the contract as unconscionable—Coleman instead presents its own interpretation of the contract. Coleman did not raise any argument suggesting the contract was unconscionable below, therefore, we may consider it waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

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[9]We note that it is not possible to cure a historical fact. *See In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1033 (9th Cir. 1997) (stating that defaults which are historical facts cannot be cured), *superseded by statute on other grounds as stated in In re Hathaway*, 401 B.R. 477, 484 (Bankr. W.D. Wash. 2009).

The district court's order granting summary judgment does not violate public policy

Coleman argues that it was against public policy for the district court to find that the death of a guarantor was a material and incurable default because the contract was not explicit. Coleman also argues that SMS acted in bad faith by claiming that the death of the guarantors was a material and incurable default simply to take advantage of higher interest rates. SMS responds that Coleman failed to raise this argument below, so it is waived. SMS also argues that provisions like the one at issue in this case are not unusual and are commonly enforced.

A careful review of the record reveals that Coleman did not raise this argument below. Accordingly, we need not consider it. *See Old Aztec*, 97 Nev. at 52, 623 P.2d at 983.

Considering the merits of Coleman's argument, this court will not enforce a contract that violates public policy. *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001). Coleman relies on an unpublished disposition from Tennessee to assert that a contract is required to expressly and unambiguously state, in the same language used in a Tennessee contract, "[i]f the undersigned shall . . . die, . . . then the Lender shall have the right to declare immediately due and payable, and the Undersigned will forthwith pay to the Lender, the full amount of all Indebtedness." *In re Estate of Price*, No. E2004-02670-COA-R3-CV, 2005 WL 3159771, at *1 (Tenn. Ct. App. Nov. 28, 2005) (omissions in original) (emphasis omitted). Coleman uses this language to argue that, in comparison, the contract at issue in this case did not put Coleman or the guarantors on notice that the death of a guarantor would be a material and incurable default, so the district court's interpretation violated public policy

by reaching its conclusion without express language supporting the conclusion. This argument is not persuasive.[10]

The contract unambiguously states, in both the promissory note and deed of trust, that the death of a guarantor is an event of default. While the language used in the contract currently before this court is not the same language that was upheld in *Price*, the language is still sufficiently clear to put the parties on notice that the death of Iran or Nuri was a default event. Additionally, while there is no caselaw in Nevada that directly addresses contracts with this language, other jurisdictions addressing this issue have held that the death of guarantor is an event of default that allows for a higher interest rate to be imposed and the collection of the loan to be accelerated. *See Auburn Cordage, Inc. v. Revocable Tr. Agreement of Treadwell*, 848 N.E.2d 738, 744 (Ind. Ct. App. 2006) (recognizing that under the terms of the loan agreement, Dr. Treadwell's death was an event of default); *Frontier Leasing Corp. v. James River Country Store*, No. 05-0953, 2006 WL 1409144 (Iowa Ct. App. May 24, 2006) (recognizing that the death of a guarantor was an event of default under the lease agreement); *N. Am. Sav. Bank v. Volkland*, No. 112,097, 2015 WL 5750526, at *1, 12-15 (Kan. Ct. App. Oct. 2, 2015) (holding that the death of a guarantor was a default event under the terms of the loan).

Finally, Coleman could have negotiated different contract terms, either originally or later, if it was concerned about the guarantors dying before the loan was paid back. *See Bank of N.Y. v. Spring Glen Assocs.*, 635

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[10]We also note that this court will not create a new contract for the parties and to do so would violate public policy and the supreme court's longstanding policy of contract enforcement. *See Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) (stating that "under well-settled rules of construction, the court has no power to" create a new contract for parties).

N.Y.S.2d 781, 782-73 (App. Div. 1995) (stating that "[t]he preprinted guarantee forms provided that if the guarantor died or became insolvent the underlying obligation would become due and payable immediately," but, because of the age and declining health of one of the guarantors, "the individual guarantees were modified to state that upon the guarantor's death, the estate would be afforded a reasonable time to make payment, and would also have an opportunity to prevent the acceleration of the loan, by furnishing a substitute guarantor"). Coleman provides no reason for its failure to negotiate a contract provision that would allow the guarantors to be replaced if they died, which is particularly notable because the guarantors were older at the time the parties' negotiated the contract. Coleman instead repeatedly states only that it was understood that it was unlikely that the guarantors would live for another 15 years without any support from the record. Even if true, it seems that such a term would have been negotiable in the original agreement or Iran and Nuri could have sought a loan from another lender. Accordingly, we conclude that Coleman's argument that the contract violates public policy is unpersuasive.

SMS did not materially breach the contract

Coleman argues that the contract documents gave Coleman an opportunity to cure the breach and that SMS actually breached the contract by failing to give Coleman a chance to cure. SMS responds that the contract recognizes that some defaults, like death, are not curable and require that a chance to cure be given only if it is possible to cure the default.

We review contract issues de novo. *Am. First*, 131 Nev. at 739, 359 P.3d at 106. Additionally, we will enforce contracts as written if the language in the contract is clear and unambiguous. *Elk Point*, 138 Nev., Adv. Op. 60, 515 P.3d at 840.

Coleman's argument relies upon its belief that it could replace guarantors if they died. This belief is not supported by the clear and unambiguous language in the contract. The contract states that the death of a guarantor is an event of default. Additionally, the contract provides a provision allowing Coleman a chance to cure the default if the default is curable. It is not possible to cure death. *See In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1033 (9th Cir. 1997) (stating that defaults which are historical facts cannot be cured), *superseded by statute on other grounds as stated in In re Hathaway*, 401 B.R. 477, 484 (Bankr. W.D. Wash. 2009). And no contract provision allows for the appointment of a replacement guarantor, even though Coleman could have negotiated for these terms to be included in the contract. Since death is not curable, SMS did not breach the contract by failing to give Coleman a chance to attempt to cure the uncurable. Accordingly, we conclude that the district court did not err by rejecting this argument.

The voluntary payment doctrine applies to this matter

Coleman argues that the voluntary payment doctrine does not apply because Coleman's payment was made under protest. Coleman also argues, in the alternative, that its payment was made under an exception to the voluntary payment doctrine because it was made under a business compulsion, which is a question of fact that should not be determined on summary judgment. SMS responds that no exception to the voluntary payment doctrine exists in this case and that Coleman was not under any duress when it paid SMS. We note that the voluntary payment doctrine was an alternative ground used by the district court to grant summary judgment.

The voluntary payment doctrine is an affirmative defense that states that a payment made voluntarily cannot be recovered on the ground that there was no legal obligation to make the payment. *Nev. Ass'n Servs.*,

Inc. v. Eighth Judicial Dist. Court, 130 Nev. 949, 954, 338 P.3d 1250, 1253 (2014). In order for the voluntary payment doctrine to apply, the payment must be made without protest. *Id.* If a defendant "shows that a voluntary payment was made, the burden shifts to the plaintiff to demonstrate that an exception to the" doctrine applies. *Id.* at 955, 338 P.3d at 1254; *see also Las Vegas Metro. Police Dep't v. Holland*, 139 Nev., Adv. Op. 10, 527 P.3d 958, 963 (2023) (noting "[i]t is well-established that a party asserting an affirmative defense has the burden of proving each element of that defense"). We review de novo. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

First, Coleman argues that the payment was not voluntary and, therefore, the voluntary payment doctrine does not apply. Coleman relies on the demand letter signed by Darius stating, "Pending Litigation Result" and "Pending Litigation" and, at the time the payment was made, ongoing federal litigation. While Coleman may have written "Pending Litigation Result" and "Pending Litigation" on the demand letter, Coleman later admitted that this was not a statement made under duress, which negates its argument that payment was not voluntary. Further, the alleged written protest statement made under duress is not in the record. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (stating that we assume missing documents support the district court's ruling). Coleman stated that it believed that SMS received the signed demand letter through the title company but admitted it did not have actual knowledge that SMS had received the letter. SMS produced a declaration made under the penalty of perjury, stating that Coleman "did not communicate any duress or other objections to SMS when it" paid the loan. The district court found that Coleman did not provide a copy of the letter to SMS and did not direct the

title company to provide the letter to SMS. Additionally, Coleman filed a motion to voluntarily dismiss the federal lawsuit after it paid SMS because Coleman argued that the issue was resolved by the sale of the property. Accordingly, we conclude that Coleman has not met its burden of showing that there is genuine dispute of material fact regarding the voluntariness of the payment.

Coleman also argues that an exception to the voluntary payment doctrine exists in this matter. Coleman specifically argues that the coercion or duress caused by a business compulsion exception applies. The "exception applies when (1) . . . one side involuntarily accepted the terms of another; (2) . . . circumstances permitted no other alternative; and (3) . . . circumstances were the result of coercive acts of the opposite party." *Nev. Ass'n Servs.*, 130 Nev. at 956, 338 P.3d at 1255 (omissions in original) (internal quotation marks omitted). This exception does not apply when a party has a reasonable alternative to payment available to it. *Id.* at 957, 338 P.3d at 1255.

Coleman argues that the only reasonable option it had in this matter was to pay SMS to avoid losing the sale or having the property go into foreclosure. However, as SMS identifies, Coleman had other options besides paying SMS, which Coleman does not refute. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious). Coleman could have requested that the disputed funds be placed in escrow. This would have allowed the sale of the property to go through while still setting aside the disputed funds which could have been distributed at the conclusion of the federal litigation. Coleman could have also requested that the federal district court intervene in the situation before it acted, perhaps by requesting that a preliminary injunction be issued. Additionally, SMS

informed Coleman that it would not initiate foreclosure proceedings. Therefore, we conclude that Coleman has not satisfied all three elements of the coercion or duress doctrine by showing a genuine dispute as to each caused by a business compulsion. *See* NRCP 56(a).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[11]

_____, C.J.
Gibbons

_____, J.
Westbrook

BULLA, J., concurring in part and dissenting in part:

I concur with the majority that, under the facts and circumstances of this case, the voluntary payment doctrine applies and, therefore, would affirm the district court decision on that basis. However, I write separately because I disagree that the death of a guarantor was an "incurable" default event under the terms of the commercial loan at issue.

It is undisputed that the loan documents identify the death of a guarantor as a default event. The question before us, rather, is whether this is an incurable default event. Here, the deed of trust provides a cure provision for non-monetary defaults, which would include the death of a guarantor. Indeed, after the death of the first original guarantor, this non-

[11]Insofar as Coleman has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

monetary default was cured by the substitution of other guarantors, which was apparently acceptable to the lender at the time. Of note, during the life of this loan, there was never a monetary default, which under the terms of the loan would have been incurable.

Several years later, following the death of the other original guarantor, SMS, which had assumed the loan, notified Coleman, which had assumed the debt, that Coleman was in default based on the death of the guarantor and demanded repayment of the loan with interest. Fortunately, for all parties involved, the property on which the loan was predicated was sold and the loan repaid. Thereafter, Coleman filed a suit in state court seeking reimbursement of certain monies it paid to SMS, including legal costs and interest, in order to complete the sale of the property and pay off the loan. In granting summary judgment to SMS, the district court found in part that the death of the guarantor was an incurable event under the terms of the loan. Therefore, the district court determined that SMS was within its rights to undertake collection efforts related to the loan, and Coleman was not entitled to any recovery.

The majority agrees and primarily relies on the historical fact doctrine in doing so. This doctrine deems that any act of default that is a historical fact, here the death of a guarantor, to be incurable. *See In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1033 (9th Cir. 1997), *superseded by statute on other grounds as stated in In re Hathaway*, 401 B.R. 477, 484 (Bankr. W.D. Wash. 2009). Thus, notwithstanding the cure provision contained in the deed of trust, the majority concludes that the death of the guarantor was an incurable event.

I respectfully decline to apply the historical fact doctrine to conclude that the death of a guarantor acts as an incurable event in the context of a traditional commercial loan. Particularly, whereas here, the

deed of trust provided a cure provision, and historically the parties to the agreement honored the substitution of a guarantor following the death of one of the original guarantors. *See In re Minesen Co.*, 635 B.R. 533, 557 n.16 (Bankr. D. Haw. 2021) (declining to extend the historical fact doctrine to determining the curability of defaults in a hotel lease agreement); *In re Vitanza*, No. 98-19611DWS, 1998 WL 808629, at *24 n.51 (Bankr. E.D. Pa. Nov. 13, 1998) (Memorandum Opinion) ("Most non-monetary defaults . . . are 'historical facts.' Consequently, if [the] 'historical fact' theory [was] applied to all non-monetary defaults, it would, in effect, eliminate the right to assume a lease for which non-monetary defaults exist.").

Because I believe the death of a guarantor to be a curable default event under the facts and circumstances presented here, I respectfully dissent on this portion of the majority order.

_____, J.
Bulla

cc: Hon. Jessica K. Peterson, District Judge
Hon. Carolyn Ellsworth, Senior Judge
James A. Kohl, Settlement Judge
Andersen & Broyles, LLP
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk