IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

SHADOW WOOD HOMEOWNERS ASSOCIATION, INC.,

Appellant,

vs.

NEW YORK COMMUNITY BANK,

Respondents.

S. Ct. No. 63180
Dist Ct. No. A-12-660328-C

Appeal From the Eighth Judicial District Court, Clark County
The Honorable Abbi Silver, District Judge

APPELLANT SHADOW WOOD HOMEOWNERS ASSOCIATION, INC'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRSP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Shadow Wood Homeowners Association, Inc.'s true name is Shadow Wood Homeowners' Association, Inc., a Nevada non-profit coop association.

DATED this 21st day of November, 2013.

ALESSI & KOENIG, LLC

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. NRS 116.31166 provides that recitals in a deed made pursuant to NRS 116.31164 of "Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell" are "conclusive proof of the matters recited" as against "the unit's former owner, his or her heirs and assigns, and all other persons." Did this conclusive evidentiary presumption warrant upholding the subject foreclosure sale?

2. Did the lower court err in completely neglecting to make any findings of fact or provide any other legal basis for its conclusion that Gogo Way Trust was not a bona find purchaser?

3. NRS 116.3116 provides a statutory lien in favor of home owners associations for delinquent common area assessments. Does this statutory lien include the fees and costs the association incurs in collecting delinquent assessments?

4. Under NRS 116.3116(2), a portion of the delinquent assessment lien takes "super priority" in favor of homeowners associations in the event of a foreclosure by the holder of a first security interest on a common interest unit. Is the statutory "super priority" lien numerically limited to so-called "nine times monthly assessments" and no more?

5. The CC&Rs for Shadow Wood Homeowners Association provides a contractual lien against a condominium unit in favor of the association that expressly includes collection fees and costs. Is this lien a valid lien?

6. Did the lower court err when it ruled that New York Community Bank's tender of $6,783.16 on or about January 31, 2012 rendered the subject foreclosure sale invalid because the entirety of the Association's assessment lien was necessarily limited at all times to an amount equal to nine times the monthly assessment, or $1,519.29?

STANDARDS FOR REVIEW

When a district court's decision to grant declaratory relief depends on a pure question of law, the review is *de novo*. ***Educ. Initiative PAC v. Comm. to Protect Nev. Jobs***, 129 Nev. ——, ——, 293 P.3d 874, 878 (2013). Questions of statutory construction are also a question of law that this Court must review *de novo*. ***Weddell v. H2O, Inc.***,--- Nev. ---, ---, 271 P.3d 743, 748 (2012); ***Borger v. District Ct.***, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

STATEMENT OF THE CASE

This action involved a dispute between Appellants Shadow Wood Homeowners Association ("Shadow Wood" or the "Association") and Gogo Way Trust and Respondent New York Community Bancorp, Inc. ("NYCB") over the validity of a foreclosure sale conducted by the law firm of Alessi & Koenig, LLC

("A&K") on behalf of Shadow Wood, where Gogo Way Trust purchased the subject real property, a condominium unit within Shadow Wood. NYCB, who was owner of the subject property when Shadow Wood processed the subject foreclosure of the property, commenced the lower court action, seeking to quiet title in its favor and to obtain declaratory relief setting aside the subject foreclosure sale. In its Amended Complaint, NYCB sought to have the sale set aside, alleging that the price Gogo Way Trust paid, $11,018.39, was "commercially unreasonable," and alleging that Shadow Wood failed to provide all statutorily required foreclosure notices.

On summary judgment, the lower court concluded as a matter of law that the subject foreclosure sale was invalid. The Court held that NYCB's payment tendered to Shadow Wood's agent, A&K, of $6,783.16 on or about January 31, 2012, satisfied the Association's assessment lien and rendered the subsequent foreclosure sale invalid as a matter of law. The Court held that Gogo Way Trust was not a bona fide purchaser, although its opinion provided no analysis made no findings of fact to explain how it reached that conclusion. In sum, to reach the conclusion that NYCB's tender of $6,783.16 necessarily satisfied the Association's assessment lien, the Court interpreted NRS 116.3116 *et seq* as providing a lien for delinquent assessments that is capped – in total – at an amount equal to nine months of assessments. This interpretation of NRS 116.3116 *et seq* is unique, as

the issue that has been the source of much litigation is whether the "super priority" portion of an assessment lien is capped at an amount equal to nine months of assessments, not whether the total assessment lien is capped at that amount. In interpreting NRS 116.3116 as capping the *entire* assessment lien at an amount equal to nine months of assessments, the Court simply failed to understand the plain statutory language.

This appeal followed. Subsequently, on September 30, 2103, the Court granted NYCB's motion for attorney's fees, issuing judgment against Appellants in the amount of $41,130.00.

STATEMENT OF THE FACTS

A. The Foreclosure Sale And NYCB's Tender Of $6,445.54

The subject real property (the "Property") is located at 3923 Gogo Way #109, Las Vegas, Nevada 89103. (APP. Pgs. 201-202) It is located within the Shadow Wood Homeowners Association ("Shadow Wood"). (APP. Pgs. 201-202) NYCB acquired title to the Property at a foreclosure sale it conducted on May 9, 2011. (APP. Pg. 202)

After acquiring title to the Property, NYCB failed to make assessment payments. (APP. Pgs. 215, 248-257) In response, Shadow Wood, via its attorneys, Alessi & Koenig, LLC ("A&K"), commenced the non-judicial foreclosure process of NRS 116.3116 *et seq.* (APP. Pgs. 211-213)

On November 15, 2011, in response to a request from NYCB, A&K sent a breakdown of Shadow Wood's assessment lien, along with a copy of a ledger showing the history of the assessment account, to a representative of NYCB. (APP. Pg. 684) The breakdown totaled $9,017.39, and, in accordance with A&K's interpretation of the governing law, contained: (1) collection charges incurred against the Property's prior owner; (2) collection charges incurred against NYCB; (3) nine months of assessments incurred against the prior owner; and (4) all assessments incurred against NYCB. (APP. Pgs. 241-242) The assessment ledger showed a total amount of $6,445.54, an amount which did not reflect that a portion of the assessment delinquency had been wiped out through NYCB's foreclosure sale. (APP. Pgs. 248-257) On or around January 31, 2012, NYCB sent A&K a check for $6,783.16, an amount based upon the amount shown in the assessment ledger (with additional months of assessments that had come due added in) rather than the amount showed on the breakdown of the assessment lien. (APP. Pgs. 241-242, 248-257, 265) A&K rejected the payment and, in an email dated February 8, 2012, informed NYCB of the correct amount. (APP. Pg. 684)

Further correspondence was had between NYCB and A&K, although it appears A&K erroneously addressed an email that did not deliver to NYCB. (APP. Pg. 716) A&K conducted a foreclosure sale on February 22, 2012, where Gogo Way Trust purchased the Property for $11,018.39. (APP. Pgs. 212, 238)

The Court made no findings of fact regarding (1) the propriety of the collection charges arising out of the prior owner's failure to pay assessments, (2) the propriety of the collection charges arising from NYCB's failure to pay assessments, or (3) the total amount of delinquent assessments and late charges owed. (APP. Pgs. 917-925) Instead, the Court's ruling bypassed all these issues, holding simply that the payment of $6,783.16 exceeded an amount equal to nine months of assessments, and that the foreclosure sale was therefore invalid. (APP. Pg. 924) The Court made no findings of fact regarding whether the Gogo Way Trust was entitled to bona fide purchaser protection. (APP. Pgs. 917-925)

B. Statutory "Super-Priority" Liens Under NRS 116.3116.

Nevada law allows homeowners associations to impose assessments against their unit owners.[1] In the event of a default by a unit owner, the association may impose fees and charges to collect those unpaid assessments.[2] Such fees must be reasonable, and may be collected by the association directly, or by a third-party, such as a property manager or a collection agency.[3] To prevent excessive fees against unit owners, collection fees are capped by regulation.[4] Nevada law also

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[1] NRS 116.3102(j).

[2] NRS 116.3102(k); NRS 116.310313(1).

[3] NRS 116.310313(1,2).

[4] NAC 116.470.

provides a statutory lien to the association upon the amounts that are owed to the associations.[5]

In the event of a foreclosure conducted by the association, the association recovers all of its unpaid lien, plus its collection fees and costs, before any other lien is satisfied.[6] A slightly different result occurs, however, when a first security interest forecloses on the unit before the association. In that instance, NRS 116.3116(2) controls. The rule provides that the association lien is senior to that of the first security interest holder "to the extent of assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to foreclose the lien. . . ."[7]

This is where litigants sometimes part company. Some maintain the foregoing phrase means the association can recover a numeric maximum of "nine times monthly assessments" and no more, regardless of what amounts the association might have incurred in its own attempts to collect prior to foreclosure by the first security interest holder.

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[5] NRS 116.3116(1);

[6] NRS 116.31164(3)(c) (providing recovery of all reasonable expenses of sale, reasonable expenses of securing possession before sale, attorney's fees and other legal expenses incurred by the association).

[7] NRS 116.3116(2).

By contrast, others, such as Shadow Wood, maintain that such a simple numeric equation—which could have easily been written into the statute—simply is not present in NRS 116.3116(2). Rather, the rule is a "look back" provision for the nine months leading up to foreclosure. In other words, NRS 116.3116(2) is designed to make the association whole for the nine month period prior to foreclosure, as if there had been no default by the unit owner. The purpose is to place the association in the same position it would have been financially ("to the extent of") but for the default ("which would have become due in the absence of acceleration") for the nine months prior to foreclosure. While this amount includes recovery of all unpaid assessments arising during the nine months prior to foreclosure, it also necessarily includes the collection fees and costs that were actually incurred by the association during that same period. Otherwise, the association is not made whole during that key period, and it is not compensated "to the extent of" the amounts it would have received "in the absence of acceleration."

C. The Nevada Real Estate Division's Advisory Opinion And The Lower Court's Unique Interpretation Of NRS 116.3116.

In this case, in reaching its ruling, the Court considered an advisory opinion the Nevada Real Estate Division issued on December 12, 2012. (APP. Pg. 923) The advisory opinion departs from both of the two conflicting interpretations of NRS 116.3116 discussed above. It finds an alternative answer to the question of

whether the super priority portion of an assessment lien may include collection fees and costs such that the super priority lien exceeds an amount equal to nine months of assessments. In sum, the opinion concludes that collection fees and costs are not part of the super priority portion of the assessment lien because assessment liens never include collection fees and costs in the first place. (APP. Pgs. 625-641)

To reach this conclusion, the opinion draws attention to language from NRS 116.3115, which provides that an association's lien includes "charges for late payment of assessments." The opinion argues that "costs of collection," a term defined in NRS 116.310313, does not fit within the purview of "charges for late payment of assessments." (APP. Pg. 626)

In purporting to adopt the advisory opinion's reasoning, this Court granted Plaintiff's motion for summary judgment, ruling as follows:

> Although not precedential, the State of Nevada Department of Business and Industry, Real Estate Division ("Real Estate Division") published an Advisory Opinion on December 12, 2012, setting forth that costs of collection cannot properly be included in an HOA's super-priority lien, and stating that "liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4)."
> [...]
> NYCB's payment of $6,783.16 more than satisfied the nine (9) months of assessments ($1,519.29) on which Shadow Wood could have legitimately based a super-priority lien, and would have netted Shadow Wood more than it ultimately collected. The Court believes, based upon the papers and pleadings submitted, as well as oral

> argument at the hearing of this matter, that Shadow Wood and/or its agents were attempting to profit off the subject HOA foreclosure by including exorbitant fees and costs that could not be used as the basis for an HOA foreclosure sale in this matter.

(APP. Pg. 923) In sum, the Court ruled that NYCB's entire obligation to the Association totaled an amount equal to nine months of assessments (i.e. the nine months of assessments that came due prior to NYCB's taking ownership of the property), despite the fact that when NYCB tendered payment of $6,783.16, NYCB had been owner of the Property for approximately nine months without paying any assessments to the Association during which time the Association incurred additional collection charges in attempting to collect those unpaid assessments from NYCB.

Moreover, the Court issued the ruling despite the fact that the Association's CC&Rs provide as follows:

> The annual and special assessments, together with interest, costs and reasonable attorney's fees, shall be a charge on the Condominium Unit and shall be a continuing lien upon the Condominium Unit against which each such assessment is made.

(APP. Pg. 914) Of course, the CC&Rs create a contractual lien that is separate and distinct from the statutory lien created by NRS 116.3116. In this case, the CC&Rs specifically provided that the Association's assessment lien includes costs and attorney's fees.

ARGUMENT

A. NRS 116.31166 Protects Home Owners Associations With A Conclusive Evidentiary Presumption That A Foreclosure Was Processed Correctly

NRS 116.31162 et seq defines the process through which home owners associations may foreclose on assessment liens after the issuance of three documents: a notice of delinquent assessment; a notice of default; and a notice of sale.

Recitals in a Trustee's Deed Upon Sale executed pursuant to NRS 116.31164 constitute "conclusive proof" that the non-judicial foreclosure notices were properly issued. Specifically, NRS 116.31166 provides:

> 1. The recitals in a deed made pursuant to NRS 116.31164 of:
> (a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;
> (b) The elapsing of the 90 days; and
> (c) The giving of notice of sale,
> ➥ are conclusive proof of the matters recited.
> 2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. [...]
> 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.

In comparison to the rule governing mortgage foreclosure sales in Nevada found in NRS 107.080, the "conclusive evidence" rule stated in NRS 116.31166

offers substantially greater protection for home owners associations that conduct foreclosure sales. Namely, the rule stated in NRS 107.080(5) requires that a trustee must show "substantial compliance" with the foreclosure requirements. To wit:

> 5. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption. A sale made pursuant to this section must be declared void by any court of competent jurisdiction in the county where the sale took place if:
> (a) The trustee or other person authorized to make the sale does not ***substantially comply*** with the provisions of this section or any applicable provision of NRS 107.086 and 107.087;
> [...]

(Emphasis added)

Here, the Trustee's Deed Upon Sale provides as follows:

> Trustee states that: This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein, Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on February 22, 2012 at the place indicated on the Notice of Trustee's Sale.

(App. Pg. 238) As a result of the recitals in the trustee's deed, the Association has the protection of a conclusive evidentiary presumption that the foreclosure requirements were satisfied. This includes a conclusive presumption arising from the recitals regarding default. Here, the recitals state that default occurred as set

forth in the Notice of Default. In this case, the Notice of Default provides that the amount due under the Association's assessment lien was $6,608.34 as of August 28, 2011. (APP. Pg. 225) This fact alone directly contradicts the Court's ruling that the Association's assessment lien totaled only $1,519.29 approximately five (5) months later on January 31, 2012, as NYCB did not make any payments between August 28, 2011 and January 31, 2012 while new monthly assessments continued to accrue and additional attorney's fees were generated. (APP. Pgs. 215, 248-257)

Since the Court simply ignored the plain statutory language of NRS 116.31166, and since this statute has a material impact on this case, the Court's ruling granting summary judgment in favor of NCYB was erroneous and should be overturned.

B. There Are Two Liens—One Contractual and One Statutory.

Without addressing the matter of whether the NRED has struck upon the correct interpretation of NRS 116.3116 (which would mean that all prior courts in this state and other states interpreting identical statutory language originating from the Uniform Common Interest Community Act have all gotten it wrong), one glaring defect of the NRED's advisory opinion, and the Court's opinion, is the failure to address the issue that an association may have CC&Rs that expressly provide that the assessment lien includes collection fees and costs. Certainly the

vast majority of CCRs for Nevada home owners associations expressly provide that the association assessment lien includes fees and costs of collection. Shadow Wood's CC&Rs, for example, expressly provide that "The annual and special assessments, together with interest, costs and reasonable attorney's fees, shall be a charge on the Condominium Unit and shall be a continuing lien upon the Condominium Unit against which each such assessment is made." (APP. Pg. 914)

Here, under the CC&Rs, the Association unquestionably had a lien against the Property that included: (1) all assessments that came due while NYCB was owner of the Property and (2) all reasonable costs and attorney's fees that the Association incurred in response to NYCB's failure to pay monthly assessments. However, the Court made no findings of fact regarding the amount of assessments that came due while NYCB owned the Property without paying, or the amount of attorney's fees and costs the Association reasonably incurred in attempting to collect on those unpaid assessments. Rather, the Court merely ruled that NYCB's tender of payment of $6,783.16 on or around January 31, 2012 necessarily satisfied the Association's lien because it exceeded an amount equal to nine months of assessments, which, according to the Court, was all NYCB owed.

It is convenient to regard the Association's assessment lien, as it existed on January 31, 2012, as comprising of four distinguishable components. Those components are: (1) nine months of delinquent assessments that came due prior to

NYCB's acquiring title to the Property at its foreclosure sale of May 9, 2011; (2) the attorney's fees and costs the Association incurred in attempting to collect on the prior owner's delinquency; (3) the unpaid assessments that came due from the date NYCB acquired title to the Property to the date NYCB tendered payment (i.e. from May 9, 2011 to January 31, 2012); and (4) the attorney's fees and costs the Association incurred in attempting to collect against NYCB for its failure to pay assessments while it owned the Property.

Here, under the plain language of the Association's CC&Rs, components "3" (i.e. NYCB's delinquent assessments) and "4" (attorney's fees and costs arising out of NYCB's failure to pay assessments) were unquestionably part of the Association's assessment lien. However, despite this fact, the Court ruled that, since NYCB's payment exceeded the amount of component "1," the payment necessarily satisfied the Association's lien. The Court made no findings of fact regarding what components "3" and "4" amount to.

Clearly, the Court's granting of summary judgment was erroneous. Even though payment of $6,783.16 exceeded an amount equal to nine months of assessments, it did not necessarily exceed the amount of the Association's assessment lien, as, by contract, the assessment lien plainly included delinquent assessments that came due after NYCB acquired title to the Property and reasonable attorney's fees. As such, additional fact finding was necessary and the

basis for the Court's opinion (i.e. that only nine months of assessments were owed) was fundamentally flawed.

C. The Court Erred In Adopting The NRED Advisory Opinion's Reasoning That "Charges For Late Payment Of Assessments" Do Not Include Attorney's Fees Related To The Collection Of Delinquent Assessments

NRS 116.3116 defines an association's statutory lien as follows:

> The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

Subsection "1" of NRS 116.3102 provides, in part:

> Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:
> [...]
> (k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

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Amongst other things, NRS 116.3115 does the following:

(1) Authorizes an association to issue assessments for the upkeep of common areas based upon a budget adopted at least annually; (Subsection 1)

(2) Requires assessments to issue against all units according to an allocation set forth in the CC&Rs; (Subsection 2(a))

(3) Requires the association to establish adequate reserve funds; (Subsection 2(b))

(4) Provides that delinquent assessments bear a specified rate of interest; (Subsection 3)

(5) Authorizes the association to assess common expenses to a unit where the common expenses result from the willful misconduct or gross negligence of the unit's owner, tenant or invitee; (Subsection 6)

Where a home owner fails to pay assessments issued pursuant to NRS 116.3115, the home owners association is certainly justified in passing the attorney's fees incurred to the home owner as a "charge for late payment of assessments." Moreover, NRS 116.3115(6) expressly authorizes the association to assess common expenses against a particular unit where the common expenses (such as attorney's fees the association pays for with common funds) result from an owner engaging in willful misconduct (for example, failing to pay monthly assessments). Thus, attorney's fees an association incurs from an owner's

nonpayment of assessments certainly fit within the association's lien for "penalties, fees, charges, late charges" contemplated in NRS 116.3116.

The advisory opinion the Court found persuasive reasons as follows:

> "Costs of collecting" defined by NRS 16.310313 is too broad to fall within the parameters of charges for late payment of assessments. By definition, "costs of collecting" relate to the collection of past due 'obligations.' "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner." In other words, costs of collecting includes more than "charges for late payment of assessments." Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien.

(APP. Pg. 626) The advisory opinion errs in concluding that "charges for late payment of assessments" do not fall within the broad terms used in NRS 116.3116(1) to define the Association's lien. Under NRS 116.3116, the lien includes "penalties, fees, charges" and "late charges."

In the present case, by statute, the Association's lien included charges for late payment of assessments. It also included the common expenses (i.e. attorney's fees and other charges) the Association incurred in addressing the NYCB's willful misconduct in failing to pay monthly assessments. As discussed above, the Court made no findings of fact as to two components of the Association's lien: (1) the amount of assessments that went unpaid while NYCB owned the Property and before tendering a payment on January 31, 2012, and (2) the reasonable attorney's fees the Association incurred in addressing NYCB's misconduct in failing to meet

its obligation to pay assessments. As a result, the Court erred in granting summary judgment to NYCB.

D. The Lower Court Erred In Excluding From The Association's Lien Collection Fees And Costs The Association Incurred Against The Property's Prior Owner

i. Collection Fees And Costs Are Included Within The Super Priority Portion Of An Assessment Lien Over And Above The Nine Month Amount

An interpretation of NRS 116.3116(2) that limits the "super priority" portion of an assessment lien to "nine times monthly assessments" is teasingly simple. However, the words "nine times monthly assessments" are notably missing from NRS 116.3116(2). The Legislature could easily have crafted such simple language if a simple formula were its intent.

The language at issue is NRS 116.3116(2), which provides in pertinent part as follows:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent

or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) . . . ***to the extent of*** the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 ***which would have become due in the absence of acceleration*** during the 9 months immediately preceding institution of an action to enforce the lien. . . .[8]

NRS 116.3116(2) is a make-whole provision designed to place the association **in the same place as if there had been no default** for the nine months preceding foreclosure. When interpreting the plain language of a statute, Nevada courts must consider a statute's provisions as a whole, reading them "in a way that would not render words or phrases superfluous or make provisions nugatory." ***S. Nev. Homebuilders Ass'n v. Clark County***, 121 Nev. 446, 339, 117 P.3d 171, 173 (2005) (quotation omitted). Meaningless or unreasonable results should be avoided by courts when interpreting statutes. ***Matter of Petition of Phillip A.C.***, 122 Nev. 1284, 1293 (2006). As such, "where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended." ***County of Clark, ex rel. Univ. Med. Ctr.***

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[8] NRS 116.3116(2) (emphasis added).

V. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (quotation omitted). Moreover, "when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." ***Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n***, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

The only state supreme court case deciding this issue is ***Hudson House Condominium Ass'n, Inc. v. Brooks***, 611 A.2d 862 (Conn. 1992). In *Hudson House*, the Connecticut Supreme Court considered whether collection fees and costs survived foreclosure as part of the super-priority lien **in addition to** "nine months" worth of assessments. 611 A.2d at 613. The Connecticut Supreme Court held that such fees and costs survived foreclosure as part of the super-priority lien, even though assessments had already been capped at the so-called "nine times monthly assessment" amount. The court stated:

> In construing a statute, we assume that "the legislature intended to accomplish a reasonable and rational result." Section 47-258(a) creates a statutory lien for delinquent common expense assessments. Section 47-258(i) authorizes the foreclosure of the lien thus created. Section 47-258(b) provides for a limited priority over other secured interests for a portion of the assessment accruing during the six month period preceding the institution of the action. Section 47-258(g) specifically authorizes the inclusion of the costs of collection as part of the lien.
>
> Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status

> to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, ***it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows.*** We conclude that § 47-258 authorizes the inclusion of attorney's fees and costs in the sums entitled to a priority.

611 A.2d at 616-17 (emphasis added).[9] Importantly, the Connecticut Supreme Court rejected the overly simplistic "nine times monthly assessments" catchphrase that is being peddled here.

Rather, the Connecticut Supreme Court viewed the purpose of the rule as a whole—to provide ***meaningful*** compensation to associations when a lender foreclosure occurs. As the court noted, the legislature must have permitted all collection costs associated with enforcement of the super-priority lien to be recoverable, even after a foreclosure. To read the statute otherwise would make no practical sense at all, as it would fashion a proverbial "bow" with no "string" or "arrows." Similar to the rules of statutory interpretation in Connecticut, under Nevada law, courts must "consider the policy and spirit of the law and will seek to

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[9] Although the Connecticut Supreme Court noted that its legislature later amended the statute to specifically include "the Association's costs and attorney's fees in enforcing its lien," the court specifically noted that this merely "clarified that attorney's fees and costs are included in the priority debt." ***Hudson House***, 611 A.2d at 617 n.4.

avoid an interpretation that leads to an absurd result." ***Fierle v. Perez***, -- Nev. --, 219 P.3d 906, 911 (2009) (quotation omitted).

Such an interpretation also makes practical sense. The intent and purpose of the CC&Rs was to give Horizons not only a legal ***right*** to recover some of the unpaid principal amounts as a result of a default, but the ***means*** to actually recover. It was designed precisely to avoid crafting the "bow without a string or arrows" that is referred to in *Hudson House*. *Hudson House* goes precisely to the spirit, purpose, and intent of super-priority liens as a whole and the unreasonable and absurd results created by the interpretation proffered by NYCB.

ii. The Attorney's Fees And Costs Incurred In Collecting Against The Property's Prior Owner Were Properly Asserted Against NYCB As Part Of The Association's Assessment Lien

In this case, the Court found that, when NYCB tendered payment of $6,783.16 on January 31, 2012, the Assessment lien amount totaled only the nine-month "super priority" amount, or $1,519.29. In so finding, the Court excluded from the assessment lien (1) fees and costs the association incurred in processing a non-judicial foreclosure against the Property's prior owner, (2) assessments that came due during the approximately nine months that NYCB owned the Property without making assessment payments, and (3) the attorney's fees and costs the Association incurred in addressing NYCB's failure to make assessment payments

by processing a non-judicial foreclosure against NYCB. However, as discussed above, the fees and costs incurred against the prior owner are properly included in the Association's assessment lien. As a result, the Court's ruling is fundamentally flawed and should be overruled.

CONCLUSION

The Court's granting summary judgment in favor of NYCB was based entirely on a flawed premise. Namely, the Court reasoned that the Association's assessment lien – in its entirety – was limited to the "super priority" amount equal to nine months of assessments, and NYCB's tender of $6,783.16 on January 31, 2012 exceeded that amount. However, the Court erred by failing to consider that the Association's assessment lien also included (1) the reasonable attorney's fees incurred in addressing the prior owner's failure to pay assessments, (2) all the assessments that came due while NYCB owned the property, and (3) all reasonable attorney's fees the Association incurred in addressing NYCB's failure to pay assessments. Further, the Court failed to take into account the conclusive evidentiary presumption in the Association's favor under NRS 116.31166. As

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such, the Court's ruling is materially flawed. Summary judgment was not warranted in Plaintiff's favor and the Court's ruling should be overturned.

DATED this 21st day of November, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type of requirements of NRAP 32 (a)(6) because: this brief has been prepared using Microsoft Word in a 14-point Time New Roman font. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages. Finally, I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particulate NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relief on is to be found.

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I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2013, I caused service of a true and correct copy of the foregoing **APPELLANT SHADOW WOOD HOMEOWNERS ASSOCIATION, INC'S OPENING BRIEF** to be made via electronic service through the Supreme Court's Master Service List and by depositing same in the United States Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

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