

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2   BANK OF NEVADA, A Nevada  
3   Banking Corporation,  
4                                   Appellant,  
5   vs.  
6   MURRAY PETERSEN, an  
7   individual,  
8                                   Respondent.

Supreme Court Case No.: 66568  
Electronically Filed  
D.C. Case No. A-280216 03:48 p.m.  
Aug 28 2016  
Tracie K. Lindeman  
Clerk of Supreme Court

9                                   **APPEAL**

10                   **From the Eighth Judicial District Court, The Honorable Kenneth Cory,**  
11                   **District Judge**

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13                   **RESPONDENT'S PETITION FOR REHEARING**  
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1                                   **RESPONDENT’S PETITION FOR REHEARING**

2           Respondent Murray Petersen (“Petersen”) hereby petitions this court  
3 under NRAP (40)(c)(2) to rehear and reconsider the Opinion entered on August  
4 12, 2016 on the basis that the Court overlooked and misapprehended a material  
5 question of law and its policy considerations and effects when it entered the  
6 Opinion.

7           As the Court is familiar the decision issued in this case primarily  
8 revolved around interpretation and application of the unpublished *Lavi v.*  
9 *Eighth Judicial Dist. Court of State ex rel. County of Clark*, 325 P.3d 1265, 130  
10 Nev. Adv. Op. 38 (2014) which in turn cited and relied upon prior published  
11 precedent *Walters v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*,  
12 127 Nev. 723, 263 P.3d 231 (Nev. 2011).<sup>1</sup> Petersen respectfully submits that  
13 the Opinion issued in this case implicitly, if not explicitly, marks a policy  
14 departure from both previously published and even recently published  
15 precedent which apply and interpret the anti-deficiency statutes strictly. *Badger*  
16 *v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89 (2016).<sup>2</sup> Petersen  
17 further submits that rehearing is appropriate because these policy considerations  
18 have been overlooked in the Opinion.

19           Specifically, the Court’s Opinion in this case found that requiring the  
20 lender to file an amended complaint or otherwise timely file an application for a  
21 deficiency would be akin to forcing it to engage an “idle act.” See Opinion,

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23           <sup>1</sup> Pursuant to NRAP 40(2)(A) *Lavi* was discussed in detail on pages 7, 8  
24 and 12 of Respondents Answering Brief filed April 8, 2015 and *Walters* was  
25 discussed in detail on pages 9, 10 and 12 of Respondents Answering Brief filed  
April 8, 2015

26           <sup>2</sup> *Badgers* was not cited or discussed in Respondents Answering Brief  
27 filed April 8, 2015 as the decision was not published until after briefing and oral  
28 argument was completed.

1 page 15. However, Petersen believes that what this Court has perceived to be  
2 an “idle act” is in fact an important procedural safeguard, the removal of which  
3 has undermined the primary policies of the anti-deficiency statutes. Rehearing  
4 should be granted because this Court has overlooked and misapprehended the  
5 importance of applying the procedural barriers imposed by NRS Chapter 40  
6 strictly rather than viewing them as superfluous acts which can be disregarded  
7 without consequence to the party seeking a deficiency.

8 Standard For Petition For Rehearing.

9 NRAP 40(C)(2) provides as follows:

10 The court may consider rehearings in the following circumstances:

11 (A) When the court has overlooked or misapprehended a material  
12 fact in the record or a material question of law in the case, or

13 (B) When the court has overlooked, misapplied or failed to  
14 consider a statute, procedural rule, regulation or decision directly  
controlling a dispositive issue in the case.

15 Legal Argument

16 Though it was not a published decision, *Lavi*, supra., relied heavily on the  
17 published decision of *Walters*, supra., and it has been looked upon extensively  
18 by the Nevada trial courts as persuasive authority when presiding over  
19 deficiency lawsuits. In light of the importance of this precedence, Petersen  
20 requests rehearing because he believes the decision rendered in this appeal  
21 marks a strong departure from this Court’s prior strict interpretation of the anti-  
22 deficiency statutes. This court’s prior jurisprudence interpreted the anti-  
23 deficiency statutes strictly which in turn fulfilled the underlying purpose of the  
24 statutes of providing strong substantive and procedural safeguards for  
25 borrowers who are often facing financial annihilation against highly  
26 sophisticated adversaries with nearly unlimited legal resources.

27 The apparent differing viewpoints between justices inherent in this  
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1 court's prior jurisprudence is identified in the *Lavi* dissent wherein the dissent  
2 submitted as follows:

3 Third, new NRS 40.495(4), which applies specifically to suits against  
4 guarantors who have given NRS 40.495(2) waivers, confirms that, in this  
5 context, NRS 40.455 and NRS 40.459 do not apply because they are  
inconsistent with NRS 40.495(4) and do not require an "application"  
beyond the pre-foreclosure complaint against the guarantor.

6 *Lavi*, supra., Dissent, p. 7.

7 By contrast, the *Lavi* majority rejected this argument and ultimately held  
8 as follows:

9 BB & T's interpretation that waiving the one-action rule also frees an  
10 obligee from complying with the provisions of NRS 40.455 is  
11 unreasonable. NRS 40.495(2) focuses on maintaining a separate action;  
nothing in the subsection implies that it also terminates the procedural  
requirements for that action.

12 *Lavi*, supra., p. 5.

13 Stated another way, what has been deemed to be idle and superfluous acts  
14 by the *Lavi* dissent, has been viewed as important procedural safeguards by the  
15 majority. Petersen submits that the majority position stated in *Lavi* follows  
16 strong precedent from this Court and courts from many jurisdictions which have  
17 interpreted state anti-deficiency statutes strictly due to the policy consideration  
18 of insuring that strong procedural and substantive safeguards are in place to  
19 protect borrowers. As an example, the Arizona courts have held as follows:

20 Statutory anti-deficiency protection reflects a legislative policy decision  
21 to place the risk of inadequate security on lenders rather than borrowers,  
22 and is intended to discourage purchase money lenders from over-valuing  
real property by requiring them to look solely to the collateral for  
recovery in the event of foreclosure.

23 *Helvetica Servicing, Inc. v. Pasquan*, 277 P.3d 198, 229 Ariz. 493 (Court  
24 of Appeals of Arizona, Division 1, 2012).

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1 As was also recently held in *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev.  
2 Adv. Op. 39, 373 P.3d 89 (2016):

3 Indeed, “the Legislature has shown a strong inclination towards  
4 protecting an obligor's rights under the antideficiency statutes.” *Lavi v.*  
5 *Eighth Judicial Dist. Court*, 130 Nev. —, —, 325 P.3d 1265, 1268  
6 (2014). Accordingly, Nevada's deficiency judgment statutes are intended  
7 not only to protect borrowers, but to protect guarantors as well. *Shields*,  
8 102 Nev. at 621, 730 P.2d at 432. Such protection furthers Nevada public  
9 policy goals because “[a] guarantor is the favorite of the law.” *Tri-Pac.*  
10 *Commercial Brokerage, Inc. v. Boretta*, 113 Nev. 203, 206, 931 P.2d 726,  
11 729 (1997) (citation omitted).

12 *Id.*, 373 P.3d at 93-94.

13 *Badger* concluded as follows:

14 Having considered the parties' filings and the attached documents, we  
15 choose to entertain the Guarantor's petition for a writ of mandamus. In  
16 doing so, we conclude that the district court erred in permitting Omni's  
17 Amended Borrower Complaint to relate back to the timely Borrower  
18 Complaint pursuant to NRCP 15(c), so as to satisfy the six-month  
19 deadline for an application for a deficiency judgment required by NRS  
20 40.455(1).

21 *Id.*, 373 P.3d at 96.

22 While *Badger* addressed different issues than this appeal, the tenor of  
23 *Badger* is in conflict with the tenor of the Court's Opinion in this appeal.  
24 Specifically, *Badger* stands for the underlying proposition that in spite of the  
25 general rule of interpreting and applying pleadings liberally in most garden  
26 variety civil actions<sup>3</sup>, this liberality does not extend to NRS Chapter 40  
27 deficiency actions.

28 In this case the District Court ruling ultimately hinged on a simple  
interpretation of the statute and on simple facts.<sup>4</sup> The District Court applied a

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<sup>3</sup> See for instance NRCP 15 (a) leave shall be freely given to amend the pleadings, and also NRCP 15 (b) permitting the amendment of pleadings even after trial to conform to the evidence.

<sup>4</sup> Pursuant to NRAP 40(2)(A), the arguments raised on this page and on the following pages were raised on pages 4, 5, 7, 8 and 10 thru 12 of

1 very simple interpretation that an “application” for a deficiency under NRS  
2 40.455 must be filed within 6 months of the foreclosure date, whether its  
3 deemed an application for a deficiency hearing or a motion for summary  
4 judgment as contemplated by *Walters*. Specifically, the District Court ruled at  
5 the hearing “I tend to agree that it does not necessarily require an amendment to  
6 the Complaint but, you know, a literal reading of 455 just says an application  
7 for a deficiency judgment. That sounds like a motion to me.”(III JA at 557-558).

8 Although Petersen may have waived the one-action rule (II JA AA352-  
9 361) there is no Nevada case which suggests that the 6 month limitation  
10 prescribed by NRS 40.455 can be waived. Under NRS 40.455(1) a judgment  
11 creditor must apply for a deficiency judgment "within 6 months after the date of  
12 the foreclosure sale or the trustee's sale ...." An application for a deficiency  
13 judgment must be in writing, "set forth in particularity the grounds for the  
14 [deficiency] application, set forth the relief sought" and be filed within six  
15 months after the foreclosure sale. *Walters v. Eighth Judicial Dist. Court of State*  
16 *ex rel. Cnty. of Clark*, 263 P.3d 231, 232-35 (Nev. 2011).

17 No “application” of any kind was filed by Bank until the untimely motion  
18 for summary judgment was filed on January 6, 2014 (II JA AA 161-410 ). Here  
19 the bank has failed to apply for a deficiency within 6 months of foreclosure.

20 While the trial court’s ruling could possibly be viewed as harshly leading  
21 to a forfeiture (see *Lavi*, supra., Dissent, p. 12), it is not harsh when placed in the  
22 context of the anti-deficiency statutes. The banks that make, hold and enforce  
23 the commercial loans that come under NRS Chapter 40 are highly sophisticated  
24 entities that have almost unlimited legal resources. The “harshness” that is  
25 perceived to have been generated by the District Court’s decision that its claims  
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27 Respondents Answering Brief filed April 8, 2015  
28

1 are time barred due to procedural failings is not harsh at all when placed within  
2 the policy consideration of placing strong procedural barriers in the way of what  
3 usually emerges as the financial annihilation that results when distressed  
4 commercial borrowers are sued.

5 The imposition of making a creditor formally seek a deficiency within 6  
6 months of a foreclosure does not mandate an idle act nor does it cause an unjust  
7 and harsh result in deficiency actions. The District Court's ruling correctly  
8 applied strict procedural barriers that were imposed by the legislature for strong  
9 public policy reasons. The District Court ruling that the Bank's claims were  
10 time barred was correct and should not have been overturned.

### 11 CONCLUSION

12 Petersen requests rehearing so that this appeal may be reconsidered in  
13 light of longstanding policy considerations that were affirmed recently in  
14 *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89 (2016) and  
15 which require that Bank of Nevada's claims are time barred due to failure to  
16 timely apply for a deficiency judgment.

17 DATED this 27<sup>th</sup> day of August, 2016.

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1 CERTIFICATE OF COMPLIANCE WITH RULES 40 and 40A

2 1. I hereby certify that this petition for rehearing/reconsideration or  
3 answer complies with the formatting requirements of NRAP 32(a)(4), the  
4 typeface requirements of NRAP 32(a)(5) and the type style requirements of  
5 NRAP 32(a)(6) because:

6 [xx ] It has been prepared in a proportionally spaced typeface using  
7 Times New Roman in Wordperfect in 14 font size; or

8 [ ] It has been prepared in a monospaced typeface using [state name and  
9 version of word-processing program] with [state number of characters per inch  
10 and name of type style].

11 2. I further certify that this brief complies with the page- or  
12 type-volume limitations of NRAP 40 or 40A because it is either:

13 ☒ Proportionately spaced, has a typeface of 14 points or more, and  
14 contains 2,235 words; or

15 [ ] Monospaced, has 10.5 or fewer characters per inch, and contains  
16 \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

17 [xx ] Does not exceed 10 pages.

18 DATED this 29<sup>th</sup> day of August, 2016.

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**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On the 29<sup>th</sup> day of August, 2016, I caused to be served a true and correct copy of the foregoing RESPONDENT'S PETITION FOR REHEARING upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service to the persons listed as follows:

Michael Stein, Esq.  
Bradley Austin, Esq.  
*Attorneys For Appellant*

  
\_\_\_\_\_  
/s/ Carol Burke  
An employee of Mincin Law, PLLC