

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARRINGTON MORTGAGE
HOLDINGS, LLC,

Appellant,

v.

R VENTURES VIII, LLC, A NEVADA
SERIES LIMITED LIABILITY
COMPANY OF THE CONTAINER
R VENTURES, LLC UNDER NRS
86.296,

Respondent.

Electronically Filed
Supreme Court Case No. 71437
Apr 25 2017 05:05 p.m.
Elizabeth A. Brown
District Court Case No. A-13-684151
Clerk of Supreme Court

APPEAL

From the Eighth Judicial District Court
The Honorable ELISSA CADISH, District Judge
District Court Case No. A-13-684151-C

OPENING BRIEF

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
NATALIE L. WINSLOW, ESQ.
Nevada Bar No. 12125
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Telephone: (702) 634-5000

Attorneys for Appellant

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Carrington Holding Company, LLC

The Carrington Companies, LLC

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), appellant Carrington Mortgage Holdings, LLC states that this case raises as principal issues: a question of first impression of common law (NRAP 17(a)(13)) and a question of statewide public importance (NRAP 17(a)(14)), as the principal issue raised on appeal is one of statutory interpretation of whether NRS 116.3116(8) provides for a mandatory award of reasonable attorneys' fees and costs for a third-party purchaser who brought claims against a senior deed of trust beneficiary to extinguish the senior deed of trust as a result of an HOA foreclosure sale.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
I. Factual Background.....	3
A. The Deed of Trust History	3
B. Red Rock's Foreclosure History and Bank of America's Tender.....	4
C. First 100, LLC Purchased the HOA's Payment Rights Pre-Foreclosure	6
II. Procedural Background	7
ARGUMENT	8
I. Standard of Review.....	8
II. NRS 116.3116 <i>et seq.</i> Solely Contemplates an Action Brought by an HOA to Recover Assessments Due under an HOA Assessment Lien.....	8
III. R Ventures is Not Entitled to Fees under NRS 116.3116.	11
CONCLUSION	14
CERTIFICATE OF COMPLIANCE.....	15

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Baldonado v. Wynn Las Vegas</i> , 194 P.3d 96 (Nev. 2008).....	11, 12
<i>Chase v. United Residential Mortgage, LLC</i> , No. 3:10-cv-00365-RCJ-RAM, 2011 WL 198008 (D. Nev. Jan. 19. 2011)	11
<i>Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC</i> , 373 P.3d 66 (Nev. 2016).....	3, 9, 10
<i>SFR Investments Pool 1, LLC v. U.S. Bank, N.A.</i> , 334 P.3d 408 (Nev. 2014).....	2
<i>State v. Catanio</i> , 120 Nev. 1030, 102 P.3d 588 (2004).....	7

Statutes

NRS 30.010.....	3, 11
NRS 40.010.....	3, 11
NRS 116.....	11
NRS 116.1201.....	8
NRS 116.3116.....	passim
NRS 116.31164.....	9

JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(8) because the district court awarded respondent R Ventures VIII, LLC its attorneys' fees after entry of final judgment in R Ventures' favor.

The district court entered its order granting R Ventures' motion for summary judgment on April 27, 2016. Notice of entry of order was filed on May 2, 2016.

Carrington filed a motion for reconsideration on May 19, 2016, and an order denying Carrington's motion was entered on August 17, 2016. Notice of entry of the order was filed on August 18, 2016.

R Ventures filed a motion for attorneys' fees and costs on July 6, 2016, and an order granting R Ventures' motion was entered on September 8, 2016. Notice of entry of the order was filed on September 29, 2016.

Carrington filed a timely notice of appeal on October 3, 2016.

ISSUES PRESENTED

Whether a third-party purchaser's quiet title action against a senior deed of trust beneficiary is an action under NRS 116.3116, authorizing an award of attorneys' fees under NRS 116.3116(8)?¹

¹ Unless otherwise noted, references to NRS 116 *et seq.* are made to those statutes in effect at the time of the HOA foreclosure sale in this case.

STATEMENT OF THE CASE

This is one of many cases regarding the proper interpretation and application of NRS 116.3116 following this Court's September 2014 decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014). R Ventures claims that its purchase of certain property in Clark County, Nevada, at an HOA foreclosure sale for \$10,100.00 extinguished a \$189,573.00 deed of trust held by Carrington. R Ventures moved for summary judgment, arguing that it was entitled to a judgment establishing it to be the holder of the property free and clear of Carrington's deed of trust due to the HOA foreclosure sale and the recitals in the trustee's deed. The district court granted summary judgment for R Ventures and denied a cross-motion for summary judgment filed by Carrington.

After the district court granted summary judgment in favor of R Ventures, R Ventures moved for its attorneys' fees and costs. R Ventures argued, *inter alia*, that because its claim was brought under NRS 116.3116, R Ventures was entitled to its fees and costs. The district court agreed, finding that R Ventures' claims for declaratory relief and injunctive relief were brought under and based on NRS 116.3116, and therefore R Ventures was entitled to a mandatory award of fees and costs of \$24,005.00.

...

...

The district court erred when it granted R Ventures its attorneys' fees under NRS 116.3116(8). First, NRS 116.3116(8) applies only to an HOA seeking to recoup its fees and costs after the HOA forecloses on a property. *See Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC*, 373 P.3d 66, 74 n.4 (Nev. 2016).

Second, R Ventures is not entitled to fees and costs because its claims were not brought under NRS 116.3116. R Ventures' claims for quiet title/declaratory relief and injunctive relief were brought under NRS 30.010 and NRS 40.010, which do not provide for attorneys' fees and costs.

The Court should reverse the district court's order granting R Ventures attorneys' fees and costs in the amount of \$24,005.00.

STATEMENT OF FACTS

I. Factual Background

A. The Deed of Trust History

On May 17, 2008, borrower Joyce Pierce purchased property located at 6175 Novelty Street, Las Vegas, Nevada 89148. She later refinanced ownership of the property by way of a loan with Taylor Bean & Whitaker Mortgage Corporation in the amount of \$189,573.00 secured by a deed of trust (the **senior deed of trust**) dated June 17, 2009. (J.A. at 340-49.) The deed of trust states that the loan at issue is insured by the Federal Housing Administration (**FHA**), and that the FHA

case number is 332-4640005-703. (*Id.* at 340.) The deed of trust repeatedly references the Secretary of Housing and Urban Development (**HUD**), including how the lender is to make mortgage insurance premiums to HUD. (*See, e.g., id.* at 342.) Mortgage Electronic Registration Services, Inc. later assigned the deed of trust to Bank of America, N.A. (*Id.* at 351-52.) On February 3, 2015, Bank of America assigned the deed of trust to Carrington Mortgage Services, LLC. (*Id.* at 354-57.)²

B. Red Rock's Foreclosure History and Bank of America's Tender

On April 23, 2010, Red Rock Financial Services, LLC (**Red Rock**), on behalf of Southern Terrace Homeowners Association (**HOA**), recorded a lien for delinquent assessments. (*Id.* at 183.) The notice stated the amount due to the HOA was \$739.00, which included "assessments, late fees, interest, fines/violations and collection fees and costs." (*Id.*) According to Red Rock's records, in June of 2010 the HOA received payment for the entire amount referenced in the April 23, 2010 notice, including the super-priority amount equal to nine months of assessments. (*Id.* at 379-89.) Red Rock recorded a release of lien for delinquent assessments on July 27, 2010. (*Id.* at 391.)

...

...

² The litigation asserts claims against Carrington Mortgage Holdings, LLC, rather than the real party in interest Carrington Mortgage Services, LLC.

On September 10, 2010, Red Rock, on behalf of the HOA, recorded a second lien for delinquent assessments. (*Id.* at 393.) The notice stated the amount due to the HOA was \$2,581.69, which included "assessments, late fees, interest, fines/violations and collection fees and costs." (*Id.*) On November 14, 2012, Red Rock, on behalf of the HOA, recorded a notice of default and election to sell pursuant to the lien for delinquent assessments. (*Id.* at 395.) Per the notice, the borrower owed the HOA \$2,359.84. (*Id.*)

On December 14, 2012, in response to the notice of default, Bank of America's counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**) contacted the HOA to obtain a payoff ledger for the 9-month super-priority lien. (*Id.* at 409-10.) The HOA responded on December 27, 2012, sending a ledger showing that the monthly master assessment amount was \$62.00 per month, and that the HOA also charged an assessment amount of \$8.00 per month. (*Id.* at 412-23.) On January 10, 2013, Miles Bauer tendered a check for \$655.14—which was for *more* than the super-priority portion of the HOA's lien—which Red Rock rejected without explanation. (*Id.* at 435-37; 439; 405-07.)

...

...

...

...

C. First 100, LLC Purchased the HOA's Payment Rights Pre-Foreclosure

After Red Rock recorded the notice of default, the HOA sold its right to payment on a number of liens—including the lien at issue in this case—to First 100, LLC. (*Id.* at 359-75.) Per the agreement, First 100 paid the HOA \$966.00 for the payment rights on the lien for the subject property. (*Id.* at 371.) The lien, however, remained with the HOA and was not sold to First 100. (*See id.* at 359-75.) The sale of the payment rights to First 100 required the HOA to retain United Legal Services as a foreclosure trustee. (*Id.* at 361.) First 100 covered all collection costs charged by Red Rock, as well as the fees charged by United Legal Services. (*Id.* at 363.)

On May 9, 2013, United Legal Services recorded a notice of foreclosure sale on behalf of the HOA, alleging that \$4,431.93 was required to satisfy the HOA's lien. (*Id.* at 397.) On June 3, 2013, United Legal Services, on behalf of the HOA, recorded a foreclosure deed. (*Id.* at 399.) Although the deed does not state the price R Ventures paid at the sale, R Ventures concedes it paid a mere \$10,100.00 for its interest in the property. (*Id.* at 403.) The undisputed fair market value of the property at the time of the foreclosure was \$163,000.00. (*Id.* at 528-48.)

...

...

...

II. Procedural Background

On June 26, 2013, R Ventures filed its complaint for quiet title and injunctive relief. (J.A. at 2-10.) On April 28, 2015, R Ventures and Carrington stipulated to add Carrington as a defendant, which the Court approved on May 8, 2015. (J.A. at 31-33.) Carrington filed its answer, counterclaims against R Ventures, and crossclaims against the HOA on July 27, 2015. (*Id.* at 46-69.)

On February 24, 2016, R Ventures and Carrington filed cross motions for summary judgment. The district court granted R Ventures' motion for summary judgment and denied Carrington's motion for summary judgment on April 27, 2016, and a notice of entry was filed on May 2, 2016. (*Id.* at 549-53; 554-61.)

On May 19, 2016, Carrington filed a motion for reconsideration of the orders on summary judgment. (*Id.* at 568-84.) R Ventures opposed. (*Id.* at 601-06.) The district court denied Carrington's motion for reconsideration, and a notice of entry was filed on August 18, 2016. (*Id.* at 658-59; 660-64.)

On July 6, 2016, R Ventures moved for its attorneys' fees and costs. (*Id.* at 628-34.) Carrington opposed. (*Id.* at 646-51.) The district court granted R Ventures' motion for its attorneys' fees and costs on September 8, 2016. *Id.* at 701-03.) The court found, *inter alia*, that NRS 116.3116 provides for a mandatory award of reasonable attorneys' fees for a prevailing party, and that R Ventures' claims were the type contemplated by the statute. (*Id.*) The district court awarded

R Ventures costs and fees in the amount of \$25,465.50, and a notice of entry was filed on September 29, 2016. (*Id.*)

ARGUMENT

I. Standard of Review.

The sole issue on appeal is one of statutory interpretation, which is subject to *de novo* review. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

II. NRS 116.3116 *et seq.* Solely Contemplates an Action Brought by an HOA to Recover Assessments Due under an HOA Assessment Lien.

NRS 116.3116 *et seq.* applies to all common-interest communities created within Nevada, and governs an HOA's lien for delinquent assessments imposed by the HOA. NRS 116.1201; NRS 116.3116. NRS 116.3116(8) allows for attorneys' fees to the prevailing party of an "action brought under this section."

Anytime the Legislature used the term "action" in NRS 116.3116, it refers to an action by the HOA to enforce its lien. *See* NRS 116.3116(2) ("The lien is also prior to all security instruments described in paragraph (b) . . . to the extent of the 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 enforce the lien.** . . .") (emphasis added); NRS 116.3116(7) ("This section does not prohibit **actions to recover sums for which subsection 1 creates a lien** or prohibit an association from taking a deed in lieu of foreclosure.")

(emphasis added); NRS 116.3116(11) ("In an **action by an association to collect assessments or to foreclose a lien**. . . ." (emphasis added); NRS 116.3116(8) ("A judgment or decree in any **action brought under this section** must include costs and reasonable attorneys' fees for the prevailing party.") (emphasis added). The very title of NRS 116.3116 makes clear that an "action" is related to "Liens against units for assessments."

R Ventures' litigation against Carrington is not an "action" under NRS 116.3116 because R Ventures is not an HOA, and the litigation is not related to any lien by R Ventures for delinquent assessments. R Ventures cannot benefit from NRS 116.3116(8) when R Ventures—a non-HOA—has not instituted an action under NRS 116.3116.

Recent Nevada Supreme Court precedent is in accord. *See Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC*, 373 P.3d 66, 74 n.4 (Nev. 2016) ("When **an HOA** forecloses on a property, the pre-2015 amendments of NRS 116.3116(3)(c) and NRS 116.3116(8) allowed for the recoupment of fees and costs."). *See also R Ventures I, LLC v. Wells Fargo Bank, N.A.*, No. 69374 (Nev. Sup. Ct., Apr. 14, 2017).

...

...

...

In *Ikon Holdings*, a homeowner failed to pay both his homeowners' association dues and his mortgage. *Ikon Holdings*, 373 P.3d at 66. Both the mortgagee and the HOA initiated non-judicial foreclosure, with the mortgagee foreclosing first. *Id.* The HOA demanded the purchaser pay the super-priority portion of its lien, which it claimed included not only nine-months of assessments, but also all fees and costs incurred during the non-judicial foreclosure. *Id.* The purchaser disagreed with this assessment, and refused to pay more than nine-months of assessments. *Id.* The purchaser filed an action for declaratory relief, seeking a ruling that the super-priority portion of an HOA's lien under NRS 116.3116(2) only included nine months of assessments and did not include fees and costs. *Id.*

In dicta, the Court noted the HOA would not have been entitled to recover fees and costs under NRS 116.3116 because it did not foreclose on the property, the mortgagee foreclosed on the property. *Id.* at 74 n.4. The Court also noted that NRS 116.3116(12) allows an HOA to recoup its fees and costs after it forecloses on a property. *Id.* This interpretation is controlling here, and R Ventures has provided no compelling argument as to why the Nevada Supreme Court's interpretation in *Ikon Holdings* should be extended to the facts here.

...

...

III. R Ventures is Not Entitled to Fees under NRS 116.3116.

R Ventures is not entitled to its attorneys' fees under NRS 116.3116(8) because that statute does not authorize a fee award in a quiet title action brought by a third-party purchaser of a property at an HOA foreclosure sale. Rather, as discussed above, NRS 116.3116(8) only provides for attorneys' fees to prevailing parties "in action[s] brought under [NRS 116.3116]."

R Ventures sought through the underlying litigation to quiet title to the property in R Ventures name following its purchase of the property at an HOA foreclosure sale. It brought claims for relief against Carrington for quiet title/declaratory relief and injunctive relief with the goal of obtaining title to the property free and clear of any and all encumbrances, and preventing Carrington from exercising any remedies under the senior deed of trust. In particular, R Ventures' declaratory relief/quiet title first claim for relief sought a declaration that R Ventures was the rightful owner of the property, and that its interest in the property was superior to any adverse interest claimed by defendants, including Carrington. (J.A. at 7-9, ¶¶ 35-50.) R Ventures' second claim for relief for preliminary and permanent injunction sought an injunction prohibiting defendants from initiating or continuing foreclosure proceedings affecting title to the property. (*Id.* at 9, ¶ 58.) While styled as such, neither claim for relief was brought under

NRS 116.3116—the claims were made pursuant to NRS 30.010 and NRS 40.010, which do not provide for the award of attorneys' fees and costs.

Indeed, NRS 116.3116 does not provide a private right of action to litigants such as R Ventures. *See* NRS 116.3116 *et seq.* NRS 116 does not provide for any sort of "damages," "cause of action," or "attorneys' fees" for third-party purchasers against anyone—much less senior deed of trust beneficiaries. The statute does not reference "damages," "cause of action," or "attorneys' fees." *See, e.g., Chase v. United Residential Mortgage, LLC*, No. 3:10-cv-00365-RCJ-RAM, 2011 WL 198008 (D. Nev. Jan. 19, 2011) (holding that a statute does not create a private right of action without these or similar words).

Accordingly, the only way that R Ventures can maintain an action under NRS 116.3116(8) is if a private right of action can be implied. "Whether a private cause of action can be implied is a question of legislative intent." *Baldonado v. Wynn Las Vegas*, 194 P.3d 96, 100-01 (Nev. 2008). If the Legislature's intent is unclear, the Court should examine "the entire statutory scheme, reason, and public policy," factoring in whether the plaintiffs are part of the class for whose benefit the statute was enacted, whether the legislative history sets forth an intent to create or deny a private right of action, and whether an implied private right of action is consistent with the statutory scheme. *Id.* at 101. These factors are not always

given equal weight: "the determinative factor is always whether the Legislature intended to create a private judicial remedy." *Id.* As the *Baldonado* Court noted:

[T]he U.S. Supreme Court has stated, 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.' As we have recently reiterated, *the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy.*

Id. (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)) (emphasis added).

This case shares two factors with *Baldonado*: (1) the statute does not have an express provision creating a private right of action for litigants such as R Ventures, and (2) the legislative history is silent. *See Baldonado*, 194 P.3d at 101-02. The Court should largely consider the third factor: whether an implied private right of action is consistent with the statutory scheme. *See id.* It is not.

NRS 116.3116 is intended to benefit HOAs seeking to enforce liens against properties in planned communities. It is entirely inconsistent with this purpose to allow a third-party purchaser at an HOA foreclosure sale to recoup attorneys' fees as a result of quiet title litigation against the senior deed of trust beneficiary, seeking to extinguish the senior deed of trust.

...

...

...

If the Legislature wants to create a private right of action for third-party purchasers at HOA sales under NRS 116.3116, it will include express language doing so. NRS 116.3116 lacks language creating a private right of action to parties such as R Ventures, and it would be inconsistent with the statutory scheme of NRS 116.3116 to imply one. R Ventures is not entitled to an award of attorneys' fees and costs under the statute.

CONCLUSION

For all of the above reasons, this Court should reverse the district court's judgment.

DATED this 25th day of April, 2017.

AKERMAN LLP

/s/ Natalie L. Winslow, Esq.

ARIEL E. STERN, ESQ.

Nevada Bar No. 8276

NATALIE L. WINSLOW, ESQ.

AKERMAN LLP

Nevada Bar No. 12125

1160 Town Center Drive, Suite 330

Las Vegas, Nevada 89144

*Attorneys for Carrington Mortgage Holdings,
LLC*

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 style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 2734 words.

FINALLY, I CERTIFY that I have read this **OPENING 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 answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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 of the transcript or appendix where the matter relied on is to be found.

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

DATED this 25th day of April, 2017.

AKERMAN LLP

/s/ Natalie L. Winslow, Esq. _____

ARIEL E. STERN, ESQ.

Nevada Bar No. 8276

NATALIE L. WINSLOW, ESQ.

Nevada Bar No. 12125

1160 Town Center Drive, Suite 330

Las Vegas, Nevada 89144

Attorneys for Respondent Carrington Mortgage Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 25, 2017, I served a true and correct copy of the foregoing **OPENING BRIEF**, via this Court's Electronic Filing System to the following:

J. Charles Coons, Esq.
Thomas A. Miskey, Esq.
COOPER COONS, LTD.
10655 Park Run Drive, Suite 130
Las Vegas, Nevada 89144

Attorney for Respondent

/s/ Allen G. Stephens
An employee of AKERMAN LLP