Case No. 73785

IN THE SUPREME COURT OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF NEW YORK MELLON, F/K/A THE BANK OF NEW YORK MELLON AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2005-17; AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellants,

vs.

THOMAS JESSUP, LLC SERIES VII; FOXFIELD COMMUNITY ASSOCITION; AND ABSOLUTE COLLECTION SERVICES, LLC,

Respondents.

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable LINDA M. BELL, District Judge
District Court Case Nos. A-13-693205-C

PETITION FOR REHEARING

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INTRODUCTION

Thomas Jessup, LLC Series VII ("Jessup") hereby petitions the Court for rehearing of this matter pursuant to Rules 40(a)(2) and 40(c)(2) of the Nevada Rules of Appellate Procedure (the "Petition"). This Court's Opinion misapplied the substantial evidence standard and ignored prior precedent of this Court. Rather than give deference to the trial court's factual findings and affirm the trial court, this Court substituted its own judgment of the facts, and even non-existent facts for that of the trial court. Because substantial evidence supported the trial court's judgment, this Court should grant rehearing and affirm the trial court's judgment.

Additionally, this Court ignored its prior precedent holding that a court sits in equity in cases where a party challenges the validity of an NRS 116 foreclosure sale. Rather than affirm the trial court's equitable analysis, this Court, in error, gave significant weight to its own interpretation of the facts and analyzed this case as one of law, rather than equity.

For these reasons and the reasons stated below, Jessup requests this Court to grant the Petition.

ARGUMENT

I. THIS COURT MISAPPREHENDED AND MISAPPLIED THE SUBSTANTIAL EVIDENCE STANDARD, AND, IN ERROR, SUPPLANTED ITS OWN INTERPRETATION OF THE FACTS IN PLACE OF THE TRIAL COURT'S FINDINGS.

A. Standard of Review.

In equitable actions, as in cases at law, the standard of review "is that this court will not disturb the finding of the lower court when supported by substantial evidence." *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562, 598 P.2d 1147, 1149 (1979), *citing Close v. Flanary*, 77 Nev. 87, 360 P.2d 259 (1961). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support the conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (superseded by statute on other grounds). Thus, the question is not whether the reviewing court agrees with the trial court's interpretation of the facts, but rather whether the trial court's decision is supported by substantial evidence; if supported by substantial evidence, this Court may not substitute its interpretation of the facts for that of the trial court. *Leeson v. Basic Refractories*, 101 Nev. 384, 705 P.2d 127, 138 (1985); *see also*, *Ogawa v Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) ("The district court's factual findings ... are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.")

The substantial evidence standard of review "*does not permit this court to pass on credibility or to reverse* [a trial court's] *decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it.*" *Hilton Hotels*, 729 P.2d at 498, fn 1 (emphasis in original) quoting *Robertson Transp. Co. v. P.S.C.*, 39 Wis.2d 653, 159 N.W.2d 636, 638 (1968).

Here, the trial court's judgment in favor of Jessup was supported by substantial evidence, yet, rather than give deference to the trial court's factual findings and affirm the trial court's decision, this Court improperly rebalanced the weight of various facts, and substituted its interpretation of those facts in place of the trial court's findings. This was error.

B. This Court Read Non-Existent Language into the ACS Fax.

This Court's Opinion acknowledges the trial court's finding that Mr. Jung understood failure to pay the superpriority portion of the lien would result in the loss of his client's interest, but then takes issue with the fact that the trial court did not "explicitly" address Mr. Jung's interpretation of the ACS fax. (Opinion at p. 8.) However, the trial court heard Mr. Jung's testimony, while sitting in the unique position to assess his demeanor and the credibility of his testimony, and reached a contrary interpretation of the ACS fax, thus rejecting Mr. Jung's interpretation.

(AA769.) Rather than give deference to the trial court on this issue, as precedent dictates, this Court then gives incredible weight to Mr. Jung's self-serving interpretation and hinges its entire decision on this manufactured interpretation. This is particularly troublesome given that "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance." *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012). This Court further noted that "a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact." (*Id*.) (*citing Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985)).

Further, this Court also failed to give deference to the following facts by the trial court:

- It was not established whether Miles Bauer received the ACS fax (AA767:1-2.)
- ACS stated in its response to Miles Bauer that it could order a "statement of account" by submitting a $50 fee. (AA767:3-4.)
- Nevada statutes permit charging such a fee. (AA771:15.)
- Miles Bauer/BANA failed and refused to pay the $50 to obtain a payoff statement. (AA767:5-6; 769:11.)

- Although Mr. Jung understood failure to pay the superpriority would result in the loss of his client's interest, he took no further action to pursue resolution of this fact. (AA769:6-8.)
- BANA did not go back to the notice of lien and look at the minimum amounts and pay that amount; had it done so, ACS would have rescinded the sale. (AA769:9-10.)
- Ultimately, the $50 became the impediment to BANA's losing its deed of trust. (AA769:12-13.)
- The court cannot implement an equitable remedy to a party that sat on their rights. (AA769:13-14.)

Rather than give deference to the trial court, who interpreted the ACS fax as nothing more than a request for a $50 fee prior to furnishing a payoff statement, this Court inserted its own contrary interpretation. (Opinion at p. 8.) This Court interpreted the letter to say ACS would reject a superpriority tender. (*Id.*) It makes this leap despite acknowledging the words on the paper say no such thing, then concludes its interpretation is "the *only* reasonable construction of the fax." (*Id.*) (emphasis added)). But this belies reality because in this case alone, there are four different interpretations: this Court's, the trial court's, Ms. Mitchell's and Mr. Jung's. But the trial court's interpretation is the only one due deference.

In substituting its interpretation in place of the trial court's, this Court ignored plain language in the fax which read, "any Statement of Account from us will show the entire amount owed" and "Should you provide us with a recorded Notice of Default or Notice of Sale, we will hold our action so your client may proceed" and "Per our previous conversation, a Statement of Account costs $50" and "If, after reviewing the information above, you would still like a Statement of Account, please email me at customerservice@absolute-collection.com or fax the above number." (AA253.) All of this language supports the trial court's interpretation of the ACS fax, even if this Court disagrees.

In addition to the fax, Mr. Jung testified Miles Bauer had a protocol of not paying for an account statement. (AA704:8-12.) But Mr. Jung testified he knew, despite what ACS may have thought, the Association had "a priority lien for nine months of dues over and above the Bank of America deed of trust." (AA705:7-13.) Yet, Miles Bauer/BANA did nothing other than send a standard form inquiry letter in August 2011, and, notwithstanding their superior knowledge that the mortgage interest was at risk of being lost, made an affirmative election to sit on BANA's rights for the next ten months and watch the property go down in a foreclosure sale, never having paid the superpriority portion. (AA765-772.) Substantial evidence supported the trial court's conclusion that equity did not tip in favor of BANA, even

if this Court disagrees. As this Court's precedent dictates, "[i]f the judgment…is sustained by findings and evidence, **it is our duty to affirm it**, for in so doing we do not have to lend approval to the mental processes of the trial court." *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505, 507 (1922) (emphasis added.)

C. This Court Relied on Non-Existent Trial Testimony.

This Court ignored testimony from Ms. Mitchell that further explained the ACS fax. Ms. Mitchell testified ACS relied on the Commission for Common Interest Communities and Hotels ("CCICH") advisory opinion from December 2010, which opined that costs of collection were included in the superpriority amounts, and this was communicated to Mr. Jung. (AA588:3-6). Thus, Ms. Mitchell's testimony elaborates the fax should be interpreted as explaining the disagreement between ACS and Miles Bauer as to what the superpriority lien portion included.

Further, Ms. Mitchell testified nothing in her fax communicated ACS would reject a payment if it was less than the full amount. (AA588-589.) Not once did Ms. Mitchell testify ACS would have "rejected a superpriority tender," yet this Court relied on non-existent testimony to subvert the factual determinations of the trial court. (Opinion at p. 8.)

What is more, it ignored the actual testimony of Ms. Mitchell:

Q. You knew that you could have accepted nine months as the super priority, correct?

A. **And we would, had it been paid.**

(AA667:20-22.) (emphasis added).)

This is also consistent with Mr. Jung's testimony that between October 2009 and March 2014 his office actually tendered superpriority payments to ACS "several hundred times." (AA685; 687.) Mr. Jung never testified about whether these payments were rejected. (AA684-713.)

In addition to this substantial evidence, the trial court heard testimony that ACS postponed the Association sale for seven months to allow the Bank to foreclose ahead of ACS, yet the Bank never took measures to accept ACS's proposal and complete its foreclosure. (AA662:15-25.) This was consistent with the representations made in the ACS fax. (AA253.) Finally, Ms. Mitchell testified that in addition to mailing all the notices of sale to the Bank, ACS also mailed them to Miles Bauer. (AA645:21-24.) Mr. Jung then testified that Miles Bauer's policy, however, was to do nothing and watch the property go to foreclosure. (AA706:4-8.)

Substantial evidence supported the trial court's conclusion; it could not grant equity to the Bank because the Bank had multiple opportunities, but took no further

action to protect the deed of trust. As the *SFR* Court acknowledged, "[t]he inequity [the Bank] decries is thus of its own making…" *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 750, 334 P.3d 408, 414 (2014). Despite this Court's acknowledgement of a "trial judge's superior position" in making determinations of credibility and fact, this Court substituted its own interpretation of the facts for that of the trial court. But the question on appeal was not whether this Court viewed the facts differently, it was whether the trial court's interpretation of the facts was grounded in substantial evidence. Because the trial court's judgment was based on substantial evidence, rehearing and affirmance of the trial court's judgment is warranted.

II. THIS COURT FAILED TO CONSIDER CONTROLLING AUTHORITY.

This Court ignored controlling authority in at least two respects. First, this Court ignored the *SFR* decision, which held that NRS 116.1104 prohibits an Association from waiving its superpriority rights. " Chapter 116's '[p]rovisions may not be varied by agreement, and rights conferred by it may not be waived . . . [e]xcept as *expressly* provided in Chapter 116' . . . 'Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien.'" (Emphasis in original.). *SFR*, 334 P.3d at 419. Second, this Court failed to consider its prior precedent in *Shadow Wood* and *Shadow Canyon*, which

requires an equitable balancing analysis. S*hadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105 (Nev. 2016); *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641 (Nev. 2017).

A. Rock Jung's Self-Serving Interpretation of the ACS Fax Cannot Serve as a Waiver of the Association's Superpriority Rights.

This Court's Opinion, in contrast to the trial court, put incredible weight on Mr. Jung's interpretation of the ACS fax, and found it could only have one interpretation: a waiver/rejection of the superpriority portion. (Opinion at p. 8.) As referenced above, a waiver by the Association is contrary to existing law under this Court's prior precedent. In *SFR*, this Court invalidated a mortgage protection clause holding that such clauses were void and unenforceable because NRS 116.1104 prohibits an Association from varying by agreement or waiving its rights under Chapter 116. *SFR*, 334 P.3d at 418-419. If NRS 116.1104 prohibits an explicit, knowing and voluntary waiver, then certainly it must also prohibit a manufactured, unknowing and involuntary waiver. The trial court properly rejected Mr. Jung's self-serving testimony about his interpretation of the ACS fax as a waiver; Nevada law prohibits such a waiver, so Mr. Jung's interpretation was meaningless.

B. ACS Fax Can Only Serve as One Factor in the Weighing the Equities; It Cannot Overtake the Totality of the Circumstances.

This Court's Opinion ignores the position in which a court analyzing a challenge to an NRS 116 sale sits; it sits in equity, not in law. *Shadow Wood,* 366 P.3d 1110. When this Court substituted its interpretation of the facts for that of the trial court, it morphed the analysis into one of law rather than equity. (Opinion at p. 8.) Even when default is being challenged, the Court still sits in equity. NRS 116.31166(1) provides the following recitals in a deed made pursuant to NRS 116.31164 are conclusive:

> (a) **Default** and the recording, 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,

NRS 116.31166(1)(a)-(c) (emphasis added.)

Default includes all portions of the Association's lien, i.e. both the superpriority and subpriority portions. Normally, in light of the conclusive recitals, there would be no way for a Bank to challenge the validity of an Association sale, and this Court recognized as much in *Shadow Wood*. *Shadow Wood*, 366 P.3d 1110. Specifically, the *Shadow Wood* Court acknowledged NRS 116.31166 could be read to establish a default justifying a foreclosure even when no such default occurred. The Court rejected such a "breathtakingly broad" and "probably legislatively

unintended" reading of NRS 116.31166, and instead, found that courts always "retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.3116." *Id.* at 1110-1111.

But then the Court recognized that when sitting in equity

> [C]ourts must consider the *entirety of the circumstances* that bear upon the equities…This includes considering the *status and actions of all parties involved*, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood, 366 P.3d at 1114 (emphasis added) (*citing Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties.")); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

This Court further exhorted that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [the Bank] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." *Shadow Wood*, 366 P.3d at 1114 fn. 7 *citing Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) ("in the case

before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

In keeping with this precedent, the Court in *Shadow Canyon* recognized while price alone is not sufficient to set aside a sale, "it should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness or oppression." *Shadow Canyon*, 405 P.3d at 648. The Court then, in dicta, noted examples of facts that *may* arise to fraud, unfairness or oppression, that accounted for and brought about the low price, one of which included an Association's representation the foreclosure sale would not extinguish the first deed of trust. *Id.* at fn 11 (*citing ZYZZX2 v. Dizon*, No. 2:13-cv-1307-JCM-PAL, 2016 WL 1181666 (D. Nev. 2016)).

In this respect, there may very well be cases where a Bank can present facts that tip the equitable scales in its favor or show fraud, unfairness, or oppression affected the sale. But this case did not have those facts, at least not in the mind of the trial court. In keeping with this Court's precedent, the trial court conducted both a *Shadow Wood* and *Shadow Canyon* analysis, and based on the substantial evidence found (1) equity tipped in favor of Jessup, rather than the Bank; and (2) no fraud,

unfairness or oppression affected the sale. (AA769-70.) But this Court ignored its own precedent and put considerable weight on its own interpretation of the ACS fax and non-existent testimony without taking into account the totality of the circumstances or whether such "evidence" accounted for or brought about the price paid at auction. (Opinion at p. 8.) In so doing, this Court ignored its posture as a court of equity, and ignored its prior precedent.

III. CONCLUSION

Jessup respectfully requests this Court grant rehearing and enter an order affirming the trial court's judgment in favor of Jessup.

Dated this 25th day of March, 2019

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CERTIFICATE OF COMPLIANCE

1. I 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 40(b)(3) because, excluding the pares of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,968 words.

3. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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.

…

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

DATED this 25th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on this 25th day of March, 2019. Electronic service of the foregoing THOMAS JESSUP, LLC SERIES VII's PETITION FOR REHEARING shall be made in accordance with the Master Service.

/s/ *Richard L. Tobler*
An employee of Richard L. Tobler, Ltd.