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

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| KENNETH BERBERICH,<br><br>Appellant,<br><br>v.<br><br>BANK OF AMERICA, N.A.; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,<br><br>Respondents. | Supreme Court No. 76457<br><br>District Court No. A758728 |



**APPEAL**

From the Eighth Judicial District Court, Department XXVI
The Honorable Judge Gloria Sturman, District Judge

# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

Respondent advances a litany of new arguments for the first time on appeal and advances a position which in directly contrary 160 years of this Court's precedent and which would create a truly ridiculous system in which purchasers of properties at all non-judicial foreclosure sales have an affirmative obligation to bring a suit for declaratory relief or risk divestment after five years. Respondent argues, without relevant support, a purchaser must bring suit for quiet title within five years of a foreclosure sale or be time-barred from asserting its claim to the property.

Here, where BANA did not allege or assert any claim to the property in the five years after its lien was presumptively extinguished, BANA alleges that Berberich had an obligation to sue them. However, Berberich had no actual notice of BANA's adverse claim, there is no basis to argue that Berberich's claims had even begun to accrue.

Moreover, BANA wholly misrepresents the controlling case law and the procedural history of this case in an attempt to mislead this Court. Based on the arguments contained herein, the Court should reverse and enter judgment in favor of Berberich.

## ARGUMENT

### I. Blaha and Gray Eagle Do Not Control The Analysis

### A. Blaha and Gray Eagle Are Both Distinguishable

1. *Blaha* was a Dispute Between Parties with Possessory Claims to Title

Respondent errantly cites to *Las Vegas Dev. Grp., Ltd. Liab. Co. v. Blaha*, 416 P.3d 233, 236 (Nev. 2018) in an attempt to support its faulty argument. In *Blaha*, the claim for quiet title was between two parties who each claimed a competing title (or ownership interest) in the property. Moreover, the appellant, Blaha, had been dispossessed of the property, and was seeking to quiet title thereto. Blaha's dispossession of the property was the appropriate triggering event for the statute of limitations under NRS 11.080.

However, the instant case is clearly distinguishable and the analysis of *Blaha* does not control. In the instant matter, Appellant has been in possession and control of the property since the HOA foreclosure sale in 2011. In other words, Appellant has never been dispossessed of the property, and it seeks declaratory relief against Respondents who held only a lien interest in the property. Regardless of whether this Court finds that NRS 11.080 or NRS 11.190 is the applicable statute of limitations, no triggering event has occurred which would give rise to a time bar. As detailed more fully in Appellant's Opening Brief, NRS

11.070 and NRS 11.080 (hereinafter collectively referred to as "The Statutes") only govern the claims of a litigant who has been "seized or possessed of the premises in question within 5 years…" before initiation of the action. Pursuant to *South End Mining Co. v. Tinney*, 22 Nev. 19, 35-36, 35 P. 89, 92 (1894) "seized" means "ownership in fee" whereas to be "possessed of the premises" means to be in actual, physical possession or control.

Thus, the meaning of NRS 11.070 is that unless a person[1] has had fee simple ownership or physical possession of real property within the preceding five years shall, that person shall not be permitted to bring or defend against an action founded upon title to real property. Similarly, the meaning of NRS 11.080 is that unless a person[2] who has had fee simple ownership or physical possession of real property within the preceding five years, he or she shall not be permitted to bring an action for the possession or recovery of real property.

Neither statute contemplates an absolute time-bar to declaratory relief actions for persons who remain in possession of the property. To the contrary, so long as a plaintiff retains fee-simple ownership of property or is in physical

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[1] (Or the ancestor, predecessor, or grantor of such person)
[2] (Or the ancestor, predecessor, or grantor of such person)

possession thereof, his statute of limitations does not begin to run. Respondent argues that NRS 11.070-080 reference "acquisition of property rights," but provides no support for its position.[3] The "court need not consider an issue not cogently argued or supported by relevant legal authority. *Frei v. Goodsell*, 129 Nev. 403, 408 n.3, 305 P.3d 70, 73 (2013).

## II. Respondent Attempts to Implicitly Shift the Burden of Proof to Appellant

Implicit in each of Respondent's arguments is the suggestion that Appellant bears the affirmative burden of demonstrating the deed of trust was extinguished. However, this position is inapposite to established precedent. Respondent attempts to misdirect this Court's analysis. Respondent attempts to point to August 11, 2016 as the "last day for Berberich to file an action to strip the deed of trust."[4] However, this is a fundamental mischaracterization of the law Berberich's claims and the issue before this Court. Berberich does not seek to "strip the deed of trust"

[3] See Respondent's Brief at 22.
[4] Respondent's Brief at 12

through the instant action. Rather, the deed of trust was extinguished on the date of the sale.[5]

Berberich now seeks a judicial declaration as to the current state of title. This Court has previously determined that in the absence of contrary evidence, it is presumed that an NRS 116 foreclosure will extinguish a first deed of trust.[6] This Court has likewise found that the burden of proving satisfaction of the superpriority lien rests with the party asserting satisfaction. "Payment of a debt is an affirmative defense, which the party asserting has the burden of proving." *Res. Grp., LLC v. Nev. Ass'n Servs.*, 437 P.3d 154, 158 (Nev. 2019)[7]. Appellant had no affirmative obligation to rush into court to confirm the presumptions set forth by statute. Likewise, Appellant is not divested of a free and clear interest in the property because he did not seek his declaratory relief within five years of the sale.

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[5] In Sandpointe Apartments, Ltd. Liab. Co. v. Eighth Judicial Dist. Court of Nevada, 313 P.3d 849, 856 (Nev. 2013) this court found that the right to sale proceeds vests at the time of foreclosure. By necessary implication, the extinguishment of a junior lien also occurs at the time of foreclosure.

[6] PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103, 395 P.3d 511 (Nev. 2017)

[7]See also Wells Fargo Bank, N.A. v. Nev. Prop. Holdings LLC, 408 P.3d 544 (Nev. 2017 "Wells Fargo has not cited any authority, nor are we aware of any, that would support the proposition that it was respondent's burden to establish the absence of a tender."

To the contrary, it was Defendant's obligation to bring suit within the applicable statute of limitations to prove that its deed of trust survived the sale. Because Respondent failed to timely bring a suit for declaratory relief to establish that the NRS 116 sale did *not* extinguish its lien interest, the presumption of extinguishment applies.

Because the Respondent's claims and defenses are timebarred, the appropriate outcome of this matter is for a declaration that Appellant owns the property free and clear of any interest of BANA. BANA offers no authority or argument for its position that it somehow prevails because no party brought suit within five years of the sale. There is no basis to shift the burden of persuasion from BANA to Berberich, and this court should confirm that BANA's failure to bring claims resulted in its inability to defend against the present action.

## III. Respondent Impermissibly Raises New Arguments On Appeal

BANA knowingly raises a host of new arguments for the first time on appeal. If there were any question about whether or not BANA knows that its arguments are raised for the first time on appeal, its own statements are telling. "BANA simply cited *Blaha* and *Gray Eagle* below, and the district court applied

the on-point precedents in dismissing the action.[8]" Notably, BANA never raised *Blaha* below.[9] Rather, it relied on mere dicta from *Gray Eagle* in support of its motion to dismiss. Now on appeal, Respondent attempts to raise a host of new arguments which were never briefed to the district court. This Court has consistently held that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) Each of the arguments identified in this section were raised for the first time in Respondent's Answering Brief and should be disregarded.

### A. Respondent Failed to oppose Berberich's district court argument that portions of *Gray Eagle* are dicta

Berberich argued at the District Court that the 5-year statute of limitations described in *Gray Eagle* was dicta (see APP 138-9, APP) While Respondent contends that Berberich did not raise this argument below, that contention obviously false. *Id.* However, it is clear that Respondent never opposed this

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[8] Respondent's Answering Brief at 15
[9] See Record Generally

argument at the lower court. (See record generally). Because respondent failed to raise any arguments on this point, this Court should wholly ignore Respondent's untimely attempt to oppose on appeal. While it is self-evident that this Court has the authority to interpret its own holdings, BANA should not be permitted to offer argument to the Court on this position.

Despite Respondent's untimely arguments to the contrary, when this Court issued its holding in *Gray Eagle,* the interpretation of NRS 11.070-080 was not at issue. The question presented to this Court in *Gray Eagle* was whether NRS 116.3116(6) created a 3-year time-bar for actions to quiet title following an HOA foreclosure. BANA's suggestion that NRS 11.080's interpretation was one of "two primary questions involved" in *Gray Eagle* is patently false. The Opening Brief and Respondent's Brief in *Gray Eagle* reference NRS 11.080 on exactly one page each. Because proper application of NRS 11.080's statute of limitations was not directly at issue, the Court could have correctly concluded that NRS 116.3116(6) does not create a such time-bar without deciding what (if any) statute of limitation applied.

"Dicta is not controlling." *Kaldi v. Farmers Ins. Exch.,* 117 Nev. 273, 282, 21 P.3d 16, 22 (2001). A statement in a case is dictum when it is "unnecessary to a determination of the questions involved." *See St. James Village, Inc. v.*

*Cunningham,* 125 Nev., 210 P.3d 190, 193 (2009) (quoting *Stanley v. Levy & Zentner Co.,* 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941))").

Thus, Respondent's only two arguments on this point are based on factually incorrect premises. Respondent provides no genuine analysis of the issue because it knows that its position is fundamentally flawed. This Court should find that the 5-year statute of limitations described in *Gray Eagle* was dicta and not controlling. To hold otherwise would require this Court to overturn *Bissell v. Coll. Dev. Co.*, 86 Nev. 404, 405, 469 P.2d 705, 706 (1970), *Kerr v. Church*, 74 Nev. 264, 272-73, 329 P.2d 277, 281 (1958), and *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867). "[U]nder the doctrine of stare decisis, [this court] will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice." *Adam v. State,* 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011). Because the dicta in *Gray Eagle* is not controlling, it cannot be the basis to overturn consistent decisions of this court which span across two centuries.

**B. Respondent Failed to Raise Stare Decisis Below**

Shockingly, Respondent attempts to argue for the first time on appeal that *stare decisis* supports a rejection of *Bissell, Kerr, and Chollar-Potosi* and supports an adoption of the dicta in *Gray Eagle.* Because respondent failed to raise any argument regarding *stare decisis* or the dicta in *Gray Eagle* below, it is prohibited

from now raising these arguments on appeal. See*: Old Aztec Mining Company*. However, even if the Court were to consider Respondent's untimely arguments, they fail.

Respondent argues as if NRS 11.080 was interpreted for the first time in *Gray Eagle.* However, as set forth in Appellant's Opening Brief and as described above, this honorable Court has interpreted the statute consistent with Appellant's position for more than 150 years. So while Plaintiff agrees that *"[s]tare decisis* plays a critical role in our jurisprudence, especially when property rights are at stake,"[10] that argument cuts in favor of Appellant. Except for the dicta in *Gray Eagle* NRS 11.070-080 has never been interpreted by the Nevada Supreme Court to preclude a party in possession of real property from seeking declaratory relief. Thus, this Court should invoke stare decisis to find that a party who remains in possession of real property cannot be barred by NRS 11.080 to seek declaratory relief against adverse claimants.

Respondent makes the bizarre claim that "The statute of limitations applicable to a lender's declaratory relief claim is not before the court because BANA is the defendant here, and the issue was not raised below or in Berberich's

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[10] Respondent's Answering Brief at 23.

opening brief." Yet again, this claim is patently false, as arguments on this point were cogently argued in at the district court and on appeal.[11]

### C. Respondent Argues for the first time on Appeal that NRS 11.070-080 Does Not Apply to a Lender

Respondent did not argue below that NRS 11.070-080 do not apply to lenders. Rather, it merely argued that Plaintiff's claims were barred by NRS 11.070-080 and *Gray Eagle*. To the extent that this Court disregards *Old Aztec* and considers BANA's argument on this point, the Court should find that the argument has no merit. Despite Defendant's contentions to the contrary, this is not an action to "remove a lien.[12]" Rather, this is an action seeking a declaration as to the state of title. The Nevada Supreme Court interpreting the identical predecessor to NRS 11.070 stated that the statute, "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining*

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[11] See Appellant's Opening Brief at 13 "BANA and MERS have never been in possession, and as such NRS 11.080's statute of limitations began running against any affirmative claims by BANA or MERS in this litigation when their grantor, Connie Fernandez, was dispossessed on August 11, 2011 by the HOA's foreclosure sale." See also APP 139-141.

[12] Respondent's brief at 31.

*Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867). Here, Defendant's property interest was never possessory, the Deed of Trust only created a non-possessory security interest in the Property. See, NRS 107.020. Defendants' grantor however enjoyed the possessory rights to the property until the foreclosure sale through which Plaintiff became owner of record. This foreclosure sale undisputedly occurred on August 11, 2011. Plaintiff has remained in continuous possession since the sale. As such Defendants could validly bring an action to recover the Property or defend against Plaintiff's interest until August 11, 2016 at the latest. Defendants are barred by NRS 11.070-80 from maintaining any defense to Berberich's claims.

However, to the extent that NRS 11.220 applies, this Court should find that the application of NRS 11.220 results in a presumption of clear title for Appellant. As more fully briefed above, the burden of demonstrating that the deed of trust survived the HOA foreclosure sale rests with the beneficiary. Because it is presumed that an HOA foreclosure extinguishes a first deed of trust, BANA had the obligation to seek declaratory relief in the four years following the sale, not Berberich. There is no basis in law which would require Berberich to seek judicial confirmation of the presumptive effects of a non-judicial foreclosure sale. Rather, because BANA is the entity seeking to assert that its lien survived, the burden rests

with it. *PNC Bank, Nat'l Ass'n v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT 103*, 395 P.3d 511 (Nev. 2017).

### D. Respondent Raises *City of Fernley* for the First Time on Appeal and is Inapplicable

BANA attempts for the first time on appeal to assert that *City of Fernley v. State Dep't of Tax.,* 132 Nev. Adv. Op. 4, 366 P.3d 699 (2016) stands for the proposition that lenders are not subject to any statute of limitations. Because this argument was not raised below it should be disregarded on appeal.[13] However, even if this Court were to consider this argument (and it should not), it is clear that BANA has, again, intentionally misrepresented the holdings of this Court. The holding in *City of Fernley* did not work to the benefit of the lender as Respondent seems to suggest. Rather, it allowed the City of Fernley to seek protection from future harm as a result of an unconstitutional statute. "But the statute of limitations does not bar Fernley's claims for injunctive and declaratory relief from an allegedly unconstitutional statute." Yet, BANA fundamentally misrepresents the meaning of *City of Fernley* and suggests that it means "[a] lender that requests declaratory relief that its deed of trust is valid and may be foreclosed is not subject

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[13] See *Old Aztec Mining Company.*

to any statute of limitations." This attempt to mislead the court is so flagrant that it invites heightened scrutiny of every argument proffered by BANA.

Here, BANA is not seeking protection from future harms. BANA is seeking remedy its own failure to bring a declaratory relief action within the applicable statute of limitations. There is simply no nexus between *City of Fernley* and this case, BANA's argument should be rejected.

### E. For the first time on appeal, Respondent argues that there is no limitation against non-judicial foreclosure.

In a truly bizarre twist, Respondent argues for the first time on appeal that "there is no limitation against non-judicial foreclosure" and it is "well within its right to enforce its deed of trust through its defense of this action.[14]" Yet, Respondent argued in direct contravention of this position below. "NRS 11.080 does not bar Bank of America's foreclosure, and in any event, a ten-year statute of limitations applies to Bank of America's enforcement of its deed of trust."[15] This Court should reject this argument because it was not raised below and because it directly contradicts BANA's own arguments.

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[14] Respondent's Brief at 34
[15] See APP0110 at 21-22

## IV. This Court's Previous Decisions Related to Deed Recitals are Highly Relevant

Respondent attempts to suggest that Berberich's citation to this Court's prior holdings related to NRS 116 deed recitals are "irrelevant."[16] However, Respondent fails to provide this court with even cursory analysis of the issue. While Appellant freely admits that a district court has the inherent equitable power to set aside an HOA foreclosure sale regardless of deed recitals, this Court has also confirmed that in the absence of contrary evidence, the presale notices required under NRS 116 in conjunction with the foreclosure deed establish a prima facie case for quiet title in favor of a purchaser. *PNC Bank, N.A. v. Saticoy Bay LLC Series 9320 Mt. Cash Ave. UT* 103, No. 69595, 2017 Nev. Unpub. LEXIS 395, at 3-4 (May 25, 2017). Having failed to raise any cogent argument in opposition, Respondent concedes that the position is meritorious and waives any opposition thereto. The "court need

[16] Respondent's Answering Brief at 39

not consider an issue not cogently argued or supported by relevant legal authority. *Frei v. Goodsell*, 129 Nev. 403, 408 n.3, 305 P.3d 70, 73 (2013)'

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## CONCLUSION

For all of the foregoing facts, authority, and argument, the lower court's decision granting judgment in favor of Respondents and denying Appellant's claim for quiet title, constituted error. Therefore, the lower court's decision should be vacated and reversed.

DATED this 6th day of May, 2019.

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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 style requirements of NRAP 32(a)(6) because this 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 brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 point, or more, and complies with the type-volume limitation because the applicable portions of 3248 words.

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FINALLY, I CERTIFY that I have read this Appellant's Reply 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 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of May, 2019

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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 May 6, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** upon the following by the method indicated:

[X] BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon 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.

*/s/ Michael Beede*
An Employee of The Law Office of Mike Beede, PLLC