IN THE SUPREME COURT OF THE STATE OF NEVADA

MONICA JONES, Appellant, v. U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3, Respondent.	Supreme Court Case No: 78054

APPELLANT'S OPENING BRIEF

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

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The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 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 Monica Jones has no parent corporations, no stock, no corporate affiliation, and is present under her true name. She is represented by Robert Kern, Esq., and has been, and expects to be, represented by no other counsel in this matter.

DATED this 30th day of May, 2019.

/s/ Robert Kern

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I.

JURISDICTIONAL STATEMENT

This appeal arises from final order granting summary judgment, of the Eighth Judicial District Court, In and for Clark County, State of Nevada, the Honorable J. Charles Thompson, Presiding. The Order was entered on the 24th day of January, 2019, and Notice of Entry of Order was filed on the 28th day of January, 2019 (Appellant's Appendix, P. 153). Jurisdiction of this Court is based upon NRAP 3A(b)(1) as an appeal from a final order.

II.

ROUTING STATEMENT

This appeal arises from a grant of summary judgment in an amount far exceeding $250,000. It does not fit clearly into cases specifically assigned to the Supreme Court, nor to those assigned to the Court of Appeals. Appellant presumes that it should be assigned based on the workload of the different courts, pursuant to NRAP 17(c).

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

WHETHER A GRANT OF SUMMARY JUDGMENT IS APROPRIATE WHEN THE MOVING PARTY FAILED TO ESTABLISH STANDING TO ASSERT THEIR CLAIM.

IV.
STATEMENT OF THE CASE

This case comes as an appeal from the District Court's order granting a motion for summary judgment. On May 10, 2017, U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 (hereinafter, "U.S. Bank") filed a complaint for judicial foreclosure and for a lost note order pursuant to NRS 104.3309. Appellant Monica Jones (hereinafter, "Jones"), appearing Pro Se, timely filed a motion to dismiss in response, which was denied, and later filed a motion for more definite statement, requesting the basis upon which U.S. Bank sought standing to enforce the loan, which was also denied. On November 1, 2018, U.S. Bank filed a motion for summary judgment, and Jones filed an opposition. The motion was heard on January 15, 2019, and was granted. Jones timely appealed from that order.

V.
STATEMENT OF FACTS

The Appellant, Monica Jones ("Jones"), is the legal title-holder of the property that is the subject of this matter (the "Property"). When U.S. Bank brought this suit to foreclose, Jones, appearing Pro Se, filed a motion to dismiss in

which she alleged, among other things, that U.S. Bank did not own the note, that the lost note affidavit conflicted with the allegations in the complaint, and that U.S. Bank had no authority to enforce the note. (See MTD, Appendix p. 46). U.S. Bank opposed, and the motion to dismiss was denied. Jones then filed a motion for a more definite statement, believing that it was the appropriate method to challenge the fact that she believed U.S. Bank had not explained the basis of their authority to enforce the note. (See Mtn for More Definite Statement, Appendix p.61). U.S. Bank opposed, and that motion was denied. U.S. Bank then filed a motion for summary judgment. (See MSJ, Appendix p.70). The motion was supported by a photocopy of the note, which was made out to a different party, and contained no endorsements and no allonges, a copy of the deed of trust, made out to another party, but accompanied by an assignment of the deed of trust to U.S. Bank, and a lost note affidavit, made by Ocwen Loan servicing, with no indication of any relation between Ocwen and U.S. Bank, at a date prior to the assignment of the deed of trust to U.S. Bank. The Affidavit did not contain any language testifying that U.S. Bank or its agents had any authority to enforce the note, nor that they ever did. Jones opposed the motion for summary judgment. (See Opp to MSJ, Appendix p. 113). In her opposition, Jones referred to the arguments contained in her motion for more definite statement as a basis for her opposition. At the hearing, U.S. Bank did not provide any additional information justifying the basis of their

right to enforce the note, and did not explain how they sought to enforce a lost note with no evidence indicating they had any right to do so. (See Transcript, Appendix p. 160). The District Court granted summary judgment, and awarded costs and fees as well as deficiency judgment against Jones. (See FFCL, Appendix p. 65). This appeal followed.

VI.
SUMMARY OF ARGUMENT

Plaintiff filed the present matter to foreclose with a lost note. The UCC requires that a party seeking to enforce a lost note be required to prove standing to enforce, by proving a transfer of the right to enforce the note. Plaintiff admitted that they do not have the note, did not provide evidence they ever had the note, nor that they were ever transferred the right to enforce the note, despite the black letter law of NRS 104.3309 requiring such proof. In the absence of a single item of evidence supporting their standing to enforce the note, the District Court granted summary judgment, over Jones' opposition. This is directly in violation of NRCP rule 56 which requires that the moving party establish their right to judgment as a matter of law. Without any showing whatsoever that U.S. Bank had standing to enforce the loan, the District Court was without subject matter jurisdiction to grant summary judgment.

VII.

ARGUMENT

I.

WHETHER A GRANT OF SUMMARY JUDGMENT IS APPROPRIATE WHEN THE MOVING PARTY FAILED TO ESTABLISH STANDING TO ASSERT THEIR CLAIM.

a. Standard of Review

An order granting a motion for summary judgment is reviewed de novo. *Pressler v. City of Reno,* 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). Issues of subject matter jurisdiction are reviewed de novo. *Ogawa v. Ogawa,* 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). The question of whether a party has standing is a question of law reviewed *de novo*. *Arguello v. Sunset Station, Inc.*, 252 P. 3d 206 (NV Sup. Ct. 2011); *Citizens for Cold Springs v. City of Reno,*125 Nev. 625, 218 P.3d 847, 850-51 (NV Sup. Ct. 2009); Levine *v. Vilsack*, 587 F. 3d 986 (9th Cir. 2009); *Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 421 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104 (1997) (Whether a party has standing is a legal question reviewed de novo**);** *See Thomas v. Mundell,* 572 F.3d 756, 760 (9th Cir. 2009); *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.,* 477 F.3d 668, 678 (9th Cir. 2007)**.** As the order appealed from was a grant of summary judgment, and the

primary question revolves around subject matter jurisdiction of the district court to grant Plaintiff its requested relief, de novo review is appropriate.

As the order was a grant of summary judgment, the district court was required to "view the evidence presented through the prism of the substantive evidentiary burden" so that there must be sufficient evidence on which a jury could reasonably find for the Plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). ; *Cottle v. Storer Communications, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). Further, all reasonable inferences must be drawn in favor of the non-moving party.

b. Foreclosure on a Lost Note Requires Proof of Standing to Foreclose.

Standing to enforce a mortgage is an essential element of any foreclosure action, but becomes more significant when the foreclosing party lacks the instrument evidencing the debt. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 US 490, (U.S. Supreme Court 1975). In order to ask the courts to use the power of the State to do its bidding, the Plaintiff must show that it is the party that holds the legal right it wishes to see enforced to its benefit. The Plaintiff must show that the legal rights belong to *it*, and not some other party.

Without standing, there is no right to judicial relief. *Id.* Essentially, in order to establish standing to foreclose in Nevada, the foreclosing party must show that it is the proper party to proceed against the Property. *Edelstein v. Bank of New York Mellon*, 286 P. 3d 249 (NV S.Ct. 2001). Mortgage notes in Nevada are treated as negotiable instruments, and thus any determination of standing to enforce a mortgage note is governed by Nevada's UCC Article 3. *Leyva v. National Default Servicing Corp.*, 255 P. 3d 1275, 1279 (NV S.Ct. 2001). Under Article 3's lost note section, NRS 104.3309, a party seeking to enforce a lost note must prove that they were given the right to enforce the note prior to its loss.

> **NRS 104.3309 Enforcement of lost, destroyed or stolen instrument.**
>
> 1. A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (a) The person seeking to enforce the instrument:
>
> (1) Was entitled to enforce the instrument when loss of possession occurred; or
>
> (2) Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

If the note is not endorsed to them (as in this case), then,

> [T]he party seeking to establish its right to enforce the note must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it. In other words, because the party seeking to enforce the note cannot "prove" its right to enforce through the use of a valid endorsement, the party must "prove" by some other means that it was given possession of the note for the purpose of enforcing it. (*Leyva*, Id. at 1281) (Internal quotations and citations omitted).

Without proving that the note was transferred to them, U.S. Bank had no standing to foreclose.

c. Standing is Jurisdictional, and Can Be Raised Anytime.

In Jones' Pro Se opposition to the motion for summary judgment, she directly referenced the arguments contained in her motion for a more definite statement, as being the basis of her opposition[1]. The motion for a more definite statement questions U.S. Bank's authority to foreclose, citing Leyva's statement that a foreclosing party must prove that the party foreclosing "actually owns the note…" (Motion for More Definite Statement, Appendix p. 61). Interpreting pleadings from a Pro Se litigant liberally, it is clear that the issue of U.S. Bank's standing to enforce the note was challenged.

However even if standing were not previously raised, as an element of subject matter jurisdiction, standing is an issue that can be raised at any stage of litigation, even on appeal. In Nevada, a party lacking standing divests the court of subject matter jurisdiction in the matter. *GARMONG v. LYON COUNTY BOARD*

[1] "Defendant's motion for a more definitive statement in itself establishes issues that if presented with proper evidence via discovery for example, that defeat any summary judgment application." (Opposition to Motion for Summary Judgment, Appendix p. 113).

OF COMMISSIONERS, No. 74644 (Nev. May 3, 2019) ("In order for a party to have standing to seek writ relief, and thus for the district court to have subject matter jurisdiction over a petition for writ relief, the party must be "beneficially interested" in the matter."). The Honorable Judge Tao explained this well:

> But whether a party has standing is a question that goes to the court's jurisdiction, and questions of jurisdiction can never be waived or stipulated away by the parties. Furthermore, they may be raised at any time, even *sua sponte* by the court for the first time on appeal. This is so because questions of jurisdiction go to whether the court has the fundamental power to grant the requested relief and enforce its own judgment. If the court has no power to grant relief—either because it lacks jurisdiction over the subject matter, an indispensable party is absent from the litigation, the dispute is moot or not yet ripe, or a party does not have the legal right to seek or receive the requested relief—then its ruling is legally void and not much more than a meaningless advisory opinion whether or not any party raised a timely objection below. (*Wallace v. Smith*, No. 70574 (Nev: Court of Appeals Mar. 5, 2018) (Tao, J, Concurring) (Internal citations omitted).

The United States Supreme Court has long observed this rule. *Arbaugh v. Y & H Corp.*, 546 US 500 (Supreme Court 2006) ("The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."). Although state courts are not directly bound by the case or controversy requirement of Article III (of which standing is an essential element) of the U.S. Constitution, Nevada's courts have adopted that requirement themselves. *Doe v. Bryan*, 728 P. 2d 443 (NV S.Ct. 1986) ("Nevada

has a long history of requiring an actual justiciable controversy as a predicate to judicial relief. Moreover, litigated matters must present an existing controversy, not merely the prospect of a future problem.").

Standing is an issue of subject matter jurisdiction, and it is well-recognized that subject matter jurisdiction can be invoked at any time, thus even if Jones' arguments raised in the lower court are not treated as raising the issue of standing there, it is an issue that can be raised for the first time on appeal. Further, even if this were not an issue of subject matter jurisdiction, a grant of summary judgment for foreclosure without a note, in the absence of any evidence whatsoever of the right to enforce the note, clearly rises to the level of plain error.

d. It is Impossible to Establish Standing to Foreclose Without any Evidence of the Right to Enforce the Mortgage.

NRCP rule 56 governs motions for summary judgment, and requires that "[T]he movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As U.S. Bank provided no evidence whatsoever of its standing to enforce the note, the District Court had no authority to grant summary judgment.[2]

[2] Further, as the affidavit was from a company unrelated to Plaintiff, and predated the date Plaintiff claimed to have acquired the loan, it was incapable of

By filing a lost note affidavit with the Complaint, U.S. Bank admitted that it does not possess the note. (See Complaint, Appendix p. 9). Further, the copy of a note that U.S. Bank attached to both the Complaint and the Motion for Summary Judgment show the note made out to a party that is not U.S. Bank, and that it is not endorsed in any way[3]. (See Complaint, Appendix p. 10). As stated above, a note is an Article 3 negotiable instrument. UCC Article 3 requires that U.S. Bank may only enforce it if it was originally made out to them (it was not), if it was endorsed to them (the copy of the note indicates that it wasn't), if it was endorsed in blank, and they had possession (again, the copy of the note shows no endorsements whatsoever), or if they can provide proof it was transferred to them in some other way. As the face of the note makes clear, the last option is the only one available for U.S. Bank. "Without holder status and the attendant presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the "person entitled to enforce." *In re Veal,* 450 B.R. 897, 912 (B.A.P. 9th Cir. June 10, 2011) (holding, in a bankruptcy case, that AHMSI did not prove that it

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establishing the Plaintiff owned the note, as it could not testify to events that would have occurred after the date of the affidavit.

[3] Also worth noting is that the stamp at the top of the note indicates that this is not a copy originating from the lender, but rather a copy the lender had to acquire from the title company.

was the party entitled to enforce, and receive payments from, a mortgage note because it "presented no evidence as to who possessed the original Note. It also presented no evidence showing [e]ndorsement of the note either in its favor or in favor of Wells Fargo, for whom AHMSI allegedly was servicing the [bankrupt party's] Loan.").

In the present case, U.S. Bank's only evidence in support of its right to enforce the mortgage were, a copy of a note made out to a different party, the deed of trust, also made out to a different party, an assignment of the deed of trust to U.S. Bank, and a lost note affidavit.

As discussed previously, a note with no endorsements, made out to a different party is more evidence against U.S. Bank's right to enforce, than it is evidence for a right to enforce. The assignment of the deed of trust is generally sufficient evidence of transfer of the deed of trust, however, as explained in *Edelstein*, a mortgage can not be enforced unless a party has both the note and the deed of trust. *Edelstein v. Bank of New York Mellon*, 286 P. 3d 249, 260 (NV S.Ct. 2012). Further, it held that a deed of trust that names MERS as nominee splits the note and deed of trust at inception. (Id. at 260). As the deed of trust in this case does contain such language, (See DOT, Appendix p. 14) this means that evidence of the transfer to U.S. Bank of the deed of trust is meaningless towards establishing

the right to enforce the note. This leaves the lost note affidavit as the sole basis for U.S. Bank to prove their right to enforce the note.

While an affidavit is generally sufficient evidence on a motion for summary judgment, the lost note affidavit fails because it does not contain any language indicating that U.S. Bank has the right to enforce the note. As per UCC Article 3, the affidavit would be required to clearly testify, by citing admissible evidence, that Plaintiff U.S. Bank was transferred the right to enforce the note by a party who themselves had the right to enforce the note. Paraphrasing the contents of the affidavit, it states: 1 – that the affiant as an agent of Ocwen loan servicing, 2 – that Ocwen is the servicer on the loan, 3 – that the information in the affidavit comes from Ocwen's business records, 4 – that Ocwen made a good faith search for the note, and failed to locate it, and 5 – that the loss was not due to transfer or satisfaction. Nowhere does the affidavit contain language indicating that U.S. Bank was ever transferred ownership of the note, or rights to enforce the note, nor any allegation whatsoever that could be interpreted as testimony that satisfies U.S. Bank's burden to prove their right to enforce the instrument as required by NRS 104.3309.

There was literally zero evidence presented to establish U.S. Bank's standing to enforce the note. None. On a judicial foreclosure, especially one with a

lost note, this is the central issue of the matter. Without providing evidence sufficient to satisfy the UCC that there was a transfer of the right to enforce the note, U.S. Bank cannot foreclose, and cannot get a lost note order. Further, this was summary judgment, meaning that any question as to sufficiency of evidence on a question of fact was required to be resolved in favor of the non-moving party. The District Court's grant of summary judgment, when there was no evidence whatsoever presented towards the most essential burden of proof, was plain error. Further, as U.S. Bank was unable to establish their standing to enforce the mortgage, the District Court was without subject matter jurisdiction to grant relief of any sort to U.S. Bank.

The District Court's order must be reversed.

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VIII.

CONCLUSION

On a motion for summary judgment, Plaintiff U.S. Bank sought to foreclose on a mortgage, with a lost note, with no evidence of their standing to enforce the note whatsoever. As NRCP rule 56 requires the moving party to prove their right to recovery, granting of summary judgment with no evidence of standing to enforce the mortgage note was plain error, and must be reversed.

Respectably Submitted this 30th day of May, 2019.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. 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 Word 97 in Times New Roman 14pt type.
2. 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 proportionately spaced, has a typeface of 14 points or more, and contains 3,253 words.
3. Finally, I hereby certify that I have read this appellate 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 and volume number, if any, 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 30th day of May 2019.

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VERIFICATION

I, ROBERT KERN, declare as follows:

1. I am an attorney at Kern Law LTD. and represent Appellant, Monica Jones, in this matter.
2. I verify that I have read this Appellant's Opening Brief, and that it is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, for those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct

Dated this 30th day of May, 2019

/s/ Robert Kern
Robert Kern Esq.

CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 2019 a true and correct copy of the foregoing Appellant's Brief was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system.

I further certify that the following participants in this case are registered with the Nevada Supreme Court of Nevada's E-Filing System, and that the service of the Opening Brief has been accomplished to the following individuals via electronic service.

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I further certify that the following party was served with a copy of the forgoing Opening Brief by U.S. Mail with postage fully prepaid.

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