IN THE SUPREME COURT OF NEVADA

U.S. BANK N.A., AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4, Appellant, vs. THUNDER PROPERTIES, INC.; AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS, Respondents.	Supreme Court No. 81129

Certified Question from the United States Court of Appeals for the Ninth Circuit
Case No. 17-16399

RESPONSE TO REHEARING PETITION

Ariel E. Stern, Esq.
Nevada Bar No. 8276
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
(702) 634-5000
ariel.stern@akerman.com

RULE 26.1 DISCLOSURE

1. U.S. Bank is a wholly owned subsidiary of U.S. Bancorp.

2. U.S. Bancorp is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent company and no publicly held company owns more than 10% of U.S. Bancorp's shares.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Yet again, Thunder and SFR relitigate *Diamond Spur*. *Diamond Spur* held a bank's deed of trust survives by operation of law when it tenders the superpriority debt before an HOA sale—without any further action by the bank. This holding has been applied in countless cases[1] and was restated in this case by all seven justices. And yet Thunder and SFR still argue that, even after a bank's tender, a deed of trust is extinguished unless the bank files suit within a certain time after the HOA foreclosure sale.

Each step of Thunder and SFR's argument fails. In quiet title cases, the statute of limitations does not necessarily begin to run at the first moment a plaintiff could file suit. Even if it did, the cause of action does not accrue until there is an actual controversy about the title, and as the majority's opinion explains, an HOA foreclosure after tender does not create an actual controversy about the validity of a bank's deed of trust. The tendering bank is entitled to assume its deed of trust survived until the new owner takes some action challenging it.

If the Court disagrees with the foregoing analysis, it should still rule for U.S. Bank on either of two grounds. **First**, Thunder and SFR's arguments are not appropriate for rehearing because Thunder did not raise them in its merits brief, and Thunder and SFR did not even attempt to comply with Rule 40 on this point.

[1] Westlaw currently lists over 500 cases citing *Diamond Spur*.

Second, to the extent Thunder and SFR's criticism of the majority opinion has any merit, the dissent is not vulnerable to the same criticism, and adopting the dissent's position would safely defuse Thunder and SFR's arguments without letting them blow up *Diamond Spur*.

LEGAL STANDARD

Under Nevada Rule of Appellate Procedure 40(c)(1), "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing." "A petition for rehearing may not be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. Nor may a litigant raise new legal points for the first time on rehearing." *Whitehead v. Nev. Comm'n on Jud. Discipline*, 873 P.2d 946, 953 (Nev. 1994) (citation omitted).

Rule 40(c)(2) provides,

> (2) The court may consider rehearings in the following circumstances:
>
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

If a party argues the Court "has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority," it

must support that argument with "a reference to the page of the brief where [the party] has raised the issue." NRAP 40(a)(2).

ARGUMENT

I. Tendering Banks Have No Duty to Sue

The Court held in *Diamond Spur* that, when a bank tenders the superpriority debt before an HOA sale, it "cure[s] the default and prevent[s] foreclosure as to the superpriority portion of the HOA's lien by operation of law." *Bank of Am. N.A. v. SFR Invs. Pool 1 LLC*, 427 P.3d 113, 120 (Nev. 2018). To the extent an HOA tries to foreclose the superpriority portion of a lien, tender "renders the sale void" and prevents even a bona fide purchaser from acquiring title free of the mortgage. *Id.* at 612 ("A void deed carries no title on which a bona fide purchaser may rely . . . ."). The Court later extended these holdings to situations where tender did not actually occur but would have been futile. *7510 Perla Del Mar Ave Trust v. Bank of Am.*, 458 P.3d 348, 352 (Nev. 2020).

In *Diamond Spur*, SFR argued that banks, even after tendering, needed to file a lawsuit and pay the tendered amount into court in order to make their tender effective. 427 P.3d at 120–21. The court rejected that position, explaining it

> would only obstruct the operation of the split-lien scheme. The practical effect of requiring the first deed of trust holder to pay the tender into court is that a valid tender would no longer serve to cure the default on the superpriority portion of the lien. Instead, the tendering party would have to bring an action showing that the

> tender is valid and paid into court to avoid loss of its position through foreclosure of the superpriority portion of the lien. This process negates the purpose behind the unconventional HOA split-lien scheme: prompt and efficient payment of the HOA assessment fees on defaulted properties.

Id. at 120–21.

Having failed in *Diamond Spur*, SFR now tries (with Thunder's help) to sneak the same rejected argument in the back door.[2] SFR and Thunder argue (1) the bank's statute of limitations to prove tender begins running when the cause of action accrues, (2) the cause of action accrues as soon as the HOA sale is complete, and (3) if the bank does not file suit to prove its tender before the statute of limitations runs, its tender becomes retroactively ineffective and its deed of trust is extinguished.

If all three steps in this argument are correct, then tender cannot save a bank's mortgage unless the bank eventually files a lawsuit to prove tender occurred—as *Diamond Spur* put it, "the tendering party would have to bring an action showing that the tender is valid . . . to avoid loss of its position through foreclosure of the superpriority portion." *Id.* at 121.

[2] SFR gives the game away when it describes the purpose of the banks' lawsuits as "to publicly reinstate its lien." (SFR Rehearing Br. at 4.) This description flatly contradicts *Diamond Spur*—when a bank tenders, its lien survives automatically and does not need to be "reinstate[d]." As SFR itself acknowledges, "a person does not need to recover something unless it has first been taken away." (*Id.* at 2–3.)

The only difference between the doctrine *Diamond Spur* rejected and the one SFR and Thunder advocate here would be the deadline for the bank's lawsuit: either before the HOA sale (as SFR argued in *Diamond Spur*) or within four years after the HOA sale (as SFR and Thunder argue now). Either way, requiring banks to sue in order to make tender effective would still "negate[] the purpose behind the unconventional HOA split-lien scheme." *Id.*

II. The Statute Begins Running When the Buyer Threatens the Mortgage

"Of course, an HOA foreclosure *can* extinguish a bank's deed of trust. But it is also possible that a foreclosure *does not* do so—for example if the bank properly tendered the superpriority amount, or if tender was excused." (Majority Op. at 12 (citations omitted).) Likewise, an HOA foreclosure buyer *can* claim the bank's deed of trust is extinguished. But it is also possible that the buyer *will not* do so.[3]

Quiet title and declaratory judgment claims exist to end controversies, not to answer hypothetical questions. Until there is an actual dispute about the deed of trust's validity, the bank has no cause of action. *See Cty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 756 (Nev. 1998) ("Declaratory relief is available only if: (1) *a justiciable controversy exists* between persons with adverse interests . . . ." (emphasis added)); *see also Clay v. Scheeline Banking & Trust Co.*, 159 P.

[3] The Court may be less familiar with such buyers because they are not as litigious.

1081, 1082 (Nev. 1916) (quiet title complaint deficient if it does not allege "that the defendants claim an interest in the property adverse to the plaintiffs").

Consequently, until there is an actual dispute about the deed of trust's validity, the statute of limitations cannot begin to run. This is not an unusual situation in property law,[4] where the bundle of rights may be split various ways and multiple parties may claim distinct but non-adverse interests in the same land: tenants' possession of the property is not adverse to their landlords, life tenants' possession is not adverse to their remaindermen, mortgagors' possession is not adverse to their mortgagees, and so forth. Each party, so long as it stays within its rights, does nothing to call the other party's rights into question.

As the California Supreme Court has explained, "Quiet title actions . . . may be maintained when an adverse claim to property is asserted, but the period of limitations does not commence to run at that date." *Maguire v. Hibernia Sav. & Loan Soc.*, 146 P.2d 673, 681 (Cal. 1944). Instead the statute begins running only when there is "a hostile claim which is . . . of a nature to ripen into a valid adverse title." *Secret Valley Land Co. v. Perry*, 202 P. 449, 451 (Cal. 1921).

This Court expressed a similar position in *White v. Sheldon* in 1868, a case involving a dispute over whether a property was held in trust: the alleged trust

[4] Notably, the *Clark v. Robison* decision Thunder and SFR rely on—the one saying the limitations period begins when a party can file suit—involved a legal malpractice claim rather than a title dispute. *See* 944 P.2d 788, 789 (Nev. 1997).

beneficiary "had no right of action"—and the statute of limitations did not begin running—"until the trust was denied or some act was done by the trustee inconsistent with the trust." 4 Nev. 280, 289 (1868). Until that occurred, the two parties' interests were not truly adverse; the trustee's ownership was still consistent with the beneficiary's asserted right. *Id.* at 289–91 (the alleged trustee "took the legal title not in violation of or opposition to any rights of plaintiff").

A. After tender, an HOA sale does not create a valid adverse claim.

Where a mortgage survives by operation of law, the HOA buyer's purchase is "not in violation of or opposition to any rights of [the bank]," *id.*, and the foreclosure deed cannot "ripen into a valid adverse title," *Secret Valley*, 202 P. 449 at 451.

The sale's superpriority portion is adverse but cannot become valid: "a claim of title under a void deed, although recorded, [will not] ripen into a fee by lapse of time." *Id.* Consequently the statute of limitations does not run in favor of a void deed. On the other hand, the subpriority portion is valid but not adverse: after a subpriority foreclosure, a deed of trust remains valid. After tender, the bank's valid deed of trust and the HOA buyer's valid subpriority deed are not in conflict, and the statute of limitations does not begin to run until a conflict arises—until the HOA buyer or a successor in interest takes some action contradicting or repudiating the bank's rights under the deed of trust.

B. *Berberich* is further evidence of this principle.

Thunder and SFR argue *Berberich* does not support the majority's decision because it relies on the language of a statute of limitations—NRS 11.080—that applies only to parties in possession of the disputed property. Thunder and SFR are correct that *Berberich* applied NRS 11.080, and the Court has held that NRS 11.080 does not apply to the bank's claim.

However, both *Berberich* and NRS 11.080 express a common-law principle that predates them: that statutes of limitations do not run against property rights until someone presses a claim adverse to those rights. Applied to title holders like Thunder, this principle means the statute of limitations does not begin running until someone challenges their title by depriving them of the paramount right belonging to title—that is, by depriving them of possession. But because a lienholder like U.S. Bank has no right to possession, Thunder's possession is not adverse to U.S. Bank and does not challenge its lien. To press an adverse claim, Thunder must take some action inconsistent with the lien's existence. Until it does so, the two parties' interests do not conflict with each other and the statute of limitations does not begin to run.

C. In most cases, the defendant sets the statute running.

SFR objects to the above conclusions and tries to make them sound radical. It writes, "Not a single statute of limitations requires the party who would be sued to trigger the timeline on another party's claim." (SFR Br. at 3.) But this is exactly

wrong: in nearly all cases the statute of limitations is triggered by the defendant's conduct, not the plaintiff's.

When a plaintiff sues in tort, her statute of limitations usually begins running when the defendant commits the tort. When a plaintiff sues in contract, his statute of limitations usually begins when the defendant breaches the contract. And, as argued above, the statute of limitations period for quiet title begins when a rival takes action challenging the plaintiff's claim to the property.

D. The sale creates no actual controversy with the buyer.

Both Thunder and SFR try to identify ways an HOA sale, after tender satisfies the superpriority lien and renders the sale's superpriority portion void, still automatically creates a controversy between the HOA buyer and the bank.

Thunder argues the HOA sale "almost certainly constitutes a breach of the borrower's obligations under the due on sale clause contained in nearly every deed of trust." (Thunder Br. at 4.) This argument is both mistaken and irrelevant. Perhaps the sale would let the bank demand the full balance, but the bank could always waive that right and choose not to accelerate the debt. Even if the bank accelerated the debt, that would matter only to the statute of limitations for enforcing the debt.

The majority already rejected the idea that the statute of limitations for the debt applies to this case. (Majority Op. at 9–10.) U.S. Bank respectfully disagrees with the majority on this point, but presumably Thunder does not, since applying the

statutes of limitations for the debt would in most cases give banks a significantly longer period to sue.

Thunder argues further that recordation of the HOA foreclosure deed gives the bank sufficient notice of a dispute to start the statute running: knowledge of the sale, knowledge of its own actions, and knowledge that "the lien foreclosed upon presumptively contains a superpriority component." (Thunder Rehearing Br. at 3–4, 5–6.) There are two problems with this argument. **First**, if the bank knows it tendered, then it knows the lien foreclosed upon did not contain a superpriority component and its deed of trust remains valid. **Second**, Thunder's list is incomplete. While the bank has notice of the sale and its effects, it does not have notice of a necessary element of quiet title: an actual controversy with the HOA buyer.

SFR similarly focuses on the public record, suggesting it supports a presumption that the deed of trust was extinguished and a requirement that the bank file suit to change that outcome. (*See* SFR Rehearing Br. at 3–4.) But as U.S. Bank argued at greater length in its reply brief, the public record after an HOA sale, during the time at issue here, did not say whether tender occurred or whether the HOA lien included a valid superpriority component at the time of sale. (Reply at 7–9.) The statutory presumptions about a completed HOA sale do not address these issues.

/ / /

/ / /

III. SFR's "vestment rights" argument begs the question.

SFR spends half its brief arguing it has an established right in its purchased properties that the court is somehow violating. (SFR Rehearing Br. at 5–8.) This argument does nothing but beg the question: does SFR actually have an established right to own these properties free and clear of the banks' mortgages?

Diamond Spur says SFR has it exactly backwards. In cases where the bank tendered or tender was futile, the superpriority portion of the lien is satisfied, and "a purchaser at a foreclosure sale of that lien does not acquire title to that property interest." *Diamond Spur*, 427 P.3d at 612. It is the tendering banks, not SFR, that have a vested property right—a property right in their deeds of trust that they preserved with their tender.

To demonstrate a judicial taking, SFR bears the burden to prove it actually possessed an "established" property right that the Court's statute-of-limitations decision contravenes. *See Stop the Beach Renourishment Inc. v. Fla. Dept. of Env'l Prot.*, 560 U.S. 702, 729 (2010). SFR does not even try to bear that burden.

Finally, as to SFR's argument against the majority ruling's retroactivity, it depends on a case addressing the retroactivity of statutes. *See Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 313 P.3d 849, 859 (Nev. 2013). Unlike statutes, judicial rulings are presumed retroactive, and prospective-only rulings are rare—completely

unavailable, in fact, unless the Court expressly overrules precedent. *K&P Homes v. Christiana Trust*, 398 P.3d 292, 295 (Nev. 2017). It did not do so here.

IV. Thunder and SFR Impermissibly Raise New Arguments

U.S. Bank's opening brief argued that its statute of limitations did not begin running until its property right was disturbed. (U.S. Bank Open. Br. at 31–32.) Citing *Berberich*, it argued an HOA sale does not press an adverse property claim, challenge the bank's lien, or begin the limitations period—at least not in situations where a bank tendered or tender was excused. (*Id.* at 33–34.)

Neither Thunder nor amicus SFR responded to these arguments in their answering briefs. Neither contested U.S. Bank's interpretation of *Berberich* or argued *Berberich* should not apply to this question. In fact, while both Thunder and SFR assumed the statute of limitations ought to begin running from the HOA sale, it appears neither cited any authority saying why that should be the case.[5]

Now, after the Court accepted U.S. Bank's uncontested arguments, Thunder and SFR both argue that U.S. Bank's statute began to run when its cause of action accrued, and both of them appeal to *Clark v. Robison* on this point—SFR even chides

[5] Thunder's brief explains that the district court in this matter applied a five-year statute of limitations that began running when the HOA foreclosure deed was recorded—though it does so without endorsing the district court's reasoning. (Thunder Br. at 23–24.) It does endorse the district court's determination that the HOA foreclosure deed put U.S. Bank on notice of its mortgage's presumptive extinguishment. (*Id.* at 40.) Aside from the district court's ruling itself, it cites no authority for either position. (*See id.* at 23–24, 40.)

the Court for "ignor[ing]" *Clark*. (Thunder Rehearing Pet. at 3; SFR Rehearing Amicus at 1.) They both argue the bank's cause of action accrued when the HOA sale occurred or perhaps when the HOA foreclosure deed was recorded. (Thunder Rehearing Pet. at 3; SFR Rehearing Amicus at 1.) But neither Thunder nor SFR asserted these arguments in their earlier briefs; in particular, neither cited *Clark*.

And that is not the end of their novel theories. SFR spends half its brief arguing the Court's decision upsets vested property rights and must be applied prospectively only. (SFR Rehearing Br. at 5–8.) This argument, too, is missing from Thunder and SFR's earlier briefing.

Rule 40 specifically provides, "no point may be raised for the first time on rehearing," and it enforces this prohibition by requiring that "any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue." NRAP 40(c)(1); NRAP 40(a)(2).

Thunder and SFR flout these rules—they raise almost exclusively new points in their rehearing papers, and they do not cite any pages of their earlier briefs addressing the issues they now assert. The rehearing petition fails on the merits, but Thunder and SFR's rule violations provide an alternative basis for denying it.

/ / /

CONCLUSION

Under *Diamond Spur*, an HOA sale after tender is void as to the superpriority portion—void to the extent it purports to transfer title free of a bank's senior deed of trust. But if Thunder and SFR have their way, the sale stays void for only four years. After that, if the bank files no suit, the sale springs suddenly to life and retroactively extinguishes a deed of trust that initially survived by operation of law.

That's not what "void" means: "a claim of title under a void deed, although recorded, [will not] ripen into a fee by lapse of time." *Secret Valley Land Co. v. Perry*, 202 P. 449, 451 (Cal. 1921). The Court should reject these parties' latest attempt to undo *Diamond Spur*.

DATED: May 5, 2022.

AKERMAN LLP

/s/ Ariel E. Stern
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this response 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 points or more and contains 3,456 words.

FINALLY, I CERTIFY that I have read this **Response to Rehearing Petition**, 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 response to rehearing petition 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: May 5, 2022.

AKERMAN LLP

/s/ Ariel E. Stern
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I electronically filed on May 5, 2022, the foregoing **RESPONSE TO REHEARING PETITION** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen
An employee of AKERMAN LLP