

**IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

VINCENT HESSER

Appellant,

vs.

KENNEDY FUNDING, INC,

Respondent.

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Case No. 81383  
Elizabeth A. Brown  
Clerk of Supreme Court  
District Court  
Case No. 09A582746

From the Eighth Judicial District Court  
Clark County Nevada  
Department XI  
The Honorable Elizabeth Gonzalez \_

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**APPELLANT'S PETITION FOR REHEARING**

LAW OFFICES OF BYRON THOMAS

BYRON THOMAS, ESQ.

BAR NO: 8906

*Attorney for*

**VINCENT HESSER**

*Appellant*

## **I. ARGUMENT**

### **A. Rehearing Standard**

Appellant requests rehearing of his appeal. Nevada Rule of Appellate

Procedure 40 provides as follows:

- 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.

### **B. The Court Failed to Consider the Impact of its Decision on the NRS 17.214.**

The Court must give a clear and unambiguous statute its plain meaning, unless doing so violates the spirit of the act. D.R. Horton, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 123 Nev. 468, 168 P.3d 731, 737 (2007). In doing so, the Court must consider a statute's provisions as a whole, reading them "in a way that would not render words or phrases superfluous or make a provision nugatory." S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 117 P.3d 171, 173 (2005) (quotation omitted).

The Court has effectively ruled that the three (3) day recording requirement of NRS 17.214(1)(b), is null and void despite finding that it was an unambiguous time and manner statute, which should be strictly construed:

"[i]f the judgment is recorded, [by] recording the affidavit of renewal in the office of the county recorder in which the original judgment is filed within 3 days after the affidavit of renewal is filed." At issue here is whether this statute is subject to strict or substantial compliance. In Leven v. Frey, we addressed this issue, concluding that this statute was subject to strict compliance and that substantial compliance would undermine legislative intent.<sup>3123</sup> Nev. 399, 409, 168 P.3d 712, 719 (2007). In doing so, we reasoned that "since the statute includes no built-in grace period or safety valve provision, its explicit three-day language leaves little room for judicial construction or 'substantial compliance analysis.'" Id. at 407, 168 P.3d at 718 (internal footnote omitted). We further reasoned that such an interpretation was "consistent with the general tenet that 'time and manner requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements," id. at 408, 168 P.3d at 718, and with the statute's primary purpose, id. at 408, 168 P.3d at 719 (noting that "the recording requirement's main purpose is to procure reliability of title searches for both creditors and debtors since any lien on real property created when a judgment is recorded continues upon that judgment's proper renewal).

Order of Affirmance p. 2-3. Yet, the Court concluded that strict construction would lead to an absurd result:

Thus, unlike in Leven where the judgment had expired, a creditor conducting a title search would have seen there was an unexpired lien on the property. As such, the purpose of procuring reliable title searches is not affected in the circumstances presented here. The fact that there was a brief delay in recording the affidavit of renewal does not impact this reality, at least where the affidavit was filed and recorded well before the judgment expired.

Order of Affirmance p. 3. Using the Court's rationale, all other deadlines mandated by 17.214 are irrelevant so long, as the thing to be done occurs before the judgment expires. For instance, the requirement of service of the affidavit of renewal three (3)

days after filing is to satisfy due process requirements. Leven v. Frey, 123 Nev. 399, 409, 168 P.3d 712, 719 (2007). But how would a debtor's due process rights be harmed if the affidavit of renewal was filed eighty-nine (89) days before the judgment expired, but it was not served until three days before the judgment expired?

Also using the Court's rationale, the ninety day renewal window is completely superfluous. NRS 17.214(1)(a). A federal district court addressed this very issue and relied heavily on Leven, but that decision seems questionable now. Influence Ent., Inc. v. 3765 Holding, LLC, No. 207CV462JCMLRL, 2021 WL 3134244, at \*1–2 (D. Nev. July 23, 2021). In short the Court's ruling invalidates an entire statutory scheme. That is the absurd result.

The Court seemed to rely on Einhorn v. BAC Home Loans Servicing, LP, 128 Nev. 689, 696, 290 P.3d 249, 254 (2012) to conclude that strict construction of a time and manner statute is improper if it would lead to an absurd result. NRS 107.086(4), states: "[t]he beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note." Id. at 251. In Einhorn, the mortgagor, rather than beneficiary brought the required documents to a mediation governed by 107.086. Id. The Court found it would have led to an absurd result to find a violation of the statute because it was mortgagor as opposed to the beneficiary that brought the documents.

The difference between Einhorn and the instant case is that in Einhorn the Court did not have to invalidate an entire statutory scheme, and it did not put itself in the position of constantly having to substitute its judgment for that of the legislature. For instance, the Court stated “[t]he fact that there was a brief delay in recording the affidavit of renewal does not impact this reality, at least where the affidavit was filed and recorded well before the judgment expired.” Order of Affirmance p. 3. What is a “brief delay?” If the Respondent had recorded the renewal one day later, would it still be a brief delay? What about two or three days later? What does “well before the judgment expired” mean? Is three (3) weeks before the judgment expires “well before?”

The Court in this instant case has completely disregarded its case law stating that statutes should be interpreted as a whole and no provision should be nullified. Instead the Court looked at the recording provision of NRS 17.214(1)(b) in isolation and then made that provision nugatory. Thus, throwing into question the validity of all the legislatively created deadlines in NRS 17.214.

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**C. The Court Also Overlooked Hesser's Challenge to the Validity of Service of the Affidavit of Renewal.**

Appellant challenged the validity of service of the Affidavit Renewal in its opening brief. Appellant's Opening Brief p.4, and 8-10. Appellant also argued that it was not timely served the affidavit of renewal in its reply. Appellant's Reply Brief p. 14-16. For instance, the statute requires service of the affidavit of renewal be made by certified mail return receipt requested. 17.214(4) Appellant pointed out that Respondent has never provided that return receipt. Reply Brief p. 14.

**CONCLUSION**

For all of the foregoing reasons, the Court should grant the petition for rehearing

Dated this 22th day of February 2022.

*/s/ Byron Thomas*

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on February 22, 2022. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that to the extent that some of the participants in the case are not registered CM/ECF users, I have/shall mailed/mail the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to any non-CM/ECF participants. A copy of the foregoing shall be electronically transmitted from the Court to the email addresses on file for each of the following:

Michael Lynch

Dated this 22 th day of February 22, 2022.

*/s/ Byron Thomas*

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## CERTIFICATE OF COMPLIANCE

The below-signed hereby certifies that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14 pt. Times New Roman type style. 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 1643 words. 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 22nd day of February 2022.

*/s/ Byron Thomas*

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