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6 Palace Monaco

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8 SUPREME COURT

9 STATE OF NEVADA

11 SATICOY BAY LLC SERIES 8149  
12 PALACE MONACO,

No. 81453

13 Appellant,

14 vs.

15 WELLS FARGO BANK, NATIONAL  
ASSOCIATION, AS TRUSTEE FOR  
16 THE STRUCTURED ADJUSTABLE  
RATE MORTGAGE LOAN TRUST,  
17 MORTGAGE PASS THROUGH  
CERTIFICATES SERIES 2005-11;

18 Respondent  
19

20  
21 **APPELLANT'S OPENING BRIEF**  
22

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### **JURISDICTIONAL STATEMENT**

(A) Basis for the Supreme Court’s Appellate Jurisdiction: The findings of fact, conclusions of law and order granting defendant’s motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The findings of fact, conclusions of law and order was entered on June 4, 2020. Notice of entry of the findings of fact, conclusions of law and order was served and filed on June 4, 2020. A stipulation and order for NRCp 54(b) certification was filed on September 29, 2020.

(C) Plaintiff filed its notice of appeal on July 6, 2020.

### **ROUTING STATEMENT**

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

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2. Whether Monaco Landscape Maintenance Association, Inc. (hereinafter “HOA”) complied with NAC 116.090 to be treated as a limited-purpose association.

4. Whether the HOA and Red Rock complied with the notice requirements in NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

6. Whether defendant's counterclaim seeking declaratory relief was barred by the three year statute of limitations in NRS 11.190(3)(a).

1 7. Whether defendant's counterclaim seeking declaratory relief was barred by the  
2 four year statute of limitations in NRS 11.220.  
3

4 8. Whether defendant's counterclaim seeking declaratory relief falls within either  
5 NRS 11.070 or NRS 11.080.  
6

7 9. Whether Saticoy Bay LLC Series 8149 Palace Monaco (hereinafter "plaintiff")  
8  
9 is protected as a good faith purchaser for value from the unrecorded claim that the  
10 default as to the superpriority portion of the HOA's lien was cured.  
11

12 10. An order granting summary judgment is reviewed de novo without deference  
13 to the findings of the lower court.  
14

### 15 **STATEMENT OF THE CASE**

16  
17 On February 27, 2018, plaintiff filed a complaint asserting three claims for  
18 relief: 1) declaratory relief/quiet title determining that plaintiff was the rightful owner  
19 of the property commonly known as 8149 Palace Monaco Avenue, Las Vegas,  
20 Nevada 89117 (hereinafter "Property"), that defendant had no right, title, interest or  
21 claim to the Property, and plaintiff's rights in the Property are superior to any interest  
22 claimed by defendant; 2) fraudulent concealment and negligence against the HOA;  
23 and 3) unjust enrichment against the HOA. (JA 1, pgs. 1-8)  
24  
25  
26

27 On March 21, 2018, the HOA filed an answer to plaintiff's complaint. (JA1,  
28

pgs. 9-15)

On October 15, 2018, defendant filed an answer to plaintiff's complaint, counter-claims, cross-claims and third party complaint. (JA1, pgs. 19-93)

On November 13, 2018, the HOA filed an answer to defendant's counter-claims, cross-claims and third party claims. (JA1, pgs. 94-100)

On February 6, 2019, plaintiff filed an answer to counterclaim. (JA1, pgs. 101-108)

On February 7, 2019, defendant filed an errata to its answer to plaintiff's complaint, counter-claims, cross-claims and third party complaint. (JA1, pgs. 109-188)

On October 28, 2019, plaintiff filed a motion for summary judgment. (JA1, pg. 199 to JA2a, pg. 328)

On October 28, 2019, defendant filed a motion for summary judgment. (JA2a, pg. 329 to JA3a, pg. 619)

On November 18, 2019, defendant filed an opposition to plaintiff's motion for summary judgment. (JA3a, pgs. 620-653)

On November 18, 2019, the HOA filed an opposition to defendant's motion for summary judgment. (JA3a, pg. 654 to JA3c, pg. 728)

1 On December 4, 2019, plaintiff filed an opposition to defendant's motion for  
2 summary judgment. (JA4, pg. 729 to JA4, pg. 907)  
3

4 On December 11, 2019, defendant filed a reply in support of its motion for  
5 summary judgment. (JA4, pgs. 908-973)  
6

7 On December 11, 2019, plaintiff filed a reply in support of its motion for  
8 summary judgment. (JA5, pgs. 974-1001)  
9

10 On June 4, 2020, the court entered its findings of fact, conclusions of law and  
11 order granting defendant's motion for summary judgment. (JA5, pgs. 1009-1017)  
12

13 On June 4, 2020, defendant served and filed notice of entry of the court's  
14 findings of fact, conclusions of law and order. (JA5, pgs. 1018-1029)  
15

16 On July 6, 2020, plaintiff filed its notice of appeal. (JA5, pgs. 1030-1031)  
17

18 On September 29, 2020, plaintiff filed a stipulation and order for NRCP 54(b)  
19 certification. (JA5, pgs. 1032-1039)  
20

21 On September 29, 2020, plaintiff served and filed notice of entry of the  
22 stipulation and order for NRCP 54(b) certification. (JA5, pgs. 1040-1049)  
23

### 24 **STATEMENT OF FACTS**

25

26 Plaintiff obtained title to the Property by entering and paying the high bid of  
27 \$17,400.00 at a public auction held on December 3, 2013. *See* copy of foreclosure  
28



1 deed recorded on December 27, 2013 at JA1, pgs. 233-235.

2       The public auction arose from a delinquency in assessments due from the  
3  
4 former owner to the HOA pursuant to NRS Chapter 116.

5       Defendant is the beneficiary by assignment of a deed of trust recorded as an  
6  
7 encumbrance against the Property. *See* copies of deed of trust recorded on March 15,  
8  
9 2005 at JA2a, pgs. 237-258, and corporate assignment of deed of trust recorded on  
10 January 26, 2017, at JA3a, pg. 616-619.

11  
12       Paragraph ( C) at page 1 of the deed of trust identified IndyMac Bank, F.S.B.  
13  
14 as the “Lender” and stated: “Lender’s address is 155 North Lake Avenue, Pasadena,  
15 CA 91101.” (JA2a, pg. 237, ¶ (C))

16  
17       Paragraph (E) at page 2 of the deed of trust stated that “MERS is a separate  
18  
19 corporation that is acting solely as a nominee for Lender and Lender’s successors and  
20 assigns” and that “**MERS is the beneficiary under this Security Instrument.**”  
21 (JA2a, pg. 238, ¶ (E)) (emphasis in original).

22  
23       Paragraph 15 of the deed of trust stated in relevant part: “Any notice to Lender  
24  
25 shall be given by delivering it or by mailing it by first class mail to Lender’s address  
26  
27 stated herein unless Lender has designated another address by notice to Borrower.”  
28 (JA2a, pg. 246, ¶ 15)

1 On May 20, 2009, Red Rock recorded a lien for delinquent assessments for  
2 \$606.71 on behalf of the HOA. (JA2a, pg. 273)  
3

4 On May 22, 2009, Red Rock mailed a copy of the recorded lien to the former  
5 owner. (JA2a, pgs. 270-273)  
6

7 On July 7, 2009, Red Rock recorded a notice of default and election to sell for  
8 \$1,740.42. (JA2a, pg. 275)  
9

10 On July 15, 2009, Red Rock mailed copies of the notice of default to the  
11 Lender at its address in Pasadena, CA, to Wells Fargo Bank, N.A., and to the former  
12 owner. (JA2a, pgs. 280-286)  
13  
14

15 On July 17, 2009, Red Rock mailed a second copy of the notice of default to  
16 the former owner. (JA2a, pgs. 277-279)  
17

18 On April 8, 2013, Red Rock recorded a notice of foreclosure sale for  
19 \$3,876.82. (JA2a, pgs. 288-289)  
20

21 On April 9, 2013, Red Rock mailed copies of the notice of foreclosure sale to  
22 the Lender at its address in Pasadena, CA, to Wells Fargo Bank, N.A., to the former  
23 owner and to the State of Nevada Ombudsman. (JA2a, pgs. 291-301)  
24  
25

26 On April 8, 2013, a copy of the notice of foreclosure sale was served upon the  
27 former owner by posting a copy of the notice in a conspicuous place on the Property.  
28

1 (JA2a, pgs. 303, 305)

2 Beginning on April 11, 2013, copies of the notice of foreclosure sale were  
3  
4 posted in three (3) public places in Clark County, Nevada. (JA2a, pg. 304)

5 The notice of foreclosure sale was published in the Nevada Legal News on  
6  
7 April 11, 2013, April 18, 2013, and April 25, 2013. (JA2a, pg. 307)

8  
9 **SUMMARY OF THE ARGUMENT**

10 The first deed of trust was extinguished when plaintiff purchased the Property  
11  
12 at the HOA foreclosure sale held on December 3, 2013.

13 The HOA did not comply with NAC 116.090 to be treated as a limited-purpose  
14  
15 association.

16 Defendant did not prove that the superpriority lien was paid prior to the public  
17  
18 auction held on December 3, 2013.

19 The HOA and Red Rock complied with every notice requirement in NRS  
20  
21 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.

22 Defendant not prove the element of causation required by the California rule.  
23

24 Defendant's counterclaim seeking declaratory relief was barred by the three  
25  
26 year statute of limitations in NRS 11.190(3)(a).

27 Defendant's counterclaim seeking declaratory relief was barred by the four year  
28

1 statute of limitations in NRS 11.220.

2 Defendant's counterclaim seeking declaratory relief does not fall within either  
3  
4 NRS 11.070 or NRS 11.080.

5 Plaintiff is protected as a good faith purchaser for value from the unrecorded  
6  
7 claim that the default as to the superpriority portion of the HOA's lien was cured.

### 8 STANDARD OF REVIEW

9  
10 In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this  
11  
12 Court stated that it "reviews a district court's grant of summary judgment de novo,  
13 without deference to the findings of the lower court."

### 14 ARGUMENT

#### 15 16 **1. The first deed of trust was extinguished by the HOA foreclosure** 17 **sale held on December 3, 2013.**

18 NRS 116.3116(2) provides that an HOA's assessment lien is "prior to all  
19  
20 security interests described in paragraph (b) to the extent of any charges incurred by  
21  
22 the association of a unit pursuant to NRS 116.310312 and to the extent of the  
23 assessments for common expenses based on the periodic budget adopted by the  
24  
25 association pursuant to NRS 116.3115 which would have become due in the absence  
26  
27 of acceleration during the 9 months immediately preceding institution of an action to  
28 enforce the lien."

1 The first deed of trust, recorded on March 15, 2005, falls squarely within the  
2 language of paragraph (b). The statutory language does not limit the nature of this  
3  
4 priority in any way.

5  
6 In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 758, 334  
7 P.3d 408, 419 (2014), this court stated:

8  
9 NRS 116.3116(2) gives an HOA a true superpriority lien, proper  
10 foreclosure of which will extinguish a first deed of trust.

11 Every notice recorded, mailed, posted and published by Red Rock stated “the  
12 total amount of the lien” as approved by this court in SFR Investments Pool 1, LLC  
13  
14 v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418.

15 The foreclosure deed (JA, pg.233) included the following recitals:

16  
17 Default occurred as set forth in a Notice of Default and Election to Sell,  
18 recorded on 07/07/2009 as instrument number 0001621 Book 20090707  
19 which was recorded in the office of the recorder of said county. Red  
20 Rock Financial Services has complied with all requirements of law  
21 including, but not limited to, the elapsing of 90 days, mailing of copies  
22 of Lien for Delinquent Assessments and Notice of Default and the  
23 posting and publication of the Notice of Sale.

24 Because the high bid of \$17,400.00 paid by plaintiff exceeded the full amount  
25 of the \$3,876.82 identified in the notice of foreclosure sale, the HOA necessarily  
26 foreclosed its entire assessment lien including the superpriority portion of the lien.

27 The foreclosure of the HOA’s super priority lien extinguished any estate, right,  
28 title, interest or claim in the Property created by the subordinate deed of trust.

1           Consequently, title to the Property vested in plaintiff free of the extinguished  
2 deed of trust.  
3

4 **2.     The HOA did not comply with NAC 116.090 to be treated as a**  
5 **limited-purpose association.**

6           At pages 10 and 11 of its motion for summary judgment (JA2a, pg. 338-339),  
7  
8 defendant cited Saticoy Bay LLC Series 4500 Pacific Sun v. Lakeview Loan  
9 Servicing, LLC, 441 P.3d 81 (Table), 2019 WL 2158334 (Nev. May 15,  
10 2019)(unpublished disposition), where this court decided that because the HOA in  
11 that case was “a limited purpose association under NRS 106.1201(2) and (6),” the  
12 HOA’s “foreclosure sale did not extinguish respondent’s deed of trust and that  
13 [buyer] took title to the property subject to the first deed of trust..”  
14  
15

16  
17           First, the unpublished order in the Pacific Sun case “does not establish  
18 mandatory precedent.” NRAP 36(c)(2).  
19

20           Second, the order has no “persuasive value” because that case focused only on  
21 the exception from NRS Chapter 116 provided in NRS 116.1201(2) for a “limited-  
22 purpose association” that had complied with the regulations adopted by the  
23 Commission for Common-Interest Communities and Condominium Hotels  
24 (hereinafter “CCICCH”) pursuant to NRS 116.1201(5).  
25  
26  
27

28           In the present case, on the other hand, the portion of the Preamble to the

1 CC&RS and Article 8.2 of the CC&Rs that are quoted at pages 4 and 5 of defendant's  
2 motion (JA2a, pgs. 332-333) do not state that the HOA was a "limited-purpose  
3 association" pursuant to NRS 116.1201(2). The Preamble (JA2a, pg. 363) and Article  
4 8.2 (JA2a, pgs. 381) instead state that the HOA was "a limited expense liability  
5 planned community" in accordance with NRS 116.110368 (replaced by NRS  
6 116.075), NRS 116.1203(1)(b), NRS 116.1203(2) and NRS 116.4101(g).

10 Article 8.2 of the CC&Rs also stated the intent "that this Declaration and the  
11 Project not be subject to any Sections of NRS Chapter 116 **except those Sections**  
12 **expressly required by Sections 116.1203(1)(b) and 116.1203(2)**, unless otherwise  
13 expressly stated in this Declaration." (JA2a, pg. 381)(emphasis added)

16 NRS 116.1203(1) provides:

18 Except as otherwise provided in subsections 2 and 3, **if a planned**  
19 **community contains no more than 12 units and is not subject to any**  
20 **developmental rights**, it is subject only to NRS 116.1106 and 116.1107  
21 unless the declaration provides that this entire chapter is applicable.  
(emphasis added)

22 NRS 116.1203(2) provides:

23 The provisions of NRS 116.12065 and the definitions set forth in NRS  
24 116.005 to 116.095, inclusive, to the extent that the definitions are  
25 necessary to construe any of those provisions, **apply to a residential**  
**planned community containing more than 6 units.** (emphasis added)

26 NRS 116.1203(3) also provides:

28 Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, **the**

1        **provisions of NRS 116.3101 to 116.350, inclusive**, and the definitions  
2        set forth in NRS 116.005 to 116.095, inclusive, to the extent that such  
3        definitions are necessary in construing any of those provisions, **apply to**  
4        **a residential planned community containing more than 6 units.**  
5        (emphasis added)

6        In the present case, the legal description in Exhibit “A” (JA2b, pgs. 407-413)  
7        and Exhibit “A-1” (JA2b, pgs. 415-420) to the CC&Rs proves that the planned  
8        community named “MONACO” included more than 12 units.

9        Paragraph B in the Preamble at page 1 of the CC&Rs (JA2a, pg. 362) also  
10       stated that the Declarant intended to develop “a residential community containing a  
11       maximum of one thousand three hundred thirty seven (1,337) single-family  
12       residences . . . .”

13       Paragraph D in the Preamble at page 1 of the CC&Rs (JA2a, pg. 362) also  
14       stated that “the development of the Project is intended to be consistent with the  
15       Monaco master development plan per Zone Change ZC-1270-97 and Tentative  
16       Subdivision Map TM 0202-97 . . . .”

17       Because the HOA in the present case included more than 12 units, NRS  
18       116.1203(3) expressly provides that “the provisions of **NRS 116.3101 to 116.350,**  
19       **inclusive,**” governed the HOA. (emphasis added)

20       These provisions necessarily included the superpriority lien rights granted to  
21       the HOA by NRS 116.3116(2) as well as the language in NRS 116.31162 to



1 116.31168, and by incorporation, NRS 107.090, that governed the nonjudicial  
2 foreclosure of the HOA's superpriority lien rights. *See also* Section 8.9.1 of the  
3 CC&Rs at JA2a, pgs. 384-385.

5 NRS 116.1104 states in relevant part:

7 Except as expressly provided in this chapter, its provisions may not be  
8 varied by agreement, and rights conferred by it may not be waived.

9 In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d  
10 at 418-419, this court held that this language in NRS 116.1104 prevented the HOA  
11 from enforcing language in the CC&Rs stating that "no lien created under this Article  
12 9 [governing nonpayment of assessments], nor the enforcement of any provision of  
13 this Declaration shall defeat or render invalid the rights of the beneficiary under any  
14 Recorded first deed of trust encumbering a Unit, made in good faith and for value"  
15 and the language in the CC&Rs stating that "[t]he lien of the assessments, including  
16 interest and costs, shall be subordinate to the lien of any first Mortgage upon the  
17 Unit."

23 In the present case, the language in Section 8.14 of the CC&Rs relating to  
24 "Priority of Lien" (JA2a, pg. 386) matches the language that this court found to be  
25 unenforceable in SFR Investments Pool 1, LLC v. U.S. Bank, N.A.

28 Although the language in Section 15.1 of the CC&Rs relating to "Mortgagee

1 Protection” (JA2a, pg. 395) is slightly different than the language described in SFR  
2 Investments Pool 1, LLC v. U.S. Bank, N.A., defendant did not explain how the  
3  
4 HOA’s exercise of the lien rights granted to the HOA by NRS 116.3116(2) and  
5  
6 Section 8.9 of the CC&Rs (JA2a, pgs. 384-385) could constitute an “amendment or  
7 violation of this declaration.”

8  
9 Furthermore, as stated at pages 9 to 12 of plaintiff’s opposition to defendant’s  
10 motion for summary judgment (JA4, pgs. 737-740), the CC&Rs for the HOA do not  
11  
12 meet the statutory requirements for the exception to NRS Chapter 116 in NRS  
13 116.1201(2) for a “limited-purpose association.”

14  
15 In this regard, NRS 116.1201(5) states in part:

16  
17 5. The Commission shall establish, by regulation:

18 (a) The criteria for determining whether an association, a  
19 limited-purpose association or a common-interest  
community satisfies the requirements for an exemption or  
20 limited exemption from any provision of this chapter. . .

21 NRS 116.015 defines the word “Commission” to mean “the Commission for  
22 Common-Interest Communities and Condominium Hotels created by NRS 116.600.”

23  
24 NRS 116.600(1) created the Commission, and NRS 116.600(2) describes its  
25 membership and appointments. On its website, the Nevada Real Estate Division  
26  
27 defines the Commission as “a seven-member body, appointed by the governor that  
28

1 acts in an advisory capacity to the Division, adopts regulations, and conducts  
2 disciplinary hearings.”  
3

4 NRS 116.1201(5)(a) directs the Commission to establish by regulation “[t]he  
5 criteria for determining whether an association, a limited-purpose association or a  
6 common-interest community satisfies the requirements for an exemption or limited  
7 exemption from any provision” of NRS Chapter 116. To that end, the Nevada Real  
8 Estate Division and the Commission adopted NAC 116.090, which provides in part:  
9  
10

11  
12 **NAC 116.090 “Limited-purpose association” interpreted.** (NRS  
13 116.1201, 116.615)

14 1. An association is a limited-purpose association pursuant to  
15 subparagraph (1) of paragraph (a) of subsection 6 of NRS 116.1201 if:

16 (a) The association has been created for the sole purpose of  
17 maintaining the common elements consisting of landscaping,  
18 public lighting or security walls, or trails, parks and open space;

19 (b) The declaration states that the association has been created as  
20 a landscape maintenance association; **and**

21 (c) The declaration expressly prohibits:

22 (1) The association, and not a unit’s owner, from enforcing  
23 a use restriction against a unit’s owner;

24 (2) The association from adopting any rules or regulations  
25 concerning the enforcement of a use restriction against a  
26 unit’s owner; **and**

27 (3) The imposition of a fine or any other penalty against a  
28 unit’s owner for a violation of a use restriction. (emphasis  
added)

29 NAC 116.090 sets forth the requirements for determining whether an HOA is  
30 a limited-purpose association, and NRS 116.1201(5)(a) expressly incorporates the

1 Commission's criteria. Thus, in determining whether the HOA is truly a limited-  
2 purpose association under NRS 116.1201, this court must look to the requirements  
3 of NAC 116.090.  
4

5 NAC 116.090 has three sub-parts that are connected by the word "and" that  
6 appears at the end of NAC 116.090(b). NAC 116.090(c) has three sub-parts that are  
7 connected by the word "and" at the end of NAC 116.090(c)(2). As a result, there are  
8 five (5) separate requirements that must be met before an association qualifies for the  
9 exception from NRS Chapter 116 provided by NRS 116.1201(2).  
10  
11

12 The first requirement under NAC 116.090(1)(a) is that the association has  
13 been created **for the sole purpose** of maintaining common elements consisting of  
14 landscaping, public lighting or security walls, or trails, parks and open space."  
15 (emphasis added)  
16  
17

18 In the present case, on the other hand, the Preamble at pages 1 and 2 of the  
19 CC&Rs (JA2a, pgs. 362-363) does not state that the HOA was formed "for the sole  
20 purpose" required by NAC 116.090(1)(a).  
21  
22

23 Furthermore, as stated at page 11 of plaintiff's opposition(JA3, pg. 664), the  
24 CC&Rs contain multiple provisions that prove the HOA was not created "for the sole  
25 purpose" required by NAC 116.090(1)(a). These disqualifying provisions include the  
26  
27  
28

1 power to enforce 16 different use restrictions (Article 3 at JA2a, pgs. 369-372), grant  
2 easements (Section 6.1.3 at JA2a, pg. 377), obtain insurance (Article 12 at JA2a, pgs.  
3 389-393), annex property (Article 13 at JA2a, pgs. 393-394), and bring civil actions  
4 (JA2b, pgs. 402-403).  
5

6  
7 Furthermore, Section 6.1.6 of the CC&Rs (JA2a, pg. 377) expressly authorizes  
8 the HOA to initiate judicial proceedings to enforce “the Governing Documents,”  
9 which term is defined in Section 1.23 of the CC&Rs (JA2a, pg. 366) to mean “this  
10 Declaration, the Bylaws, any Association Rules, and any other documents that govern  
11 the operation of the Association.”  
12

13  
14  
15 Section 6.1.7 of the CC&Rs (JA2a, pg. 378) also grants the HOA “[t]he power,  
16 but not the duty, to perform any and all lawful acts incidental to and in furtherance  
17 of the Association’s express powers set forth in Sections 6.1.1 to 6.1.6 above which  
18 the Association deems necessary or proper.”  
19

20  
21 At page 12 of its motion (JA2a, pg. 340), defendant stated that “Monaco is  
22 governed by the terms of the CC&Rs and not Chapter 116 by the express language  
23 of the statute and the CC&Rs.”  
24

25  
26 To support this argument, at page 14 of its reply (JA4, pg. 921), defendant  
27 quoted a portion of Section 17.3.1 of the CC&Rs (JA2b, pg. 402) and stated that the  
28

1 last sentence in Section 17.3.1 explicitly prohibited the HOA from enforcing a use  
2 restriction against a unit's owner.  
3

4 On the other hand, the first part of the last sentence clearly stated that "[t]he  
5 enforcement powers of the Association shall be limited to enforcement of **any**  
6 provisions of this Declaration concerning the Association Property and the  
7 Association . . . ." (JA2b, pg. 402, § 17.3.1) This use of the word "any" would  
8 necessarily include the 16 different use restrictions in Article 3 of the CC&Rs. (JA2a,  
9 pgs. 369-372)  
10  
11

12 Because the HOA did not qualify for the exceptions to NRS Chapter 116  
13 provided by either NRS 116.1201 or NRS 116.1203, the HOA in the present case is  
14 therefore governed by the mandatory language in NRS 116.1104 that prohibited the  
15 HOA from varying by agreement or waiving the superpriority lien rights granted to  
16 the HOA by NRS 116.3116(2).  
17  
18

19 Consequently, defendant's deed of trust was subordinate to the HOA's  
20 superpriority lien and was extinguished by the nonjudicial foreclosure of that prior  
21 lien on December 3, 2013.  
22  
23

24  
25  
26 **3. Defendant did not prove that the superpriority lien was paid**  
27 **prior to the public auction held on December 3, 2013.**

28 Under Nevada law, when "payment" is asserted as a defense, "each element of

1 the defense must be affirmatively proved,” and “[t]he burden of proof clearly rests  
2 with the defendant.” Schwartz v. Schwartz, 95 Nev. 202, 206, n. 2, 591 P.2d 1137,  
3 1140, n. 2 (1979); Rosenbaum v. Rosenbaum, 86 Nev. 550, 552, 471 P.2d 254, 255  
4 (1970).

5  
6  
7 In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003),  
8  
9 the court of appeals stated:

10 “The trustor-mortgagor or the person who alleges that a debt has been  
11 paid has the burden of proving payment.” (4 Miller & Starr, Cal. Real  
12 Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn.  
omitted.)

13 In the present case, defendant argued that Exhibits 15 to 18 to its motion (JA3a,  
14 pgs. 555-573) proved that the former owner entered into a payment arrangement with  
15 the HOA. **These exhibits, however, do not include the writing that sets out the**  
16 **terms of the payment arrangement** – these exhibits instead include four (4)  
17 cashier’s checks purchased by the former owner and four (4) “Payment Allocation  
18 Reports” prepared by Red Rock.  
19  
20  
21

22 The four (4) cashier’s checks were drawn payable to Red Rock for the  
23 following amounts:  
24  
25

| <u>Date</u>  | <u>Amount to Red Rock</u> |
|--------------|---------------------------|
| May 30, 2013 | \$ 404.00                 |

1 June 21, 2013 169.00

2 July 22, 2013 168.00

3  
4 August 23, 2013 168.00

5  
6 Total Payments: \$ 909.00

7 None of the cashier's checks tendered by the former owner (JA3a, pgs. 556-  
8  
9 557, 560-561, 565-566, 570-571) included any direction by the former owner on how  
10 to apply each partial payment.

11  
12 Defendant relied on deposition testimony by Sara Trevino, a trustee sale officer  
13 employed by Red Rock, as proof that "[t]he HOA Trustee allocated Nardizzi's  
14 payments to the oldest outstanding assessments of the HOA." (JA2a, pgs. 336-337,  
15 ¶23)

16  
17  
18 As discussed at page 14 of plaintiff's opposition (JA4, pg. 742), however, the  
19 deposition testimony by Ms. Trevino proved that Red Rock **received \$909.00** in  
20 payments from the former owner, and Red Rock **paid only \$559.00** from those  
21 payments to the HOA:

| <u>Amount to Red Rock</u> | <u>Amount to HOA</u> | <u>Testimony by Ms. Trevino</u> |
|---------------------------|----------------------|---------------------------------|
| \$ 404.00                 | \$ 129.00            | JA3a, pg. 505, 80:8-11          |
| 169.00                    | 94.00                | JA3a, pg. 506, 83:16-22         |



|   |               |               |                         |
|---|---------------|---------------|-------------------------|
| 1 | 168.00        | 168.00        | JA3a, pg. 506, 85:15-19 |
| 2 |               |               |                         |
| 3 | <u>168.00</u> | <u>168.00</u> | JA3a, pg. 507, 87:11-13 |
| 4 | \$ 909.00     | \$ 559.00     |                         |

5  
6 The payment allocation reports created by Red Rock show that Red Rock  
7 deducted a portion of the first two payments to reimburse itself for the \$350.00 paid  
8  
9 for the “Trustee Sale Guarantee” incurred during the foreclosure process – this  
10 includes \$275.00 posted under “Title Allocation Detail” at JA3a, pg. 558 and \$75.00  
11  
12 posted under “Title Allocation Detail” at JA3a, pg. 563.

13 The payment allocation reports created by Red Rock also show that Red Rock  
14  
15 credited all other payments against the past due semi-annual assessments that became  
16  
17 due on January 1, 2009, July 1, 2009, January 1, 2010, July 1, 2010 and January 1,  
18 2011. (JA3a, pgs. 558, 563, 568) Red Rock did not allocate any portion of the  
19  
20 monies that it received to the other foreclosure expenses, late fees or interest  
21  
22 identified in Red Rock’s account detail, dated December 3, 2013. (JA2b, pgs. 470-  
23 474)

24 In the deposition transcript attached as Exhibit 9 to defendant’s motion, Ms.  
25  
26 Trevino testified:

27 Q So is it Red Rock’s policy if they receive more than the  
28 semiannual assessment that’s due, they would just forward it to

1 the next semiannual assessment charge?

2 A The oldest outstanding assessment.

3 JA3a, pg. 507, 86:10-14 (emphasis added)

4  
5 Although this might be “Red Rock’s policy,” defendant did not prove that the  
6  
7 HOA and the former owner agreed to use “Red Rock’s policy” for the payments made  
8  
9 by the former owner.

10 Because Ms. Trevino was employed by Red Rock and not by the HOA, Ms.  
11  
12 Trevino did not have the personal knowledge required by 50.025(1) to testify  
13  
14 regarding how the HOA applied the partial payments received by it.

15 In 9352 Cranesbill Trust v. Wells Fargo Bank, N.A., 136 Nev. 76, 80, 459 P.3d  
16  
17 227, 231 (2020), this court applied some of the rules from Able Electric, Inc. v.  
18  
19 Kaufman, 104 Nev. 29, 752 P.2d 218 (1988), “that courts follow in deciding how to  
20  
21 allocate partial payments on overdue debts.”

22 One of these rules provides that “[w]hen a debtor partially satisfies a judgment,  
23  
24 that debtor has the right to make an appropriation of such payment to the particular  
25  
26 obligations outstanding.” Able Electric, Inc. v. Kaufman, 104 Nev. at 30-31, 32, 752  
27  
28 P.2d at 219, 220.

Another rule is that “[i]f the debtor does not direct how to apply the payment

1 to her account, the creditor may determine how to allocate the payment.” Able  
2 Electric, Inc. v. Kaufman, 104 Nev. at 32, 752 P.2d at 220.  
3

4 In the present case, however, the former owner and the HOA entered into a  
5 written payment agreement that specifically defined how the monthly payments of  
6 \$163.38 would be applied. (JA3a, pg. 671)  
7

8 Although paragraph 16 of the district court’s findings of fact (JA5, pg. 1012,  
9 ¶16) quoted language from the fifth paragraph of the payment agreement, the district  
10 court did not quote the following language in the fourth paragraph of the payment  
11 agreement:  
12  
13

14  
15 Please note that **this Payment Agreement includes the current**  
16 **balance owed plus future assessments through the end of the**  
17 **Payment Agreement.** Upon completion of this Agreement, your  
18 account will be current with the Association and Red Rock. Do not send  
a separate payment to the Association or the managing agent until the  
completion of this Payment Agreement. (emphasis added)

19 The district court also did not mention paragraph 8 of the HOA’s written  
20 Collection of Assessments Policy (JA3b, pg. 674), which states:  
21

22 Payment Agreements and Allocations:Requests for Payment Agreements  
23 must be submitted by the unit’s owner(s) in writing. The Board may  
24 from time to time allow the Collection Agency to enter into Payment  
25 Agreements of limited term and conditions on behalf of the Association.  
26 The Board will determine acceptable terms and conditions and notify the  
27 Collection Agency in writing. Any requests for terms other than those  
28 pre-approved by the Board require the approval of the Board prior to  
execution of the agreement. **The Agreement allows the owner to**  
**make scheduled partial payments of the entire balance owing, in**  
**addition to the current assessments.** Failure to meet any terms of the  
written agreement shall give the Association and/or its Collection  
Agency the right to immediately continue the collection process without

1 further notice to the owner bringing all amounts due and payable. All  
2 payments received shall be allocated to the Association in accordance  
3 with current law. (emphasis added)

4 The four (4) "Payment Allocation Reports" prepared by Red Rock prove that  
5 Red Rock and the HOA violated the payment terms provided by the Payment  
6 Agreement and the HOA's written Collection of Assessments Policy because Red  
7 Rock did not apply any part of the payments made by the former owner to "future"  
8 assessments and/or "current" assessments.  
9  
10

11 The district court also did not apply the agreed method of allocating the former  
12 owner's payments, but instead relied entirely on how Red Rock allocated the  
13 payments in Red Rock's payment allocation reports. *See* Paragraphs 4 and 5 of the  
14 court's conclusions of law, filed on June 4, 2020 at JA5, pg. 1014, ¶¶ 4, 5.  
15  
16

17 In 9352 Cranesbill Trust v. Wells Fargo Bank, N.A., 136 Nev. at 80, 459 P.3d  
18 at 231, this court cited 70 C.J.S. Payment § 53 (2019), to support its conclusion that  
19 when the court must "determine how to apply the payment," the court should make  
20 that allocation "in view of all of the circumstances, as is most in **accord with justice**  
21 **and equity** and will best protect and maintain the rights of **both** the debtor **and** the  
22 creditor." (emphasis added)  
23  
24  
25  
26

27 From the perspective of the borrower/unit owner, there is no benefit to  
28

1 applying a payment only to the superpriority portion of an assessment lien because  
2 foreclosure of even the nonpriority portion of the lien will terminate the unit owner's  
3 interest in the property and vest title to the property in the HOA sale purchaser.  
4

5 From the perspective of the creditor (i.e. the HOA), there is a specific benefit  
6 to payments being allocated only to foreclosure costs and the nonpriority portion of  
7 the lien because purchasers are more likely to enter bids at the HOA foreclosure sale  
8 if they know that the subordinate deed of trust will be extinguished.  
9

10 From the perspective of "justice and equity," it also makes sense that any  
11 payments made by the unit owner be allocated first to foreclosure costs and the  
12 nonpriority portion of the lien because allocating those payments to the superpriority  
13 portion of the lien disturbs "the equitable balance" that the superpriority lien was  
14 designed to achieve.  
15

16 In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 748-749, 334  
17 P.3d at 413, this court quoted from Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d  
18 1085, 1090 (Del. 1995), that "[a]n official comment written by the drafters of a statute  
19 and available to a legislature before the statute is enacted has considerable weight as  
20 an aid to statutory construction."  
21

22 This court also noted that comment 1 to 1982 UCIOA § 3-116 and comment  
23  
24  
25  
26  
27  
28

1 2 to 1994 & 2008 UCIOA § 3-116 stated that the superpriority lien “is a specially  
2 devised mechanism designed to ‘strike[ ] an equitable balance between the need to  
3 enforce collection of unpaid assessments and the obvious necessity for protecting the  
4 priority of the security interests of lenders.’” 130 Nev. at 748, 334 P.3d at 412  
5

6  
7 That “equitable balance” is not served if a lender can choose not to make any  
8 payments to an HOA during the nonjudicial foreclosure process and later insist that  
9 partial payments made by a unit owner be applied to the assessments making up the  
10 superpriority portion of the lien.  
11

12  
13 As stated at page 14 of plaintiff’s opposition (JA4, pg. 742), by the time that  
14 Mr. Nardizzi made his first partial payment on May 30, 2013, Mr. Nardizzi’s account  
15 had been delinquent since January 1, 2009, a period of approximately four and one-  
16 half years.  
17

18  
19 The account detail produced by Red Rock (JA2b, pgs. 470 to 474) proved that  
20 by December 3, 2013, the former owner had failed to pay four semi-annual  
21 assessments of \$114.00, six semi-annual assessments of \$120.00, ten late fees of  
22 \$10.00, and interest of \$146.55, for a total of \$1,176.00.  
23

24  
25 At page 15 of its reply (JA4, pg. 922), defendant stated that Red Rock’s  
26 account detail (JA2b, pgs. 470-474) proved that the superpriority lien was only  
27  
28

1 \$114.00 and that the partial payments made by the former owner were “allocated by  
2 the HOA Trustee, **at the direction of the HOA**, to Nardizzi’s account.” (emphasis  
3 added)  
4

5         The record on appeal, however, does not contain any evidence proving that the  
6 HOA directed Red Rock to allocate the payments received from the former owner in  
7 a manner that is inconsistent with the Payment Agreement and the HOA’s written  
8 Collection of Assessments Policy.  
9

10         The Payment Allocation Reports attached as Exhibit 15 (JA3a, pg. 558),  
11 Exhibit 16 (JA3a, pg. 563), Exhibit 17 (JA3a, pg. 568), and Exhibit 18 (JA3a, pg.  
12 573) to defendant’s motion were each prepared by Red Rock. None of the reports  
13 include any instructions from the HOA as to how Red Rock should apply the monies  
14 received from the former owner.  
15

16         At pages 16 and 17 of its reply (JA4, pgs. 923-924), defendant stated that the  
17 HOA’s discovery responses prove that the HOA “outsources its collection and  
18 foreclosure activities,” but the HOA’s responses to Interrogatory No. 16 and  
19 Interrogatory No. 18 did not say that the HOA “outsourced” how the payments  
20 received from Red Rock’s “collection and foreclosure activities” would be applied.  
21

22         Arguments made by counsel are not evidence and do not establish the facts of  
23  
24  
25  
26  
27  
28

1 a case. Nevada Association Services, Inc. v. Eighth Judicial District Court, 130 Nev.  
2 949, 957, 338 P.3d 1250, 1255-56 (2014).  
3

4 Because the record on appeal does not contain any admissible evidence proving  
5 that the HOA directed Red Rock to allocate the payments received by Red Rock in  
6 a manner inconsistent with the Payment Agreement and the HOA's written Collection  
7 of Assessments Policy, the findings in paragraphs 17, 18, 19 and 20 of the district  
8 court's findings of fact (JA5, pg. 1012, ¶¶ 17, 18, 19 and 20) should be vacated by  
9 this court.  
10  
11  
12

13 **4. The HOA and Red Rock complied with every notice requirement in**  
14 **NRS 116.31162 to NRS 116.31168, and by incorporation, NRS 107.090.**

15 At page 18 of its motion (JA2a, pg. 346), defendant stated that in SFR  
16 Investments Pool 1, LLC v. Bank of New York Mellon, 134 Nev. 483, 487, 422 P.3d  
17 1248, 1252 (2018), this court observed "that NRS 116.31168 incorporates NRS  
18 107.090, which requires that notices be sent to a deed of trust beneficiary."  
19  
20  
21

22 Although NRS 116.31168(1) states that "[t]he provisions of NRS 107.090  
23 apply to the foreclosure of an association's lien as if a deed of trust were being  
24 foreclosed," NRS 107.090 does not require that any "notices be sent to a deed of trust  
25 beneficiary."  
26  
27

28 / / /



1 Prior to being amended in 2019, NRS 107.090(3) required that a copy of the  
2 notice of default be mailed to “[e]ach person who has recorded a request for a copy  
3 of the notice” (NRS 107.090(3)(a)) and “[e]ach other **person with an interest** whose  
4 interest or claimed interest is subordinate to the deed of trust.” (NRS 107.090(3)(b))  
5 (emphasis added)  
6  
7

8  
9 NRS 107.090(4) required that “a copy of the notice of time and place of sale”  
10 be mailed to “each person described in subsection 3.”  
11

12 NRS 107.090(1) stated:

13 As used in this section, “person with an interest” means **any person**  
14 **who has or claims any right, title or interest in, or lien or charge**  
15 **upon, the real property** described in the deed of trust, as evidenced by  
16 any document or instrument recorded in the office of the county recorder  
of the county in which any part of the real property is situated.  
(emphasis added)

17  
18 The Nevada Legislature’s decision not to include the words “deed of trust  
19 beneficiary” in NRS 107.090(3)(b) is significant because this court has stated that  
20 “**we are bound to follow a statute’s plain language** when the language is  
21 unambiguous” and that “[t]o do otherwise would implicate the separation of powers.”  
22  
23 Pope v. Motel 6, 121 Nev. 307, 314, 114 P.3d 277, 282 (2005) (emphasis added)  
24

25 In Public Employees’ Benefits Program v. Las Vegas Metropolitan Police  
26 Dep’t, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008), this court stated that “when a  
27  
28

1 statute is facially clear, we will generally not go beyond it in determining the  
2 Legislature’s intent” and “**we consider multiple legislative provisions as a whole,**  
3 **construing a statute so that no part is rendered meaningless.**” (emphasis added)  
4

5 In Williams v. State Dep’t of Corrections, 133 Nev. 594, 598, 402 P.3d 1260,  
6 1264 (2017), this court stated that “[w]e must presume that the variation in language  
7 indicates a variation in meaning” and that the Legislature’s “explicit decision to use  
8 one word over another in drafting a statute is material.” (quoting S.E.C. v. McCarthy,  
9 322 F.3d 650, 656 (9th Cir. 2003)).  
10  
11

12 At page 18 of its motion (JA2a, pg. 346), defendant referred to footnote 11 in  
13 Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev.  
14 740, 749 n. 11, 405 P.3d 641, 648 n. 11 (2017)(hereinafter “Shadow Canyon”), that  
15 parenthetically describes SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev.  
16 at 756, 334 P.3d at 418, as “observing that NRS 116.31168 incorporates NRS  
17 107.090, which requires that notices be sent to a deed of trust beneficiary.” This  
18 court, however, did not use the words “deed of trust beneficiary” in SFR Investments  
19 Pool 1, LLC v. U.S. Bank, N.A.  
20  
21  
22  
23  
24  
25

26 At page 18 of it motion (JA2a, pg. 346), defendant also altered the meaning of  
27 the language quoted by defendant from U.S. Bank, National Association ND v.  
28

1 Resources Group, LLC, 135 Nev. 199, 203, 444 P.3d 442, 446 (2019), by inserting  
2 the word “[MERS]” in place of the words “U.S. Bank” that were used by this court  
3  
4 in that case.

5  
6 This change in language is significant because MERS did not serve as a  
7 nominee for the Lender in U.S. Bank, National Association ND v. Resources Group,  
8  
9 LLC like MERS did in the present case. Paragraph 2 instead named the Lender as the  
10 beneficiary of the deed of trust. 135 Nev. at 202, 444 P.3d at 446. This court also  
11  
12 noted that paragraph 1 of the deed of trust identified a specific mailing address for the  
13 Lender. Id.

14  
15 Furthermore, earlier in its opinion, this court stated that “these statutes require  
16  
17 an HOA seeking to foreclose a superpriority lien to send **the holder** of a recorded  
18 first deed of trust notices of default and of sale, even though the deed of trust holder  
19  
20 has not formally requested them.” 135 Nev. at 201, 443 P.3d at 445. (emphasis added)

21 In SFR Investments Pool 1, LLC v. Bank of New York Mellon, this court  
22  
23 stated:

24 Replacing the deed of trust with the homeowners’ association  
25 superpriority lien within the language of NRS 107.090 then requires that  
26 the homeowners’ association provide notice **to the holder of the first**  
**security interest** as a subordinate interest.

27  
28 135 Nev. at 203, 443 P.3d at 446. (emphasis added)

1 In U.S. Bank, National Ass'n ND v. Resources Group, LLC, the deed of trust  
2 stated that any required notice "shall be given by delivering it or by mailing it by first  
3 class mail to the appropriate party's address on page 1." 135 Nev. at 202, 443 P.3d  
4 at 446.  
5

6  
7 The defect in U.S. Bank, National Ass'n ND v. Resources Group, LLC was  
8 created because Alessi & Koenig did not mail copies of the notice of default and  
9 notice of foreclosure sale to U.S. Bank National Association ND at its address in  
10 Fargo, ND stated in paragraph 1 at page 1 of the deed of trust. Alessi & Koenig  
11 instead mailed the notices to the "return to" name and address for "US Recordings"  
12 appearing at the top left corner of page 1 of the deed of trust.  
13  
14  
15

16 In the present case, paragraph 15 of the deed of trust (JA2a, pg. 246, ¶15)  
17 stated in relevant part:  
18

19  
20 Any notice to Lender shall be given by delivering it or mailing it by first  
21 class mail to Lender's address stated herein unless Lender has  
22 designated another address by notice to Borrower. Any notice in  
23 connection with this Security Instrument shall not be deemed to have  
24 been given to Lender until actually received by Lender. If any notice  
25 required by this Security Instrument is also required under Applicable  
26 Law, the Applicable Law requirement will satisfy the corresponding  
27 requirement under this Security Instrument.  
28

29 Paragraph ( C ) at page 1 of the deed of trust identified the Lender's address as  
30 155 North Lake Avenue, Pasadena, CA 91101. (JA2a, pg. 237, ¶ (C)) This is the  
31 exact address to which Red Rock timely mailed copies of both the notice of default  
32

1 and the notice of foreclosure sale. *See* certified mail receipts at JA2a, pgs. 281, 295.

2       The deed of trust does not contain any language that required that any notices  
3  
4 be mailed to MERS either as beneficiary or as nominee for the Lender.

5       Defendant also does not identify any statute or other authority that requires that  
6  
7 notice to be sent to MERS when MERS is named as a beneficiary but is “acting solely  
8  
9 as nominee for Lender and Lender’s successors and assigns.” *See* paragraph (E) at  
10 JA2a, pg. 238, ¶ (E).

11       The holding in U.S. Bank, National Ass’n ND v. Resources Group, LLC does  
12  
13 not support defendant’s argument because MERS was not identified as a nominee for  
14  
15 the Lender in the deed of trust in that case.

16       In Edelstein v. Bank of New York Mellon, 128 Nev. 505, 520, 286 P.3d 249,  
17  
18 259 (2012), this court stated that “a [deed of trust] beneficiary is entitled to a  
19  
20 distinctly different set of rights than that of a note holder.” This court also stated:

21       Although we conclude that MERS is the proper beneficiary pursuant to  
22       the deed of trust, **that designation does not make MERS the holder**  
23       **of the note.** (emphasis added)

24       In Edelstein, it was necessary to determine the “proper beneficiary” of the deed  
25  
26 of trust because the statute interpreted in Edelstein specifically provided that “[t]he  
27 **beneficiary of the deed of trust** or a representative shall attend the mediation.” NRS  
28

1 107.086(5). (emphasis added)

2 In the present case, on the other hand, NRS 107.090(3)(b) and NRS 107.090(4)  
3  
4 did not require that notices be mailed to “the beneficiary identified in the Deed of  
5 Trust” as claimed by defendant at page 18 of its motion. (JA2a, pg. 346)  
6

7 In the present case, the “person with an interest” in the deed of trust recorded  
8  
9 on March 15, 2005 was not MERS. The “person with an interest” was instead the  
10 Lender named in the deed of trust: IndyMac Bank, F.S.B. (JA2a, pg. 237, ¶ (C))  
11

12 Paragraph (E) of the deed of trust expressly stated that MERS was acting  
13 “solely as nominee for Lender and Lender’s successors and assigns.” (JA2a, pg. 238,  
14  
15 ¶ (E))

16 The recitals at page 3 of the deed of trust (JA2a, pg. 239) also stated:  
17

18 Borrower understands and agrees that **MERS holds only legal title to**  
19 **the interests granted by Borrower in this Security Instrument. . . .**  
(emphasis added)

20 In Landmark National Bank v. Kesler, 216 P.3d 158 (Kan. 2009), the lender  
21  
22 named in a first mortgage filed a petition to judicially foreclose its mortgage, but did  
23  
24 not name MERS as a party even though MERS was identified as the beneficiary in  
25  
26 a second mortgage recorded against the property. After the lender named in the first  
27 mortgage obtained a default judgment and the property was sold at a sheriff’s sale,  
28

1 the unrecorded assignee of the second mortgage (i.e. Sovereign Bank) filed a motion  
2 to set aside the court's confirmation of the sale because "MERS was a K.S.A. 60-  
3  
4 219(a) contingently necessary party and, because Landmark failed to name MERS as  
5 a defendant, Sovereign did not receive notice of the proceedings." Id. at 162.

6  
7 MERS also joined Sovereign's motion. Id.

8  
9 The Kansas Supreme Court examined language in the mortgage that matches  
10 the language used at pages 1 and 2 of the deed of trust (JA2a, pgs. 237-238) and  
11 language that matches other language used in the deed of trust in the present case.  
12

13 In particular, the court noted that paragraph 12 of the mortgage stated that "any  
14 notice to Lender shall be given by certified mail to Lender's address stated herein or  
15 to such other address as Lender may designate by notice to Borrower as provided  
16 herein." Id. at 165.  
17

18  
19 As quoted at page 32 above, paragraph 15 of the deed of trust (JA2a, pg. 246,  
20 ¶15) in the present case contains similar language.

21  
22 In Culhane v. Aurora Loan Services of Nebraska, 708 F.3d 282, 287 (5th Cir.  
23 2013), the court stated:

24  
25  
26 **MERS's mortgagee status is narrowly circumscribed: it acts solely**  
27 **as "nominee" for the owner or servicer of the mortgage**, including  
28 the owner's or servicer's successors and assigns. There is one condition:  
the party for whom MERS serves as nominee must be a member of  
MERS. The upshot of this arrangement is that MERS holds the legal

1 title to the mortgage as mortgagee of record, but **it does not have any**  
2 **beneficial interest in the loan.** (emphasis added)

3 Because MERS does not hold “any beneficial interest” in a loan, MERS is not  
4 a “person with an interest” as defined in NRS 107.090(1).  
5

6 Black’s Law Dictionary (10th ed. 2014) defines the word “nominee” as “[a]  
7 person designated to act in place of another, usu. in a very limited way” and as “[a]  
8 party who holds bare legal title for the benefit of others or who receives and  
9 distributes funds for the benefit of others.” (emphasis added)  
10  
11

12 By definition, a “nominee” like MERS is not a “person with an interest” as  
13 defined in NRS 107.090(1). MERS is instead an agent for the “person with an  
14 interest.”  
15  
16

17 Defendant did not cite any authority that requires duplicate notices to be  
18 mailed to MERS when notice is provided directly to the “person with an interest” at  
19 the exact address identified in the deed of trust.  
20  
21

22 At page 19 of its motion (JA2a, pg. 347), defendant stated that “the Deed of  
23 Trust cannot be extinguished from the Property as its holder never received a copy  
24 of the operative foreclosure notices, or had actual notice of the sale by any means.”  
25 As discussed above, MERS was not the “holder” of the deed of trust in the present  
26 case.  
27  
28



1 This court has stated that a nonjudicial foreclosure agent's only duty is to mail  
2 the notices, that "[t]heir mailing presumes that they were received," and that "[a]ctual  
3 notice is not necessary as long as the statutory requirements are met." Hankins v.  
4 Administrator of Veteran Affairs, 92 Nev. 578, 555 P.2d 483, 484 (1976); Turner v.  
5 Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462, 464 (1971)(applying NRS  
6 107.080(3)).  
7  
8  
9

10 Because copies of both the notice of default and the notice of foreclosure sale  
11 were timely mailed to the Lender, the law presumes that both notices were received.  
12

13 At page 20 of its motion (JA2a, pg. 348), defendant stated that "[a]s MERS was  
14 not provided the Notice of Default and Notice of Sale it was deprived of all of the  
15 required information contained in the foreclosure notices." On the other hand,  
16 defendant did not cite any authority that requires a second notice to be served on a  
17 "nominee" when notice has already been provided directly to the entity for which  
18 MERS is "acting solely as a nominee."  
19  
20  
21  
22

23 Because defendant did not prove that any required notice was not timely  
24 recorded, mailed, posted or published as required by statute, the sale held on  
25 December 3, 2013 was not void.  
26

27 ///  
28

1 **5. Defendant not prove the element of causation required by the**  
2 **California rule.**

3 At the bottom of page 20 and top of page 21 of its motion (JA2a, pgs. 348-  
4 349), defendant stated that “[t]he fair market value of the Property at the time of the  
5 HOA Sale was \$185,000" and that the high bid of \$17,400.00 paid by plaintiff at the  
6 foreclosure sale was “less than 10% of the Property’s value.”  
7  
8

9 On the other hand, in Shadow Canyon, this court stated that the “commercial  
10 reasonableness” standard, which derives from Article 9 of the Uniform Commercial  
11 Code, “has no applicability in the context of an HOA foreclosure involving the sale  
12 of real property.” Shadow Canyon, 133 Nev. at 741, 405 P.3d at 642.  
13  
14

15 With respect to the reference to comment b to Restatement (Third) of Prop.:  
16 Mortgages, § 8.3 (1997) in Shadow Wood Homeowners Association, Inc. v. New  
17 York Community Bancorp, Inc., 132 Nev. 49, 60, 366 P.3d 1105, 1112-1113 (2016),  
18  
19 this court stated in Shadow Canyon:  
20  
21

22 As to the Restatement’s 20-percent standard, we clarify that *Shadow*  
23 *Wood* did not overturn this court’s longstanding rule that “inadequacy  
24 of price, however, gross, is not in itself a sufficient ground for setting  
25 aside a trustee’s sale” absent additional “proof of some element of  
26 fraud, unfairness, or oppression as accounts for and brings about the  
27 inadequacy of price,” 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting  
28 *Golden v. Tomiyasu*, 9 N3v. 503, 514, 387 P.2d 989, 995 (1963)).

133 Nev. at 741, 405 P.3d at 642-643.

In Shadow Wood, this court stated that the consideration paid by a bona fide

1 purchaser need only be “valuable” (*quoting* Fair v. Howard, 6 Nev. 304, 308 (1871))  
2 and “that the fact that the foreclosure sale purchaser purchased the property for a ‘low  
3 price’ did not in itself put the purchaser on notice that anything was amiss with the  
4 sale.” (*quoting* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished  
5 disposition)). Shadow Wood, 132 Nev. at 65, 366 P.3d at 1115.  
6  
7

8  
9 The \$17,400.00 paid by plaintiff satisfies these standards.

10 At page 21 of its motion (JA2a, pg. 349), defendant stated that fraud,  
11 oppression, or unfairness affected the foreclosure sale because Red Rock mailed  
12 letters to the Lender and Wells Fargo Bank, N.A. that stated: “The Association’s Lien  
13 for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder.”  
14 (JA3a, pgs. 536-537)  
15  
16  
17

18 On the other hand, the very next sentence in each letter stated: “This Lien may  
19 affect your position.” (JA3a, pgs. 536-537)  
20

21 Defendant did not prove that any person who received the letters interpreted  
22 the letters as a statement that the HOA was not foreclosing the superpriority portion  
23 of its lien.  
24  
25

26 Furthermore, because defendant did not prove that either letter was made  
27 known to the persons who attended the public auction held on December 3, 2013, it  
28

1 is impossible for these letters to “account for” or have “brought about” the high bid  
2 of \$17,400.00 paid by plaintiff for the Property.  
3

4 Defendant also stated that the HOA’s governing documents contained a  
5 mortgage protection clause. As discussed at page 13 above, this court stated in SFR  
6 Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 P.3d at 418-419,  
7 that “NRS 116.1104 defeats this argument.”  
8  
9

10 Defendant’s second allegation of fraud, oppression, or unfairness is that after  
11 the notice of lien was recorded, the former owner made payments to Red Rock that  
12 were “equal to almost eight times the superpriority amount.” (JA2a, pg. 350)  
13  
14

15 As discussed at pages 20 to 29 above, however, defendant did not meet its  
16 burden to prove that Red Rock properly applied the former owner’s payments to the  
17 super priority portion of the HOA’s lien.  
18  
19

20 Defendant’s third allegation of fraud, oppression, or unfairness is that Red  
21 Rock did not mail the notice of default or notice of sale to MERS. (JA2a, pgs. 350-  
22 351) However, as discussed above, MERS was simply a nominee on behalf of  
23 IndyMac Bank, and NRS 107.090 does not require notices to be mailed to a nominee.  
24 Defendant also did not prove that failing to mail notice to MERS had any impact on  
25  
26 the amounts bid at the public auction held on December 23, 2013.  
27  
28

1 **6. Defendant's counterclaim seeking declaratory relief was barred by**  
2 **the three year statute of limitations in NRS 11.190(3)(a).**

3 At page 3 of its motion for summary judgment (JA2a, pg. 331) defendant stated  
4 that "[t]his quiet title action involves the claimed rights and interests in real property  
5 that . . . ."

6  
7 As discussed at page 4 of plaintiff's opposition (JA2, pg. 202), defendant's  
8 counterclaim asserted a first cause of action for quiet title/declaratory relief, a second  
9 cause of action for permanent and preliminary injunction, and a third cause of action  
10 for unjust enrichment.  
11  
12

13 The controlling language in NRS 116.31166(1) states that the recitals in a  
14 foreclosure deed are "conclusive proof of the matters recited." This includes the  
15 recital of "default" in NRS 116.31166(1)(a). NRS 116.31166(2) states that the  
16 foreclosure deed is "conclusive against the unit's former owner, his or her heirs and  
17 assigns, and all other persons."  
18  
19  
20

21 A lender like defendant cannot rebut these presumptions in its own mind and  
22 act as if the presumptions do not exist. The presumptions are true until proven  
23 otherwise, and one can only prove otherwise through a court action. The record  
24 titleholder does not have any duty to prove the presumptions because this would  
25 obviously defeat the whole nature of the presumptions.  
26  
27  
28

1 Nevada law provides that “[a] presumption not only fixes the burden of going  
2 forward with evidence, but it also shifts the burden of proof.” Yeager v. Harrah's  
3 Club, Inc., 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (*citing* NRS 47.180 and  
4 Vancheri v. GNLV Corp., 105 Nev. 417, 421, 777 P.2d 366, 368 (1989)).  
5

6  
7 In Shadow Canyon, 133 Nev. at 746, 405 P.3d at 646, this court stated that  
8 NRS 47.250(16) includes a presumption that “the law has been obeyed” and that there  
9 is “a presumption in favor of the record titleholder.” (*quoting* Breliant v. Preferred  
10 Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)).  
11

12  
13 In Shadow Wood, 132 Nev. at 57, 366 P.3d at 1110-1111, this court discussed  
14 the effect that a conclusive recital of default could have even where no default  
15 existed, and in order to avoid what it perceived to be a “breathtakingly broad”  
16 reading, this court held that “courts retain the power to grant equitable relief from a  
17 defective foreclosure sale when appropriate despite NRS 116.31166.”  
18  
19

20  
21 This court stated, however, that the recitals in a foreclosure deed are  
22 “conclusive, *in the absence of grounds for equitable relief.*” 132 Nev. at 59, 366 P.3d  
23 at 1112 (*quoting* Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d  
24 493, 496 (1943)).  
25

26  
27 This court also concluded that the “Legislature, through NRS 116.31166’s  
28

1 enactment, did not eliminate the equitable authority of the courts to consider quiet  
2 title actions when an HOA’s foreclosure deed contains conclusive recitals.” 132 Nev.  
3  
4 at 59-60, 366 P.3d at 1112.

5  
6 As a result, but for invoking the court’s inherent powers of equity, neither this  
7 court, nor any other court, could ever look behind the conclusive recital of default.  
8  
9 As a result, simply proving the delivery of a valid tender does not end the inquiry  
10 because as stated by this court in Shadow Wood, “[w]hen sitting in equity, however,  
11 courts must consider the entirety of the circumstances that bear upon the equities.”  
12  
13 132 Nev. at 63, 366 P.3d at 1114 (citations omitted).

14  
15 In Armenta-Carpio v. Nevada, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013),  
16 this court stated that “under the doctrine of *stare decisis*, we will not overturn  
17 precedent absent compelling reasons for doing so.”

18  
19 In Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev. 604, 612,  
20 427 P.3d 113, 121 (2018)(hereinafter “Diamond Spur”), this court included a passing  
21 reference to Shadow Wood when discussing “SFR’s status as a bona fide purchaser,”  
22  
23 but this court did not discuss at all the legal effect of the “conclusive” recital of  
24  
25 default on the lender’s claim that the rejected tender cured the default as to the  
26  
27 superpriority portion of the lien. 134 Nev. at 612, 427 P.2d 121.  
28

1 In Resources Group, LLC, as Trustee of E. Sunset Road Trust v. Nevada  
2 Association Services, Inc., 135 Nev. 48, 437 P.3d 154, 156 (2019), this court stated  
3  
4 that “the burden of demonstrating that the delinquency was cured presale, rendering  
5  
6 the sale void, was on the party challenging the foreclosure . . . .”

7 Consequently, in order to obtain equitable relief from the “conclusive” recital  
8  
9 of default in the foreclosure deed, defendant was required to timely file an action  
10 seeking that relief.

11  
12 Declaratory relief is not a stand-alone claim. Stock West, Inc. v. Confederated  
13 Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989); Nguyen v.  
14 JP Morgan Chase Bank, No. SACV 11-01908 DOC (ANx), 2012 WL 294936, at \*4  
15  
16 (C.D. Cal. Feb. 1, 2012) (“A claim for declaratory relief is not a stand-alone claim,  
17  
18 but rather depends upon whether or not Plaintiff states some other substantive basis  
19  
20 for liability.”). For a party to obtain declaratory relief, there must be an independent  
21 basis for jurisdiction. Miller–Wohl Co., Inc. v. Commissioner of Labor & Industry,  
22  
23 685 F.2d 1088, 1091 (9th Cir.1982).

24 Because declaratory relief is not a stand-alone claim and is only derivative of  
25  
26 some other substantive claim brought in the action, the statute of limitations that  
27  
28 governs a request for declaratory relief is that which applies to the substantive cause



1 of action. “A claim for declaratory relief is subject to a statute of limitations generally  
2 applicable to civil claims.” Zuill v. Shanahan, 80 F.3d 1366, 1369-70 (9th Cir. 1996).

3  
4 In Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993), the  
5 court quoted from Gilbert v. City of Cambridge, 932 F.2d 51, 58 (5th Cir.1991), that  
6 if “a claim for declaratory relief could have been resolved through another form of  
7 action which has a specific limitations period, the specific period of time will  
8 govern.” The statute of limitations for declaratory relief is the one applicable to an  
9 ordinary legal or equitable action based on the same claim. Mangini v.  
10 Aerojet-General Corp., 230 Cal. App. 3d 1125, 1155, 281 Cal. Rptr. 827, 846 (Cal.  
11 Ct. App. 1991).

12  
13 In Perry v. Terrible Herbst, Inc., 132 Nev. 767, 770, 383 P.3d 257, 260 (2016),  
14 this court stated that “[t]he nature of the claim, not its label, determines what statute  
15 of limitations applies.” (*citing* Stalk v. Mushkin, 125 Nev. 21, 25, 199 P.3d 838, 841  
16 (2009)) This court also stated that “[w]hen a statute lacks an express limitations  
17 period, courts look to analogous causes of action for which an express limitations  
18 period is available either by statute or by case law.” 383 P.3d at 260. (*quoting*  
19 Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex.  
20 1998))

1 In Diamond Spur, 134 Nev. at 610, 427 P.3d at 120, this court discussed  
2 specific principles that apply to statutory liens:  
3

4 Generally, the creation and release of a lien cause priority changes in a  
5 property's interests as a result of a written legal document. But Bank of  
6 America's tender discharged the superpriority portion of the HOA's lien  
7 by operation of law. *See* NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A  
8 statutory lien is created and defined by the legislature. The character,  
9 operation and extent of a statutory lien are ascertained solely from the  
terms of the statute ."). NRS Chapter 116's statutory scheme allows  
banks to tender the payment needed to satisfy the superpriority portion  
of the HOA lien and maintain its senior interest as the first deed of trust  
holder. NRS 116.3116(1)-(3).

10 In Diamond Spur, the plaintiff bank asserted its tender claim, and this court  
11 decided the issue of satisfaction of the superpriority lien, by tender, solely under the  
12 language in NRS 116.3116. In particular, this court stated that "NRS 116.3116  
13 governs liens against units for HOA assessments and details the portion of the lien  
14 that has superpriority status." 134 Nev. at 606, 427 P.3d at 117.  
15  
16  
17

18 This court also stated:

19  
20 As discussed in Section A, **a plain reading of NRS 116.3116** indicates  
21 that at the time of Bank of America's tender, tender of the superpriority  
22 amount by the first deed of trust holder was sufficient to satisfy that  
23 portion of the lien. (emphasis added)

24 134 Nev. at 608, 427 P.3d at 118.

25 In Diamond Spur, this court held that Bank of America's delivery of a check  
26 in the amount of nine months of assessments satisfied the superpriority portion of the  
27 lien, and therefore at the time when the HOA foreclosed there was no default as to  
28

1 and no authority to foreclose the superpriority portion of the lien. 129 Nev. at 612,  
2 427 P.3d at 121.  
3

4 An allegation that the superpriority portion of the lien was satisfied challenges  
5 the fact that a default existed and that the HOA had authority to foreclose. *See Collins*  
6 *v. Union Fed. Sav. & Loan Ass’n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) (“An  
7  
8 action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can  
9 establish that at the time the power of sale was exercised or the foreclosure occurred,  
10  
11 no breach of condition or failure of performance existed on the mortgagor's or  
12  
13 trustor's part which would have authorized the foreclosure or exercise of the power  
14  
15 of sale.”) *See also, McKnight Family, LLP v. Adept Management Services, Inc.*, 129  
16  
17 Nev. 610, 616, 310 P.3d 555, 559 (2013) (“A wrongful foreclosure claim challenges  
18 the authority behind the foreclosure, not the foreclosure act itself.”)  
19

20 Black’s Law Dictionary (10th ed. 2014) defines the word “liability” to be “[t]he  
21  
22 quality, state, or condition of being legally obligated or accountable.”  
23

24 Consequently, the statute of limitations that would apply to the declaration  
25  
26 sought by defendant against plaintiff is the three-year period in NRS 11.190(3)(a)  
27  
28 because the claim is “[a]n action upon a liability created by statute.”  
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1 As stated by this court in Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788,  
2 789 (1997), “[i]n determining whether a statute of limitations has run against an  
3 action, the time must be computed from the day the cause of action accrued.” This  
4 court also stated that “[a] cause of action ‘accrues’ when a suit may be maintained  
5 thereon.” Id.

6 This court has recognized that “[e]very one is presumed to know the law and  
7 this presumption is not even rebuttable.” Smith v. State, 38 Nev. 477, 481, 151 P.  
8 512, 513 (1915).

9 As a result, defendant is presumed to have known the “fundamental principle  
10 of mortgage law” that “[a] valid foreclosure of a mortgage terminates all interests in  
11 the foreclosed real estate that are junior to the mortgage being foreclosed and whose  
12 holders are properly joined or notified under applicable law.” Restatement (Third)  
13 of Prop.: Mortgages, § 7.1 (1997).

14 Defendant is also presumed to have known that this “fundamental principle of  
15 mortgage law” supplemented the provisions of NRS Chapter 116 pursuant to NRS  
16 116.1108.

17 Where the facts giving rise to the cause of action are a matter of public record,  
18 “[t]he public record gave sufficient notice to start the statute of limitations running.”  
19

1 Cumming v. San Bernardino Redevelopment Agency, 125 Cal. Rptr. 2d 42, 46 (Cal.  
2 App. 2002).

3  
4 In the present case, the foreclosure sale that extinguished the deed of trust  
5 became a matter of public record when the foreclosure deed was recorded on  
6 December 27, 2013. (JA1, pg. 233-234)  
7

8  
9 Because the Lender had constructive notice that the high bid paid by plaintiff  
10 exceeded “the total amount of the lien” disclosed in each recorded notice, the Lender  
11 had notice no later than December 27, 2013, that the public auction held on December  
12 3, 2013 had extinguished the deed of trust.  
13

14  
15 Consequently, defendant needed to file an affirmative claim seeking equitable  
16 relief from the conclusive recital of default on or before December 27, 2016.  
17

18 As noted above, however, defendant did not file its counterclaim seeking relief  
19 from the “conclusive” foreclosure deed until defendant filed its answer and  
20 counterclaim on October 15, 2018. (JA1, pgs. 19-93)  
21

22  
23 Because defendant’s counterclaim was filed more than three (3) years after the  
24 HOA foreclosure deed was recorded on December 27, 2013, defendant’s  
25 counterclaim was barred by the statute of limitations.  
26

27 ///  
28

1 **7. Defendant's counterclaim seeking declaratory relief was barred**  
2 **by the four year statute of limitations in NRS 11.220.**

3 As quoted at page 8 of plaintiff's opposition (JA2, pg. 736), NRS 11.220 states  
4 that "[a]n action for relief, not hereinbefore provided for, must be commenced within  
5  
6 4 years after the cause of action shall have accrued."

7  
8 Because the claim for declaratory relief asserted by defendant falls within the  
9 cases described in NRS 11.190(3)(a), NRS 11.220 does not apply to defendant's  
10  
11 counterclaim.

12 However, even if this court applied the four-year statute of limitations in NRS  
13  
14 11.220, that four-year time period expired no later than December 27, 2017.

15 **8. Defendant's counterclaim seeking declaratory relief does not fall**  
16 **within either NRS 11.070 or NRS 11.080.**

17 As quoted at page 8 of plaintiff's opposition (JA4, pg. 736), NRS 11.070  
18  
19 expressly limits the five year period provided by that statute to a "cause of action or  
20  
21 defense to an action" that is "founded upon the title to real property." NRS 11.070  
22 also requires that "the person prosecuting the action or making the defense, or under  
23  
24 whose title the action is prosecuted or the defense is made" was "seized or possessed  
25  
26 of the premises in question within 5 years before the committing of the act" for which  
27 the "action is prosecuted or defense made."  
28

1 NRS 11.080 also provides a five-year limitations period for actions “for the  
2 recovery of real property, or for the recovery of possession thereof. . . .”  
3

4 In Hamm v. Arrowcreek Homeowners Ass’n, 124 Nev. 290, 298, 183 P.3d 895,  
5  
6 902 (2008), this court stated that while “a lien is a monetary encumbrance on  
7 property, which clouds title,” the lien “exists separately from that title,” and therefore  
8  
9 an action involving the lien does not “relate to” title.

10 Defendant’s counterclaim could not be “founded upon title to real property”  
11  
12 as required by NRS 11.070 because defendant did not foreclose its deed of trust and  
13  
14 obtain title to or possession of the Property. For the same reason, defendant’s  
15 counterclaim could not be an action for the “recovery of real property” or the  
16  
17 “recovery of the possession thereof” as required by NRS 11.080.

18 A plain reading of the language used by the Legislature in both NRS 11.070  
19  
20 and NRS 11.080 proves that defendant did not have standing to assert a claim that  
21  
22 falls within either statute.

23 **9. Plaintiff is protected as a good faith purchaser for value from the**  
24 **unrecorded claim that the default as to the superpriority portion**  
25 **of the HOA’s lien was cured.**

26 In Shadow Wood, this court stated:

27 So, when an association’s foreclosure complies with the statutory  
28 foreclosure rules, **as evidenced by the recorded notices**, such as is the  
case here, and without any facts to indicate the contrary, the purchaser

1 would have only “notice” that the former owner had the ability to raise  
2 an equitably based post-sale challenge, **the basis of which is unknown**  
3 **to that purchaser.**

4 **That NYCB retained the ability to bring an equitable claim to**  
5 **challenge Shadow Wood’s foreclosure sale is not enough in itself to**  
6 **demonstrate that Gogo Way took the property with notice of any**  
7 **potential future dispute as to title.** And NYCB points to no other  
8 evidence indicated that Gogo Way had notice before it purchased the  
9 property, either actual, constructive, or inquiry, as to NYCB’s attempts  
10 to pay the lien and prevent the sale. . . .

11 132 Nev. at 65-66, 366 P.3d at 1116. (emphasis added)

12 This court also stated that because the lender did not prove that the purchaser,  
13 Gogo Way, “had any notice of the pre-sale dispute between NYCB and Shadow  
14 Wood, the potential harm to Gogo Way must be taken into account and further  
15 **defeats NYCB’s entitlement to judgment as a matter of law.”** 132 Nev. at 66, 366  
16 P.3d at 1116. (emphasis added)

17 In the present case, every document recorded as of the date of the HOA  
18 foreclosure sale showed that the Lender held the beneficial interest in the deed of  
19 trust and that the deed of trust was subordinate to the HOA lien being foreclosed.

20 In Shadow Canyon, this court stated that the lender “has the burden to show  
21 that the sale should be set aside in light of Saticoy Bay’s status as the record title  
22 holder.”133 Nev. at 746, 405 P.3d at 646.

23 In Wells Fargo Bank, N.A. v. Radecki, 134 Nev. at 621, 426 P.3d at 596, this  
24 court stated that “[w]e agree with the district court that Radecki has no obligation to  
25  
26  
27  
28



1 establish BFP status.”

2  
3 In First Fidelity Thrift & Loan Ass’n v. Alliance Bank, 60 Cal. App. 4th 1433,  
4 1442, 71 Cal. Rptr. 2d 295, 301 (1998), the court stated that where a party seeks  
5 equitable relief, the burden is on the party seeking equitable relief to allege and prove  
6 that the person holding legal title is not a bona fide purchaser.  
7

8  
9 In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the  
10 California Supreme Court stated:

11  
12 The protection of such purchasers is consistent ‘with the purpose of the  
13 registry laws, with the settled principles of equity, and with the  
14 convenient transaction of business.’ Williams v. Jackson, 107 U.S. 478,  
15 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better  
16 reasoned cases from other jurisdictions which have dealt with similar  
17 problems upon general equitable principles and in the absence of  
18 statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765,  
19 certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams  
20 v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v.  
21 Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60  
22 N.E. 913; Millick v. O’Malley, 47 Idaho 106, 273 P. 947; Day v.  
23 Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit  
24 Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash.  
25 145, 34 P.2d 444.

26  
27 The bona fide purchaser doctrine protects a purchaser’s title against competing  
28 legal or equitable claims of which the purchaser had no notice at the time of the  
conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172  
(1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

26  
27 Because every recorded document was consistent with the foreclosure of a  
28 delinquent assessment lien that included an unpaid superpriority amount, and because

1 the Lender did not record any document stating that the default in payment of the  
2 HOA's superpriority lien had been "cured," plaintiff's rights are not affected by that  
3 unrecorded claim.  
4

5 NRS 111.180(1) identifies several requirements for a purchaser to be a "bona  
6 fide purchaser," but the words "bona fide purchaser" do not appear in NRS 111.325.  
7

8 NRS 111.325 expressly provides that in order to be protected from the  
9 unrecorded claim of tender, plaintiff need only be a subsequent purchaser, in good  
10 faith and for a valuable consideration "where his or her own conveyance shall be first  
11 duly recorded."  
12

13 Moreover, when choosing the language in NRS 111.325, the Nevada  
14 Legislature intentionally chose not to include the words "actual knowledge,  
15 constructive notice of, or reasonable cause to know" that are included in NRS  
16 111.180(1), but not in NRS 111.325. NRS 111.325 expressly provides that in order  
17 to be protected from the unrecorded claim of tender, plaintiff need only be a  
18 subsequent purchaser, in good faith and for a valuable consideration "where his or her  
19 own conveyance shall be first duly recorded."  
20

21 According to the principles of statutory interpretation discussed in Williams  
22 v. State Dep't of Corrections, 133 Nev. 594, 598-599, 402 P.3d 1260, 1264 (2017),  
23  
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1 the Legislature’s decision not to include the words “bona fide purchaser” or the words  
2 “actual knowledge, constructive notice of, or reasonable cause to know” in NRS  
3  
4 111.325 must be viewed as intentional.

5  
6 Comment c to Section 6.4 of Restatement (Third) of Prop: Mortgages (1997)  
7 explains the significance of recording notice of payments made by the person  
8  
9 responsible for payment of a debt:

10 When payment or tender by the person primarily responsible for the debt  
11 has extinguished the mortgage, the payor derives little comfort unless a  
12 document can be recorded to clear the public records of the mortgage  
lien.

13 Defendant’s argument, however, requires that this court interpret NRS Chapter  
14  
15 116 in a way that permits the expectations of a “good faith” purchaser to be subverted  
16  
17 by a lender’s intentional choice not to disclose its claim that the superpriority portion  
18 of the lien had been paid.

19  
20 Because the foreclosure deed was “first duly recorded,” the express language  
21 in NRS 111.325 provides that defendant’s unrecorded claim based on the payments  
22 made by the former owner is “void” as to plaintiff.

### 24 CONCLUSION

25  
26 By reason of the foregoing, plaintiff respectfully requests that this court reverse  
27 the findings of fact, conclusions of law and order granting defendant’s motion for  
28

1 summary judgment.

2 DATED this 23rd day of December, 2020.

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7 DATED this 23rd day of December, 2020.

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