

# OELLA RIDGE TRUST

VS.

SILVER STATE SCHOOLS CREDIT  
UNION

Respondent.

) Supreme Court C

# APPELLANT'S OPENING BRIEF

Docket 81584 Document 2021-09046

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

OELLA RIDGE TRUST	)	Supreme Court Case No.: 81584
	)	
Appellant,	)	
	)	
vs.	)	
	)	
SILVER STATE SCHOOLS CREDIT	)	
UNION	)	
Respondent.	)	
_____	)	

**DISCLOSURE STATEMENT PURSUANT TO RULE 26.1**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Iyad Haddad – Trustee of the Manager of Appellant

Ryan Welch – Trustee of the Manager of Appellant

Kerry P. Faughnan, Esq. who represented Plaintiff/Appellant in the state court case and during this appeal

Dated March 29, 2021

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## TABLE OF CONTENTS

<b>DISCLOSURE STATEMENT PURSUANT TO RULE 26.1</b>	<b>i</b>
<b>TABLE OF CONTENTS</b>	<b>ii</b>
<b>TABLE OF AUTHORITIES</b>	<b>ii</b>

### CASES

<u>Brunzell v. Golden Gate National Bank</u> , 85 Nev. 345, 455 P.2d 21 (1961).....	7
<u>Collins v. Murphy</u> , 113 Nev. 1380, at 1384, 951 P.2d 598 (1997).....	7
<u>Houston v. Wells Fargo Bank</u> , 119 Nev. 485, 488, 78 P.3d 71, 73 (2003).....	6
<u>Linville v. Scheeline</u> , 30 Nev. 106, 111, 93 Pac. 225 (1908).....	6, 9

### STATUTES

NRS 18.110(1).....	6, 8
--------------------	------

### RULES

NRAP 3A(b)(1).....	1
NRAP 4(a)(1).....	1
NRAP 17(b).....	1
NRAP 17(a)(12).....	1
NRAP 39(e).....	7
NRCP 54(d)(2)(B)(i) .....	6, 7, 8
NRCP 54(d)(2)(C)... ..	9

<b>JURISDICTIONAL STATEMENT.....</b>	<b>1</b>
<b>ROUTING STATEMENT.....</b>	<b>1</b>
<b>STATEMENT OF THE ISSUE.....</b>	<b>2</b>
<b>INTRODUCTION.....</b>	<b>2</b>
<b>STATEMENT OF THE CASE.....</b>	<b>3</b>
<b>STATEMENT OF THE FACTS .....</b>	<b>4</b>
<b>SUMMARY OF THE ARGUMENT.....</b>	<b>5</b>
<b>STANDARD OF REVIEW.....</b>	<b>6</b>
<b>ARGUMENT.....</b>	<b>6</b>
<b>CONCLUSION .....</b>	<b>11</b>
<b>CERTIFICATE OF COMPLIANCE.....</b>	<b>12</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>13</b>

## **JURISDICTIONAL STATEMENT**

This is an appeal after a motion to dismiss was granted against Oella Ridge Trust (hereinafter "Oella") and Respondent Silver State Schools Credit Union (hereinafter "Silver State").

Notice of Entry of Order Granting Motion to Dismiss was filed June 30, 2020. 2 AA 267-271.<sup>1</sup>

Notice of Appeal was filed July 30, 2020. 2 AA 272 – 273.

An appeal is due 30 from notice of entry of order of the order to be appealed from, NRAP 4(a)(1). The appeal being filed 30 days after notice of entry of the decision, this appeal is timely.

This Court has jurisdiction as an appeal may be taken from a district court in a civil action of a final judgment entered in a proceeding. NRAP 3A(b)(1).

## **ROUTING STATEMENT**

This matter is presumptively retained by the Supreme Court because the matter is not one of the enumerated case categories presumptively assigned to the Court of Appeals under NRAP 17(b). The matter also concerns a principal issue of statewide public importance, NRAP 17(a)(12).

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<sup>1</sup> AA – Appellant's Appendix

## **STATEMENT OF THE ISSUE**

Did the district court commit clear error and abuse its discretion in allowing Silver State Schools Credit Union to charge attorney's fees to a note and deed of trust that were not requested after the original trial where they were purportedly incurred.

## **INTRODUCTION**

Appellant Oella is the owner of a piece of property it purchased at a HOA foreclosure sale November 2, 2012, commonly known as 193 Oella Ridge Court, Henderson NV 89012. Amended Complaint, 1AA 1, Par. 1.

As a result of a 2012 quiet title action, on July 11, 2019, this Court in case 76382 reversed a District Court judgment in favor of Oella, declaring that Silver State's note and deed of trust survived the HOA's foreclosure sale. 1 AA 35 – 37.

Appellant Oella subsequently requested a payoff of respondent Silver State's note. Amended Complaint, 1 AA 2, Par. 7.

The payoff Appellant Oella received included over \$95,000 in attorney's fees and costs never awarded as a result of the 2012 action, and Appellant Oella brought a declaratory relief action to have those costs removed from the payoff, since they never were awarded Respondent Silver State after reversal and remand. Complaint, 1 AA 1-3, Payoff, 1 AA 50.

## STATEMENT OF THE CASE

The case was filed January 23, 2020. Amended Complaint, 1 AA 1 – 3.

After service of the complaint, Respondent Silver State moved to dismiss. 1 AA 4-43.

On March 9, 2020, the Court treated Respondent Silver State's motion as a motion for summary judgment motion, granting the motion in part. March 9, 2020 Minutes, 1 AA 51.

The court ordered Respondent Silver State to provide supplemental briefing by March 30, 2021 to substantiate the claim for attorney's fees. March 9, 2020 Minutes, 1 AA 51.

Respondent Silver State filed their Supplement April 16, 2020, 1 AA 56-235.

Appellant Oella claimed Silver State's filing was late and therefore time barred. Second Amended Opposition to Supplemental Brief, 1 AA 236-261.

The District Court allowed the late filing, and subsequently granted respondent Silver State's motion to dismiss, 2 AA 264-266, leading to this appeal.

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## STATEMENT OF THE FACTS

This matter concerns Appellant Oella Ridge Trust who purchased a piece of property commonly known as 193 Oella Ridge Court, Henderson NV 89012 at a HOA foreclosure sale November 2, 2012. Amended Complaint, 1AA 1, Par. 1.

Oella brought a quiet title action in 2012 against Silver State Schools Credit Union, where the District Court quieted title in favor of Oella, extinguishing Silver State Schools Credit Union's deed of trust recorded against the property. On July 11, 2019, this Court in Case 76382 reversed the District Court's decision, declaring that Silver State's note and deed of trust survived the HOA's foreclosure sale. 1 AA 35 – 37. After reversal and remand, the District Court entered judgment in favor of Silver State Schools Credit Union after trial and appeal, 1 AA 40 – 43.<sup>2</sup> The judgment did not award any costs or attorney's fees.

Appellant Oella subsequently requested a payoff of the Silver State note. Amended Complaint, 1 AA 2, Par. 7.

The payoff Appellant Oella received included over \$95,000 in attorney's fees and costs never requested or awarded in the 2012 action. Appellant Oella then brought a declaratory relief action against Silver State to have those costs removed from the payoff. Complaint, 1 AA 1-3, Payoff, 1 AA 50.

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<sup>2</sup> In said case the borrower/prior homeowner on the note and deed of trust was also a defendant. See Caption, 1 AA 40.

After granting partial summary judgment to Silver State, the District Court ordered Silver State to file a supplement brief by March 30, 2020. Minutes, March 9, 2020, 1 AA 51, April 7, 2020 Order on Motion to Dismiss, 1 AA 53 – 55.

Silver State did not file its Supplemental Brief until April 16, 2020. Supplemental Brief, 1 AA 56 – 235.

Appellant Oella objected, stating Respondent Silver State had failed to comply with the court's direct order, including a 10 day extension granted by Oella, Second Amended Opposition to Supplemental Brief, 1 AA 236 – 1 AA 246.

Respondent Silver State's response to the objection implied it was Oella's fault that it didn't make further inquiry after the deadline Silver State requested, that professional courtesy should allow an untimely filing, and it was all Covid-19's fault, despite no mention of same being in Silver State's original untimely filed Supplemental Brief. 2 AA 247 – 2 AA 261.

Ultimately, the District Court allowed the untimely filing, Minute Order May 18, 2020, 2 AA 262, and then subsequently granted the Motion to Dismiss.

### **SUMMARY OF THE ARGUMENT**

The district court committed reversible error in finding that there was no obligation to request attorney's fees and costs at the conclusion of the 2012 litigation because of the language in the note and deed of trust.



Not timely requesting costs pursuant to NRS 18.110(1), and attorney's fee pursuant to NRCP 54(d)(2)(B)(i), is waiver of same despite the contract language in the note and deed of trust, requiring reversal and remand.

### **STANDARD OF REVIEW**

The District Court treated the Motion to Dismiss as a Motion for Summary Judgment. March 9, 2020 Minutes, 1 AA 51, Order on Motion to Dismiss, 1 AA 54. Summary judgment orders are reviewed de novo. Houston v. Wells Fargo Bank, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003).

### **ARGUMENT**

When Respondent Silver State finally filed its late Supplemental Brief, it stated it was entitled to \$112,497.20 in fees and \$10,299.13 in costs. 1 AA 57, Line 12.

For more than 100 years, the law in Nevada has been that failure to file a cost bill as provided by statute waives the right to costs. "In order for the prevailing party to recover costs, he must come within the provisions of sec. 486, ch. 112, Stats. 1869, as amended by sec. 1, ch. 23, Stats. 1889, (cf. NRS 18.110), which governs the contents and filing of cost bills, and if he fails to file his cost bill within the time prescribed by statute, he is deemed to have waived his right to costs." Linville v. Scheeline, 30 Nev. 106, 111, 93 Pac. 225 (1908).

In this matter, the only time Silver State filed a Memorandum of Costs, was July 19, 2019 before this Court in case 76382, after reversal and remand, requesting costs and disbursements of \$2,302.44. That request was denied by this Court August 6, 2019, and Footnote 1 of the Order Regarding Costs further stated "This order is without prejudice to appellant's right to seek any costs that are taxable in the district court. See NRAP 39(e) (setting forth costs that are taxable in the district court)."

Respondent Silver State therefore was given express notice that costs would need to be filed in the district court, which it never undertook.

NRCP 54(d)(2)(B)(i) is similar. If a request for attorney's fees is not filed within 21 days, you are waiving attorney's fees.

There is a public policy for requiring a party to timely make a request for attorney's fees, which is waiting prejudices the party the fees are request to be assessed against. Collins v. Murphy, 113 Nev. 1380, at 1384, 951 P.2d 598 (1997). In Collins, attorney fees were disallowed that were applied for after the deadline for an appeal had passed. Here, they have never been applied for.

Also, by not bringing a timely motion for attorney's fees, yet claiming attorney's fees are due, there is no judicial examination whether the fees claimed are reasonable, necessary, actually incurred or proper under a Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 21 (1961) analysis.

Appellant Oella, and Respondent Silver State (1 AA 9, Lines 8-9), are unaware of any caselaw in Nevada to support the theory that if a party prevails in litigation, and there is a contract provision as the basis of assessing attorney fees to a borrower who is a co-defendant, at the conclusion of litigation no attempt is made to timely request costs and attorney's fees pursuant to NRS 18.110(1) and NRCPP 54(d)(2)(B)(i), you are entitled to continue to claim those fees as a debt due and owing against the borrower co-defendant which have never seen judicial application, review and approval.

Even in this case, the District Court only granted the Motion to Dismiss. The District Court did not award the attorney's fees and costs claimed by Respondent Silver State after its late filed Supplemental Brief, or find them reasonable. Order Granting Motion to Dismiss, 2 AA 270, Lines 1 – 2.

Section 9 of Respondent Silver State's Deed of Trust, 1 AA 22, states the costs and fees to be assessed a borrower must be reasonable. Nevada law and the rules of civil procedure provides the timing a request is to be made so that reasonableness can be determined, otherwise you have waived your rights to make a claim.

Appellant's Amended Complaint did not fail to state a claim upon which relief could not be granted.

Respondent Silver State's \$96,528.25 of Attorney's Fees pursuant to the Payoff, 1 AA 50, certainly was never timely requested or reviewed by the District Court after this Court's reversal and remand in case 76382, and in the judgment after reversal, Respondent Silver State was never awarded any attorney's fees or costs, 1 AA 40 – 43, nor as a result of the District Court's dismissal of this case.

What is different about this case and the out of state authorities cited by Respondent, is Nevada has a time and place post judgment to review and award costs and attorney's fees to insure there is no prejudice to a party to be charged with same, and prevent unsubstantiated and unreasonable costs and attorney's fees. For more than 100 years, if you don't timely apply, or don't provided appropriate supporting documentation, you have waived costs and attorney's fees, Linville,

The cases cited by Respondent for California and Hawaii are not binding on Nevada Courts.

Respondent only attempted to justify their costs and attorney's fees April 16, 2020, seven (7) months after judgment was entered September 16, 2019, 1 AA 40 – 43. NRCP 54(d)(2)(C) however prevents the extension of time for requesting attorney's fees after time has expired, therefore Respondent Silver State requesting the District Court to ratify its Supplemental Brief on attorney fees was improper, being more than seven months late besides late when filed in the current case.

Section 9 of Respondent Silver State's Deed of Trust, 1 AA 22, is required to be interpreted under Nevada law, as it concerns Nevada real property.

Appellant Oella demonstrated a prima facie case that Respondent Silver State never timely applied for attorney's fees and cost after the conclusion of the 2012 case. Appellant Oella also demonstrated the time for making such a claim has passed, which bars Respondent Silver State from the right to attempt to claim attorney's fees and costs now through the Payoff, 1 AA 50, months later, or trying to justify same through the April 16, 2020 Supplemental Brief, 1 AA 56-235.

Nevada borrowers are entitled to have reasonableness determined, when challenged, and in the prior, 2012 case, the borrower was a co-defendant, and costs and attorney's fees were never requested, or awarded, Respondent Silver State.

Notwithstanding Section 9 of Respondent Silver State's Deed of Trust, 1 AA 22, Appellant is aware of no caselaw in Nevada that allows a party to unilaterally assess attorney's fees to themselves as the prevailing party, if they are neither awarded them by the court, or the party does not timely apply for them as required by law.

## CONCLUSION

For the above and foregoing reasons, the order of the District Court treating Respondent Silver State's Motion to Dismiss as a Motion for Summary Judgment, and granting same, should be reversed and remanded, with direction to enter judgment in favor of Appellant Oella Ridge Trust.

Respondent Silver State Schools Credit Union failed to timely make application for costs or attorney's fees in the prior litigation between the parties, which waives their right to request same in the post judgment Payoff Statement, 1 AA 50, given Appellant Oella Ridge Trust by Respondent Silver State Schools Credit Union, despite the language in Section 9 of the Deed of Trust, 1 AA 22.

Dated March 29, 2021    Respectfully submitted,

/s/ Kerry P. Faughnan  
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Attorney for Appellant  
Oella Ridge Trust

## ***CERTIFICATE OF COMPLIANCE***

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more, and contains approximately 2,330 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED March 29, 2021.

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## **CERTIFICATE OF SERVICE**

I certify that on March 29, 2021, I served a copy of the foregoing upon all counsel of record by allowing the Court's ECF system to serve same upon:

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DATED March 29, 2021.

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