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.	)	
	)	

APPEAL
From the Eighth Judicial District Court
The Honorable Mark R. Denton
District Court Case No. A-20-809078-C

APPELLANT'S REPLY BRIEF

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THE AMERICAN RULE, AND NRS 18.010, NRS 18.110 AND NRCP 54(d)(2)(B)(i)

Respondent requests that Appellant's Appeal be dismissed, (Answering Brief, Page 17, Line 2,) arguing that to comply with Nevada law for attorney's fees and costs would be substantially prejudicial to the former homeowners and undermine Nevada's anti-deficiency protections, (Answering Brief, Page 17, Lines 4 – 5.)

Nevada follows the American Rule where absent a statute, rule or contract providing for attorney's fees, attorney's fees may not be awarded. Pardee Homes of Nev. v. Wolfram, 135 Nev. Adv. Op. 22 (2019).

In Nevada, NRS 18.010, NRS 18.110 and NRCP 54(d)(2)(B)(i) provide the mechanism for awarding attorney fees and costs.

There is no question there is a contract in this case concerning the right to attorney's fees and costs because of the deed of trust, so while the contract might control the liability for attorney fees, state law still controls the award of attorney's fees. Cf. Pacific Intermountain Express Co. v. Leonard E. Conrad, Inc., 88 Nev. 569, 502 P.2d 106 (1972), federal law may control liability, but state law controls the award of attorney's fees and costs.

Respondent cites Chacker v. JPMorgan Chase Bank, N.A., 27 Cal. App. 5th 351, 237 Cal. Rptr. 3d 921 (2018) as a nearly identical case out of California as reason that costs and attorney's fees may be added to the note. There are several

glaring differences though between the case at bar and the California case, supporting reversal in favor of Appellant.

First, in the California case, JPMorgan Chase Bank applied for costs and attorney's fees. Here, Respondent never applied for attorney's fees and costs, so if you don't request them, the logic should be, you can't add them to the note.

Second, California has Civil Code § 1717, whereas we have NRS 18.010, NRS 18.110, and NRCP 54(d)(2)(B)(i) as the rules for applying for attorney fees and costs. Again, Respondent never followed Nevada law to apply for attorney's fees and costs, neither the 5 day rule of NRS 118.110, or the 21 day rule of NRCP 54(d)(2)(B)(i), therefore when you don't follow the law and apply for fees and costs, it would be unequitable to be permitted to unilaterally add attorney's fees and costs to a note years later.

Similarly, in the other two cases out of California and Hawaii cited by respondent, the lender/prevailing party each applied for attorney's fees and costs, which were ultimately allowed to be assessed against the borrower's note. But the overring fact different in both of these additional cases remains fees and costs were requested by the prevailing parties, contrary to this case, where no action was taken by Respondent to do anything to liquidate attorney fees and costs to a fixed amount, waiving the right to claim fees and costs against the note years later.

This Court should be concerned with what Respondent is asking this Court to affirm: the right to claim, at any time, any amount of attorney's fees and costs it desires, pursuant to Section 9 in its deed of trust, 1 AA 22, whether prevailing party or not, without application under NRS 18.010, NRS 18.110, and NRCP 54(d)(2)(B)(i), and without any right of review for necessity, reasonableness, timeliness, or good faith and fair dealing.

Let's briefly look at another example using Respondent's argument:

Lender challenges a mechanics lien filed against a property it holds a note and deed of trust upon. Judgment for the lienholder. Lender incurs $50,000 in costs and fees in "protecting its interest." Under Respondent's argument, that is now a debt of the borrower to be assessed the borrower's note and deed of trust, which no one, not even the borrower, can challenge. This is not equitable.

Respondent claims it never has to comply with NRS 18.010, NRS 18.110, and NRCP 54(d)(2)(B)(i) because of the provision in Section 9 in the deed of trust, 1 AA 22. Yet that renders the statutes and rules meaningless and superfluous, clearly not the intent of the legislature and the courts in adopting the statutes and rules regarding awarding attorney's fees and costs.

The legislature and the courts clearly want a time limitation for fee and cost applications. ". . . 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, no district court, in either the 2012 or the 2020 case, awarded fees and costs to Respondent, and Respondent never applied for fees and costs.

REQUIRING APPLICATIONS FOR FEES AND COSTS PROTECTS EVERYONE

Contrary to the argument of Respondent, it is specifically applying for fees and costs that protects homeowners and other parties, not prejudices them, by giving notice within the time provided by law of a party's intent to recover their alleged losses, as well as allowing a party to object as to reasonableness and timeliness. For example, even if a contract provided for fees and costs, if the application is more than 6 years from when they were incurred, anything beyond 6 years would also be time barred by the statute of limitations. NRS 11.190(1)(b), 6 year statute of limitation on contracts. The District Court dismissed the 2020 case for failure to state a claim, 2 AA 264-265. Yet there must be some methodology allowed to challenge unawarded attorney's fees and costs from 2012, and a declaratory relief action is an appropriate methodology. The district court erred in its decision and should not have summarily resolved the issue that Appellant failed to state a claim and has no right to challenge a claim of attorney's fees and costs.

Further, Respondent's argument that this somehow undermines Nevada's anti-deficiency statutes is also without merit. This matter was not a foreclosure

situation, it was an assessment of attorney's fees to a payoff request. 1 AA 2, Par. 9. As stated by Respondent, pursuant to NRS 40.455, in general, a first deed of trust holder can not seek a deficiency judgment if they foreclose and the amount owed exceeds the amount received for the property. What makes up the amount owed is irrelevant.

CONCLUSION

Appellant Oella Ridge Trust brought a declaratory relief action against Respondent Silver State Schools Credit Union to challenge attorney's fees and costs added to a payoff demand from Respondent Silver State Schools Credit Union that at the time the action was commenced, were unsubstantiated, unexplained, seemingly unreasonable, had never been requested at trial, and had never been awarded to Respondent, 1 AA 3.

A declaratory relief action if an appropriate methodology to challenge the payoff demand.

The District Court granted Respondent's motion to dismiss for failure to state a claim, and made no ruling awarding or confirming the claimed attorney's fees and costs, 2 AA 264-265.

Attorney's fees and costs are only available to a party if applied for and awarded by the court. NRS 18.010, NRS 18.110, and NRCP 54(d)(2)(B)(i).

Failure to apply for same is waiver, Linville.

While a deed of trust may allow attorney's fees and costs to be added to the note, Nevada law provides the timing and methodology of their award.

Respondent may not unilaterally grant itself attorney's fees and costs years later despite the provision found in Section 9 of its deed of trust, 1 AA 22, if they do not request them in the original proceedings.

For all the foregoing reasons and arguments, Appellant requests the decision of the District Court be reversed and remanded with instruction consistent with these reasonings.

Dated July 12, 2021.

Respectfully submitted,

/s/ Kerry P. Faughnan__
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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 1.257 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 July 12, 2021.

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CERTIFICATE OF SERVICE

I certify that on July 12, 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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