IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS L. CORNWELL, A NEVADA RESIDENT, Appellant,

v.

NEIL E. SCHULTZ, A NEVADA RESIDENT, A/K/A THE NEIL E. SCHULTZ TRUST DATED JANUARY 29, 2016, Respondent.

Supreme Court No. 82106

First Judicial District Court
Case No. 18 RP 00018 1B

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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.

Appellant Thomas J. Cornwell is an individual and therefore has no parent corporation to disclose and is not a publicly held company.

Appellant's law firm of record in this appeal is Garman Turner Gordon, LLP.

DATED this 15th day of July 2021.

GARMAN TURNER GORDON LLP

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I. JURISDICTIONAL STATEMENT

This is an appeal from a trial in the First Judicial District Court, Carson County, at which Appellant represented himself in proper person. A Complaint to Quiet Title to Real Property was filed by Plaintiff/Appellee Neil Schultz on November 5, 2018. Following a trial on the matter the Findings of Fact, Conclusions of Law and Judgment were entered by the First Judicial District Court on November 5, 2020, granting a judgment quieting title in Appellee's favor. The Notice of Appeal was filed November 18, 2020.

II. ROUTING STATEMENT

Appellant cannot state sufficient reasons for the Supreme Court to retain this matter rather than assigning it to the Court of Appeals.

III. ISSUES ON APPEAL[1]

1. Whether the District Court improperly relied on hearsay evidence and incorrectly shifted the burden of proof to the Appellant.

[1] Mr Cornwell's Docketing Statement, filed in proper person, described the Issues on Appeal as: "The Sale of my note without my consent. Separation of Property and Home. The Foreclosure on property. Neil turning Water and Power off in an attempt to force me from my home. Neil stated we defaulted on Note to George in 2010 whereas this statement is false, and I have documentation of payments made. Which I do not see has anything to do with Neil. Neil never intended to honor my Note." The issues are condensed and restated here.

2. Whether, as a matter of equity, Appellant is entitled to notice and procedures provided for under NRS Chapter 107.085, 107.086 and 107.0865, and other protections afforded homeowners in a foreclosure.

IV. STATEMENT OF THE CASE[2]

This case demonstrates just how daunting litigation can be for the individual citizen; the average person, unable to obtain counsel, who wants to exercise his rights, but is constrained by practicality to proceed in proper person. Moreover, it implicates both the rules of procedure and evidence, and principles of equity.

The Case arises from an action in the First Judicial District Court wherein plaintiff Neil Schultz sought a judgment quieting title to a parcel of land located at 2355 Columbia Way, Carson City, Nevada (herein referred to as "the Property"), on which sits Appellant, Thomas L. Cornwell's, mobile home residence. Appellant's longtime partner, Ms. Clarke, and he bought the Property in 2003, which was titled in her name. Ms. Clarke transferred the Property to Appellant in 2017. At all times, Appellant believe the mobile home was part of the land.

On March 30, 2018, Appellee Schultz acquired a 2003 note and deed of trust executed by Ms. Clarke, by assignment from a Mr. Soetje. Schultz obtained record title to the Property as the successful bidder at a trustee sale held on August 23, 2018.

[2] These facts are supported by the district court's finding of facts, see ROA 251-257.

Appellant challenged the validity of the foreclosure sale and raised a number of related issues, both in his defense and in counterclaims.

The trial of this matter was held on August 5, 2020, and the Court ordered the parties to file written closing arguments, the last of which was filed on October 20, 2020.

Appellant in his Counterclaim and in his testimony at trial, denied, however, that the debt, on which Appellee relied to quiet title was in default. Appellee asserted that on or about June 5, 2010, Ms. Clarke defaulted on the promissory note. He purported, however, to have learned of this eight-year-old default, by way of a statement from the assignor of the promissory note, Mr. Soetje, at the time he took assignment of the note and deed of trust. Soetje did not testify, and that alleged statement was hearsay, not subject to any exception. Appellant denied the payments on the note were in default. In support of his counterclaim, he presented evidence that payments were made after June 5, 2010, in a written list of payments he attached to his Counterclaim. No evidence of a notice of default on the debt during that time appears in the record.

Nonetheless, when it entered the Findings of Fact, Conclusions of Law, and Judgment, on November 5, 2020, the district court found a default. The district court based the finding on the Appellant's testimony to the hearsay statement of his

assignor Soetje,[3] that the promissory note, as modified in May 2010, was in default when Ms. Clarke failed to make her June 5, 2010, payment, and that no additional payments were made on the promissory note thereafter.

The district court also ruled that, under the terms of the deed of trust, Schultz could declare the entire debt in default, based on the quitclaim deed from Ms. Clarke to the Appellant in 2017, without any notice to Appellant. Cornwell was only served with a Notice of Default and Election to Sell, and later with the Notice of Sale. Neither the notices, nor any other of the protections of the foreclosure statutes that apply to residential property were provided or followed. At the foreclosure sale on August 23, 2018, Mr. Schultz made the highest bid for the Property, and so received the Trustee's Deed to the Property.

Mr. Cornwell at all times in issue, and to this day, resides in the mobile home on the Property. Nonetheless, the district court ruled that Appellant's mobile home was not an owner-occupied home, because it had not been fully converted to real property in 2001. Thus, the court ruled, Appellant was not entitled to homeowner notices provided for in NRS 107, 085, 107.086 and 107.0865.

In its Findings of Fact, Conclusions of Law and Judgment, the district court improperly relied on hearsay evidence, and it incorrectly shifted the burden of proof to the Appellant.

[3] Spelled Sochy in the trial transcript.

Moreover, as a matter of equity Appellant was entitled to notice and procedures provided for under notices provided for in NRS 107, 085, 107.086 and 107.0865, and other homeowner protections offered under NRS Chapter 107.

V. FACTUAL BACKGROUND

A. Relevant Background.

Appellant lives in the mobile home located on the Property located at 2355 Columbia Way, Carson City. He has lived there for many years – since 2003. He acquired title in 2017 but had paid the obligations on the Property since the beginning.[4] While a senior citizen of modest means, the Appellant believes that he has equity in the Property and mobile home.[5]

Appellant's former partner, Karen Lynn Clarke, purchased the property from a Mr. Childers in 2003. On or about May 2, 2003, Ms. Clarke executed a promissory note in the principal sum of $32,000.00 in favor of George Soetje.[6] Under the terms of this note, the loan was scheduled to be paid in monthly installments of $306.82 for five years, although the payments were set based on a 17-year amortization. This note was secured by a deed of trust executed by Ms. Clarke and recorded on May 8, 2003.[7] The promissory note was modified by Ms. Clarke and Mr. Soetje on a couple

[4]AA-366, lines 19-22.

[5]AA-382, line 22 to AA-383, line 6.

[6] ROA 58-59.

[7] ROA 60-61.

of subsequent occasions, as described in the Trustee's Deed. In May 2010, there was a final modification of the promissory note. The terms of this modification and an amortization table of payments was admitted into evidence. Mr. Cornwell acknowledged his familiarity with final modification document at trial. Appellant also testified that his money was used to make the payments.[8] When the couple parted ways, Ms. Clarke conveyed title to the Property to Mr. Cornwell by Quitclaim Deed dated February 9, 2017. [9]

On or about March 26, 2018, Soetje sold his beneficial interest in the promissory note to Appellee, and on March 30, 2018, the beneficial interest of Soetje in the note and deed of trust was assigned to Appellee Schultz.[10] Clearly, Appellee bought Note and Deed of Trust for the purpose of foreclosing and acquiring the Property. After Appellee obtained the assignment of the note and deed of trust from Soetje, he promptly retained Automatic Funds Transfer Services, dba Allied Trustee Services to commence foreclosure proceedings against the Property under the deed of trust. No one disputes that this foreclosure did not provide notices and remedies available to homeowners under NRS 107.085, 107.086, and 107.0865. Allied Trustee Services conducted the foreclosure sale of the Columbia Way Property. The

[8] AA-366 , line 19-22.

[9] ROA 74-75.

[10] ROA 253, lines 16-20.

high bidder was the Neil E. Schultz Trust dated January 29, 2016. Appellee became the record title holder of the Property by virtue of a Trustee's Deed recorded in the Carson City Recorder's Office on September 26, 2018[11]

By November 5, 2018, Appellee had commenced an action in the First Judicial District Court wherein he sought a judgment quieting title to the Property.[12] Appellant challenged the validity of the foreclosure sale in his answer and counterclaim. The trial of this matter was held on August 5, 2020, at which time testimony and documents were submitted into the record. The district court ordered the parties to file written closing arguments, the last of which was filed on October 20, 2020. It entered Findings of Fact, Conclusions of Law and Judgment ("FFCLJ"), on November 5, 2020. In the FFCLJ, the district court entered judgment in favor of Neil Schultz and declared that :

> "[H]e is the lawful owner the land located at 2355 Columbia Way, Carson City, Nevada, and is entitled to full possession and enjoyment of the premises to the exclusion of all others. The Court does not make a determination as to who is the owner of the mobile home currently situated on the land, but title is not merged with the title of the land at this time.[13]

Mr. Cornwall appeals from this judgment.

B. Evidence Offered at Trial

[11] ROA 97-99.

[12] ROA 2.

[13] ROA 258-259.

In order to arrive at this Judgment, Appellee had to prove, and the district court had to conclude, among other things, that the note was in default, thereby justifying the foreclosure; and that the foreclosure was property completed.

Appellant disputed Schultz assertion that the promissory note had been in default since June 5, 2010. In the face of this dispute, however, Appellee offered no admissible evidence at trial. He had no personal knowledge of the payments on the promissory note, and no personal knowledge as to whether the note had been in default since June 5, 2010. Nor did Soetje, who held the note from 2003 through March 2018, testify or sit for a deposition. In lieu of testimony by a person with personal knowledge, Appellee offered a hearsay affidavit, to which Appellant objected[14]. The record is unclear as to whether the affidavit was admitted.[15] At trial, counsel for Schultz also asked a leading question on this point that directly called for a rank hearsay response, in the following exchange:

> MR. BARTLETT: Okay. And, uh, did [Soetje] inform you, uh, whether the note was in good standing or delinquent or what did he -- how did he describe the status of the note?
>
> MR. SCHULTZ: Uh, he did tell me it was delinquent that no payments had been made s- -- uh, last payment was 2010.[16]

[14] See Ex 25; AA-312, line 25 to AA-313, line 3.

[15] AA-326, lines 9-13; AA-378, line 11-16.

[16] AA-349, line 24 to AA-350, line 5.

Like the affidavit, this statement also constituted an out of court statement, offered for the truth of the matter asserted and not subject to an exception. In short, Appellee offered no admissible evidence to meet his burden of showing he was entitled to foreclose based upon Appellant's payment default.

The district court glosses over this in its findings and shifts focus at one point from the Plaintiff's claim for clear title onto the inartful counterclaim of the *pro se* Mr. Cornwell. In its analysis the district court acknowledges the detailed list of payments submitted as an exhibit to Appellant's counterclaim but appears to reject the exhibit, because Appellant did not provide copies of actual money orders and checks from four to nine years earlier.[17] Based on the discussion, this list seems to go to the issue of certain payments not being credited or properly applied. However, the Appellee's failure to provide a shred of admissible evidence that any amount was owed is both striking and more to the point. No admissible evidence that any amount was owed, and therefore a payment default occurred, came before the district court. Nor did the district question how a maker of a note could make no payment in eight years without the payee taking any action. The district court had before it only hearsay accounts of what Soetje allegedly told Schultz, and an illogical factual scenario.

[17] ROA 72. Half of the payments take the form of money orders and half checks. All include check or money order numbers.

The lack of evidence as to a balance due also undermines the district court's fallback ruling referencing a due on sale clause. The deed of trust executed did contain the following provision briefly referenced by the district court[18]:

> IN THE EVENT THE HEREIN DESCRIBED PROPERTY, OR ANY PORTION THEREOF, OR ANY INTEREST THEREIN, IS SOLD, AGREED TO BE SOLD, CONVEYED OR ALIENATED, BY THE TRUSTOR, OR BY THE OPERATION OF LAW OR OTHERWISE, ALL OBLIGATIONS SECURED BY THIS INSTRUMENT, IRRESPECTIVE OF THE MATURITY DATES EXPRESSED THEREIN, AT THE OPTION OF THE HOLDER THEREOF AND WITHOUT DEMAND OR NOTICE SHALL IMMEDIATELY BECOME DUE AND PAYABLE.

Even under this fallback approach, however, the existence of a balance cannot be confirmed by Schultz. He only knew of his own personal knowledge what he paid for the assignment of the note and deed of trust. Not whether any amount was owed. Furthermore, the "demand and notice" language of this provision can also be subject interpretation. By 2018, the underlying obligation could not be recovered if the default occurred in 2010.

The district court did admit evidence that Appellant was served with the Notice of Default and Election to Sell, and later with the Notice of Sale compliant with NRS 107.080 for land and not for a home. If the Property is either legally or equitably the Appellant's home, then the foreclosure did not comply with Nevada law. If not, then it did comply – aside from the fact no default was proved.

[18] ROA 254, lines 18-21.

As for that important distinction, the district court received ample evidence, and indeed acknowledged, that Appellant resides at the Property. He has lived there 17 years[19] and believed that he had substantial equity in the Property.[20] Since 2010, despite allegedly making no payment, Mr. Cornwell lived on the Property in peace and enjoyment, including for a year after his ex-partner quit claimed the Property to him. Appellant also provided evidence the seller and realtor expressly represented the mobile home to be part of the land when Ms. Clarke and he bought it in 2003.[21] In short, he had no reason to believe he did not own a home on a piece of land accruing equity. The district court, however, decided that the mobile home remained personal property because the original owner, Childers, recorded the conversion affidavit the day after he sold the Property to Ms. Clarke's predecessor, Cavendish.[22] Appellee did offer a document showing that local authorities continued to tax the mobile home as personal property, but without witness testimony this evidence, if admissible at all, it was not entitled to any weight.[23]

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[19] AA-365, lines 10-12

[20] AA-382, lines 22-23; AA-383, lines 23-24.

[21] ROA 65.

[22] ROA 255.

[23] The district court did find that according to the Manufactured Housing Division of the Department of Business and Industry, title to the mobile home remains in the name of Clarence Childers, but it expressly declined to determine who owns the mobile home. See, ROA 259.

VI. LEGAL ARGUMENT

A. District Court improperly relied on hearsay evidence and incorrectly shifted the burden of proof to the Appellant.

In the action below, Appellee sought to quiet title to the Property. Appellee had the burden of proving that claim. As this Court said in *Chapman v. Deutsche Bank Nat'l Trust Co.*[24]:

> A plea to quiet title does not require any particular elements, but "each party must plead and prove his or her own claim to the property in question" and a "plaintiff's right to relief therefore depends on superiority of title." *Yokeno v. Mafnas*, 973 F.2d 803, 808 (9th Cir.1992); see also *Hodges Transp., Inc. v. Nevada*, 562 F.Supp. 521, 522 (D.Nev.1983)

Appellee Schultz asserted that the promissory note went into default in 2010, and that no payments were made after June 5, 2010. He, however, offered no admissible evidence at trial as to a default. Appellee only acquired the note and deed of trust be assignment, on March 30, 2018. Thus, he lacked any personal knowledge of a default in 2010, the payment history thereafter, or the balance owed. The note seller, Soetje, did not testify at trial. Nothing in the record suggests the Soetje' s actual business records were offered. At one point in the trial, Appellee offered a hearsay affidavit, to which Appellant objected. The record is unclear as to whether the affidavit was admitted.

[24] 129 Nev. 314, 319, 302 P.3d 1103, 1106 (2013).

Asked at trial, in a leading question from his counsel whether gave him a status of the note, Appellee merely replied, "Uh, he did tell me it was delinquent that no payments had been made s- -- uh, last payment was 2010."[25] This testimony constitutes the statement of a person not present in the court and subject to cross-examination offered for the truth of the matter asserted. It fits precisely within the NRS 51.035 definition of inadmissible hearsay evidence. Appellee offered no other evidence of default and failed to meet his burden of proving entitlement to quieting title to the Property.

The same failure holds true for the district court's fallback finding that the due on sale clause supported the foreclosure. That provision, found only in the deed of trust, provides that transfer of the property makes "ALL OBLIGATIONS SECURED BY THIS INSTRUMENT… IMMEDIATELY BECOME DUE AND PAYABLE."[26] Again, however, Appellee offered no admissible evidence of any obligation outstanding at the time of transfer.

The district court not only accepted Appellee's hearsay testimony, but in its findings, it shifted focus from the Plaintiff's claim for clear title onto the inartful counterclaim of the pro se Mr. Cornwell. In its analysis the district court acknowledged the detailed list of payments submitted as an exhibit to

[25] AA-349, line 24 to AA-350, line 5.

[26] ROA 254, line 18-21.

Appellant's counterclaim but appears to reject the exhibit, because Appellant did not provide copies of actual money orders and checks from four to nine years earlier. Appellant does not quarrel with a finding that he failed to provide sufficient evidence to support his counterclaim. To that extent, however, the district court findings suggest this failure proved Appellees right to foreclose, and to quiet title, the district clearly erred by improperly shifting the burden of proof to Mr. Cromwell.

Appellee having failed to "prove his or her own claim to the property in question"[27] the judgment must be reversed.

[27] *Chapman* at 129 Nev. 319, P.3d 1106.

B. As a matter of equity, Appellant is entitled to notice and procedures provided for under NRS Chapter 107.085, 107.086 and 107.0865, and other protections afforded homeowners in a foreclosure.

Appellee sought one thing in the district court, to quiet title. When trying a quiet title claim, the district court sits in equity.

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief. *Smith v. United States*, 373 F.2d 419, 424 (4th Cir.1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); see also *In re Vlasek*, 325 F.3d 955, 963 (7th Cir.2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney,* 248 Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.").[28]

The district court, sitting in equity, was required to consider the entirety of the circumstances, including the status and actions of the parties and whether an innocent party might be harmed in granting quiet title to Mr. Schultz. Let us consider the status and actions of all parties involved, and the harm to an innocent party.

At issue is a parcel of land, on which sits Appellants mobile home. Mr. Cornwell, at all times in issue, and to this day, resided in the mobile home on the

[28] *Shadow Wood HOA v. N.Y. Cmty. Bancorp*., 132 Nev. 49, 63-64, 366 P.3d 110, 114-115 (2016),

Property. While a senior citizen of modest means, the Appellant believed that he had equity in the Property and mobile home. Appellant's longtime partner, Ms. Clarke, and he bought the property in 2003. It was initially titled in her name, but Appellant testified that his money made monthly payments. When he and Ms. Clarke split in 2017, she quitclaimed the Property to Appellant. He believed the mobile home was part of the land as apparently did the previous owner, Childers, who recorded a conversion affidavit, but did so the day after he sold the Property to Ms. Clarke's predecessor.

Appellant maintains he was not in default on the note, and Appellee proved no default. Appellee also took the position no payment had been made for eight years prior to his purchase of the note and deed of trust. In that time, shockingly, Appellee's predecessor in interest took no action on the debt. Nor did Appellee present evidence of notice of a default being sent in 2010 or at time thereafter. Appellant could reasonably have relied on the assumption that no default existed. Moreover, an eight-year default means the note could not be enforced through any judicial proceeding, because the statute of limitations ran in 2016.[29]

[29] Appellant acknowledges that the non-judicial foreclosure itself in not subject to the statute of limitation. See, *Facklam v. HSBC Bank USA for Deutsche ALT–A Securities*, 133 Nev. 497 401 P.3d 1068 (2017).

Appellant did not have an attorney. His pleadings in the district court, make his misapprehension of the law and the process very apparent. This put him at a serious disadvantage with grave consequences. If the judgement stands, Appellant will no longer have a home or any of the equity he claims to have in it.

For Appellee, the whole affair is purely business. Schultz testified that he bought the note and deed of trust because he believed the price he paid Soetje would net him about $20,000 in equity.[30] Appellee made no demand for payment but simply commenced foreclosure shortly after acquiring the note and deed of trust. For him, the home was incidental. He knew someone lived there but proceeded to foreclose on the land without regard to notices a homeowner would receive under NRS 107 -- perhaps technically correct, but certainly inequitable.

Mr. Cromwell is the innocent party harmed by quieting title in favor of Appellee. The existing ruling of the district court does not result in his "possible detriment," but Appellant's certain detriment. In short, the district court ruling does not result in equity.

Appellant would like to be in a position to urge the Court in this brief to strike the deed of trust, but he cannot do that. However, he can and does argue that the Court should reverse the decision of the district court. If the Court reverses on the ground that the district court granted relief based on inadmissible evidence and

[30] AA-343, lines 23-25 and AA-349, lines 16-23.

improper burden shifting, the matter ends. If not, Appellant asks this Court to reverse the district court on equitable grounds and admonish Appellee the if he wishes to obtain title to the Property, he must proceed to commence a new nonjudicial foreclosure following the provisions of NRS Chapter 107 that give a homeowner like, Mr. Cornwell notice, and the mechanisms for a possible resolution provided to homeowners like him.

VII. CONCLUSION

For the reasons stated above, this Court should hold that the district court erred in entering judgment to quiet title in favor of Appellee and should reverse that judgment.

DATED this 15th day of July 2021.

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VIII. ATTORNEY'S CERTIFICATION

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 Office 365 Word in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains less than 14,000 words; or

☐ does not exceed 30 pages.

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of July 2021.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of July 2021, I served a copy of this completed **APPELLANT'S OPENING BRIEF** upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By E-Service through Nevada Supreme Court; email and by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

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