IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT ELLIS LINCICOME, JR; AND VICENTA LINCICOME,

Appellants,

v.

BRECKENRIDGE PROPERTY FUND 2016, LLC,

Respondent.

Supreme Court Case No: 86324
District Case No: 18-CV-01332

RESPONDENT'S ANSWERING BRIEF

HUTCHISON & STEFFEN, PLLC
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NRAP 26.1 DISCLOSURE

I certify that the following are persons and entities that must be disclosed pursuant to NRAP 26.1:

- Breckenridge Property Fund 2016, LLC.
- The parent company of Breckenridge Property Fund 2016, LLC is Neighborhood Stabilization Holdings I, LLC.
- There is no publicly held corporation that owns a 10% or greater stock interest in Neighborhood Stabilization Holdings I, LLC.

The law firms who have appeared on behalf of appellant in this Court and in district court are:

- Counsel at District Court: Casey Nelson, Esq.
- Counsel at District Court: Wedgewood, LLC Office of the General Counsel
- Appellate Counsel: Robert Werbicky, Esq.
- Appellate Counsel: Hutchison & Steffen, PLLC

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 26th day of February, 2024.

HUTCHISON & STEFFEN, PLLC

/s/ Robert E. Werbicky

By:_____

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I. JURISDICTIONAL STATEMENT

On January 12, 2024 this Court concluded: "that the district court's [February 10, 2023] order granting in part [Breckenridge's] motion for judgment on its remaining claims is a final, appealable judgment."[1] As such, this Court has appropriate jurisdiction under NRAP 3A.

II. ROUTING STATEMENT

In the prior appeal, *Lincicome v. Sables, LLC as Tr. of Deed of Tr. Given by Vicenta Lincicome & Dated 5/23/2007*, 523 P.3d 1100 (Nev. 2022), which largely, if not completely, resolved the issues in this appeal, the Nevada Supreme Court retained jurisdiction. To ensure continuity and avoid the possibility of conflicting rulings, the Nevada Supreme Court should retain jurisdiction over this appeal.

III. STATEMENT OF THE CASE

The history of this case and the prior appeal, Case No. 83261, is important since this case involves the portion which was Partially Dismissed on January 19, 2022. This Court dismissed Breckenridge from the appeal because Breckenridge's claims for slander of title, writ of restitution, unjust enrichment, and rent or monies for possession of the subject property were not yet resolved by the district court. RA001-003. The remainder of the appeal was allowed to proceed owing to a proper NRCP 54(b) certification of a final judgment. RA002; AA04065. In the

[1] And pointed out a dismissal of a cross-claim the undersigned missed.

resulting opinion, issued on December 29, 2022, this Court ruled the Lincicomes' claims of wrongful foreclosure were defeated and affirmed the district court's grant of summary judgment against the Lincicomes. Thus, the prior appeal resolved the principal arguments the Lincicomes raise in this appeal.

This long-running home foreclosure dispute was between appellants, Vicenta Lincicome and Albert Ellis Lincicome, Jr. (collectively, the "Lincicomes"), and respondent banks, mortgage servicer, and trustee. Breckenridge only became involved after it purchased the Property at the foreclosure sale.

The Lincicomes had accepted a loan modification agreement (LMA) from respondent Bank of America ("BANA") in 2009 after falling into default on a 2007 loan secured by a deed of trust. The Lincicome also defaulted on the LMA and foreclosure proceedings commenced in 2018.

The case below began on November 7, 2018 when the Lincicomes brought a Complaint in the Third Judicial District against Sables, LLC - Trustee on the Deed of Trust ("Sables"), Fay Servicing, LLC - the loan servicer ("Fay"), Prof-2013-M4 Legal Title Trust by U.S. Bank National Association ("U.S. Bank") and BANA – the banks (the "Banks")(all collectively the "Defendants").

The Lincicome's Complaint sought to halt the imminent foreclosure on the Property alleging Sables, Fay, and the Banks breached Nevada foreclosure laws.

AA00049-173. The Lincicomes also recorded a lis pendens against the property on November 7, 2018. AA00257.

On November 8, 2018, on an ex parte application by the Lincicomes, the district court halted the foreclosure sale. AA00307-08; *see* AA00310-312 (amending the Order). The hearing on the preliminary injunction was held on November 20, 2018. The district court was willing to enjoin the sale of the Property provided the Lincicomes post a bond of $172,610.67 by December 20, 2018, and post additional security each month thereafter. AA00862.

The Lincicomes failed to post the bond which relieved the Defendants from any duty to comply with the injunction. AA00862; AA00039. As such, the Property was put up for auction at a non-judicial foreclosure sale on January 4, 2019. Breckenridge purchased the Property at the sale.

While the Lincicomes and the Defendants then began motion practice before the district court, Breckenridge was not initially brought into the lawsuit. On May 24, 2019 Breckenridge moved to intervene and expunge the lis pendens. AA01243-53. On August 28, 2019, the district court granted Breckenridge's motion to intervene but did not rule on the motion to expunge. AA01506-07.

On October 3, 2019 Breckenridge, as Intervenor, filed Counterclaims against the Lincicomes. AA01546-78. These causes of action were Quiet Title, Slander of Title, Writ of Restitution, Unjust Enrichment, and Rent or Monies for Possession

of the Property. *Id.* On October 23, 2019, the Lincicomes answered these Counterclaims and asserted Counterclaims against Breckenridge. AA01605-26. These Counterclaims were Declaratory Relief, Quiet Title, Special Damages - Attorney's Fees. *Id.*

On December 20, 2019, the Lincicomes amended their complaint to assert claims for Wrongful Foreclosure, Declaratory Relief, Quiet Title, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Violation of Homeowner's Bill of Rights, Slander of Title, and Special Damages against the Defendants. AA01685-1828. The claims against Breckenridge remained the same. *Id.* Breckenridge and the Defendants answered. AA01829-1857; 1860-79.

The Defendants brought motions for summary judgment in March 2021 which Plaintiffs opposed. The Defendants filed replies in support.

Breckenridge likewise brought its motion for summary judgment on March 18, 2021. AA02485-535. This was opposed by the Lincicomes on April 15, 2021. AA03433-441. Breckenridge filed a reply in support on May 10, 2021. AA04043-48.

The Plaintiffs filed their motion for summary judgment on March 19, 2021. AA02637-845. The Defendants filed oppositions from April 14-19, 2021. Plaintiff filed a reply in support on May 6, 2021. AA03977-4003.

On June 23, 2021 the district court granted summary judgment in favor of Defendants and denied Plaintiffs' motion for summary judgment. AA04049-4066. As part of that Order, the district court granted NRCP 54(b) certification. AA04065.

A notice of appeal was filed by the Lincicomes on July 19, 2021. This was Case No. 83261.

On July 6, 2021 the order granting Breckenridge summary judgment was entered. AA04070-4077. The order incorporated "the legal findings, factual findings, and analysis contained in" the June 23, 2021 order granting Defendants summary judgment. AA04075. The district court further found: "As Breckenridge purchased the Property at the foreclosure sale, Breckenridge is entitled to summary judgment **regarding their claims to title to the property**. *Id.*

Breckenridge moved for a Permanent Writ of Possession on September 9, 2021. This was opposed on September 24, 2021. AA04294-95. Breckenridge replied on October 6, 2021. AA4366-68. The order issuing the writ was filed on November 22, 2021.

Breckenridge also moved for attorney's fees and costs. AA04113-87. This was opposed on August 5, 2021. AA04196-206. Breckenridge filed a reply in support on September 2, 2021. AA04210-15. The order granting Breckenridge's motion was filed on January 19, 2022.

On the same day, this Court dismissed Breckenridge from the appeal in Case No. 83261 since Breckenridge's damages claims were yet to be resolved by the district court.

On August 26, 2022 Breckenridge moved for summary judgment on its remaining claims. AA05007-43. This was opposed on September 13, 2022. AA05084-103. Breckenridge filed a reply on September 30, 2022. AA05104-122. The order partially granting the motion, and effectively granting the Lincicomes summary judgment on the slander of title claim, was filed on February 10, 2023.

With all of Breckenridge's claims now resolved, the Lincicomes filed a notice of appeal on March 24, 2023.

On December 29, 2022, this Court issued its Order affirming the district court order granting the Defendants summary judgment. *Lincicome v. Sables, LLC as Tr. of Deed of Tr. Given by Vicenta Lincicome & Dated 5/23/2007*, 523 P.3d 1100 (Nev. 2022)(unpublished). AA00038-48. The Lincicomes filed a Petition for Rehearing on January 17, 2023, claiming the Court "overlooked facts and primary authority." RA004-031. An Answer was filed by Defendants on March 16, 2023. The Court promptly denied the rehearing on March 20, 2023. RA032.

The Lincicomes filed a petition for *en banc* reconsideration on April 3, 2023 claiming the Court "misapprehended material facts and misapplied Nevada contract law, excused violations of public policy, and condoned the improper and

wrongful foreclosure of the Lincicomes' home in violation of NRS 107.080." RA033-61. The Lincicome's petition was promptly rejected on April 14, 2023. RA061-62.

IV. STATEMENT OF THE FACTS

A. The Facts and Law Set by this Court

This Court's December 29, 2022 Order of Affirmance in *Lincicome v. Sables, LLC as Tr. of Deed of Tr. Given by Vicenta Lincicome & Dated 5/23/2007* ("*Sables LLC*") set forth the facts associated with this case through the date of the competing motions for summary judgement. The facts, as set by this Court are:

> This case concerns a long-running home foreclosure dispute between appellants. Vicenta Lincicome and Albert Ellis Lincicome, Jr. (collectively, the Lincicomes), and respondent banks, mortgage servicer, and trustee. The Lincicomes accepted a loan modification agreement (LMA) from respondent Bank of America (BANA) in 2009 after falling into default on a 2007 loan secured by a deed of trust. However, when the Lincicomes attempted to make the reduced payment due under the LMA, BANA objected, stating that it had no record of the modification. BANA accepted the Lincicomes' first LMA payment in September of 2009, but rejected their second LMA payment in October of 2009. BANA told the Lincicomes that it would try to locate the lost LMA, but that in the meantime they needed to make the larger monthly payments due under the original note. After BANA rejected their October 2009 payment, the Lincicomes stopped making payments on the note or the LMA and filed for bankruptcy in 2010.
>
> Unknown to the Lincicomes, BANA signed and recorded the LMA in 2011. But, after a bankruptcy stay

> on foreclosure was lifted in 2014, BANA and its successors in interest demanded payment under the original loan. The Lincicomes failed to pay, and Sables, LLC (Sables), the trustee for BANA and its successors, filed a notice of default in 2017. The Lincicomes petitioned for foreclosure mediation against all parties except BANA. At the mediation, the parties agreed to resolve their disputes by the Lincicomes agreeing to provide, and Sables agreeing to accept, a deed in lieu of foreclosure by July 5, 2018. When the Lincicomes failed to timely provide the deed, Sables recorded a Notice of Trustee's Sale.
>
> The Lincicomes filed the underlying action in November 2018 against BANA, US Bank (BANA's successor mortgagee), Sables, and loan servicer Fay Servicing (Fay), seeking declaratory and injunctive relief against foreclosure and damages. The district court granted a preliminary injunction against foreclosure on the condition that the Lincicomes post bond. When the Lincicomes failed to do so, the property went to foreclosure sale. The Lincicomes then amended their complaint to add claims for wrongful foreclosure. The parties filed competing motions for summary judgment, and the district court granted summary judgment in favor of respondents and denied the Lincicomes' cross-motion for summary judgment. The Lincicomes timely appealed.

Sables, LLC, 523 P.3d 1100, AA00038-40.

In its Opinion this Court further held: "The Lincicomes' contract-based damages against BANA accrued in 2009, when BANA repudiated the LMA, and the six-year statute of limitations provided by NRS 11.190 for such claims expired before the Lincicomes filed suit in 2017." *Sables, LLC*, 523 P.3d 1100, AA00040. This Court further held: "US Bank, Fay, and Sables (the foreclosing respondents)

were not liable for wrongful foreclosure because of the foreclosure mediation agreement, which the Lincicomes then breached." *Id.*

Ultimately, this Court held: "Because of the Lincicomes' breach, the agreement permitted the foreclosing respondents to proceed with foreclosure of the property. This defeats the Lincicomes' wrongful foreclosure claim." *Sables, LLC*, 523 P.3d 1100, AA00047, and: "The district court properly granted summary judgment based on the statute of limitations as to BANA and as to the remaining defendants based on the deed-in-lieu mediation agreement." *Id.*

B. Facts Related to Breckenridge's Other Claims.

There is no evidence new facts related to the quiet title or wrongful foreclosure where uncovered after the Breckenridge portion of the case resumed. The district court did necessarily make factual and legal determinations regarding Breckenridge's other causes of action. Yet these are generally not challenged by the Lincicomes.

1. Writ of Possession

A Trustee's Deed upon Sale was recorded on January 25, 2019. AA04263-66. This divested the Lincicomes of any interest in the Property. The Lincicomes were served with a three-day notice to quit on January 28, 2019. AA04268-73. Despite this, the Lincicomes would neither vacate the Property nor pay a reasonable rent to remain in the Property. The rental value was determined to be

$2,250-$2,500 per month. AA04277. By October 2021, the Lincicomes still had not made a single payment to Breckenridge. While the district court was willing to allow the Lincicomes to remain in the Property until the appeal was resolved, it would not allow them to remain without making adequate payments. The district court required 56 months of rental payments (from February 1, 2019 through September 2023) to be posted as a supersedes bond in order to stay the writ of possession pending appeal. AA04647-56. The Lincicomes did not timely post the bond, so the writ of possession was issued. AA04647-56. The Lincicomes left (or were moved from) the Property on November 15, 2021.

2. Unjust Enrichment

The district court noted on February 10, 2023 that this Court had affirmed its judgment in *Sables, LLC*, 523 P.3d 1100. AA00028. Based upon the affirmation, the district court reiterated Breckenridge was the rightful owner of the Property. *Id.*

The district court ruled that the Lincicomes were unjustly enriched at Breckenridge's expense by staying in the Property without paying rent. The district court ruled Breckenridge was entitled to damages for 33 ½ months of rent at a reasonable rental value of $2,500 per month, for a total of $83,750. AA00035.

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3. Unlawful Detainer

The district court also found the Lincicomes remained in unlawful retainer of the Property by holding over. AA00030-33. The landlord, Breckenridge, was entitled to reasonable rent during the holdover period. AA00034-35. Thus, Breckenridge would be entitled to the same award for reasonable rent under a claim for unlawful detainer. The district court refused to award treble damages under the statute, however. AA00033-35.

4. Award of Attorney's Fees to Breckenridge

The district court did make findings in the record to support its award of attorney's fees to Breckenridge and its determination the Lincicomes' claims were brought or maintained "without reasonable grounds or to harass the other party." AA00015; AA00022-24. The district court was particularly critical of the Lincicome continuance of the claim once it became clear the claims were futile. AA00022.

The district court found: "Disturbing to the Court, the [Lincicomes] seem to believe they can game the system to avoid repaying the money borrowed and to remain in a house rent free." AA04063. The district court found: "The [Lincicomes] admit to engaging in bad faith." AA04064.

The district court found: "The evidence brought at the preliminary injunction hearing was in stark contrast to what was brought out in discovery." AA00022.

The district court also ruled: "The evidence also establishes that the [Lincicomes] abused the foreclosure mediation process." *Id.* at 00022-23. It also found the Lincicomes' legal theories "unreasonable," noted the Lincicomes presented no legal authority on multiple legal theories advanced. AA00023.

Ultimately, the district court concluded: [Lincicomes] claims were maintained without reasonable grounds to Breckenridge. Id.

V. SUMMARY OF THE ARGUMENT

The Lincicomes continue to make arguments conclusively resolved in *Sables LLC,* yet those determinations are binding as the law of the case, and *Sables, LLC* is mandatory precedent under NRAP 36(c)(2). While the Lincicomes take umbrage over certain findings made by this Court, their arguments relating to these were waived or barred given this Court rulings on the Lincicomes' petitions for rehearing and en banc review. Further, the Lincicomes are bound by any factual issues argued regarding the foreclosure process by issue preclusion.

The Lincicome rehashed arguments regarding the injunction findings are not binding as they failed to post the required bond. Thus, the order they so frequently rely upon is "absolutely void," is not binding on later determinations, and was later found to be factually incorrect.

The Lincicomes arguments on the district court determinations regarding the writ of possession, unlawful detainer, and unjust enrichment are admittedly linked to the wrongful foreclosure determination – which is a dead issue.

Finally, the Lincicomes do nothing to counter the district court factual determinations made in support of its award of attorney's fees. They fail to show the factual determinations are clearly erroneous or that the district court abused its discretion in awarding fees. Indeed, the Lincicomes' continued pursuit of this frivolous appeal after the determination in Sables LLC became final only bolsters the district court's determinations.

VI. ARGUMENT

A. Standards of Review

While a grant of summary judgment is reviewed *de novo*, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This must change under the law of the case doctrine, however. When an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal. *Hsu v. Cnty. of Clark*, 123 Nev. 625, 629–30, 173 P.3d 724, 728 (2007). This is the antithesis of a *de novo* review.

The determination that the foreclosure of the Property was properly conducted is the law of the case and is not subject to *de novo* review. The only

recognized exception to the law of the case doctrine in Nevada is when this court issues an intervening decision that constitutes a change in controlling law. *Hsu*, 123 Nev. at 637-38.[2] No such decision is cited by the Lincicomes.

The district court's decision to grant or deny writ relief is reviewed for an abuse of discretion. *Pane v. Bank of Am., N.A.,* 136 Nev. 857, 461 P.3d 171 (Nev. App. 2020)(discussing a writ of possession) *citing Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010) (recognizing that the district court's denial of a writ petition is reviewed for an abuse of discretion).

This Court reviews an attorney fees decision for an abuse of discretion. *Rodriguez v. Primadonna Co*., LLC, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). A district court may award attorney fees to a prevailing party when it finds that the opposing party brought or maintained a claim without reasonable grounds. *Id. citing* NRS 18.010(2)(b). For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it. *Rodriguez*, 125 Nev. at 588.

[2] The two other "extraordinary circumstances" which create exceptions to the law of the case recognized in federal jurisprudence are subsequent proceedings produce substantially new or different evidence, or the prior decision was clearly erroneous and would result in manifest injustice if enforced. *Hsu*, 123 Nev. at 632 fn. 17 (citing cases). This Court may also depart from prior holdings when "they are so clearly erroneous that continued adherence to them would work a manifest injustice." *Hsu,* 123 Nev. at 632-33.

B. While unpublished, the prior appeal is mandatory precedent in this appeal.

While *Lincicome v. Sables, LLC as Tr. of Deed of Tr. Given by Vicenta Lincicome & Dated 5/23/2007*, 523 P.3d 1100 (Nev. 2022) is unpublished, NRAP 36(c)(2) provides:

> An unpublished disposition, while publicly available, does not establish mandatory precedent **except in a subsequent stage** of a case in which the unpublished disposition was entered, **in a related case,** or in any case for purposes of **issue or claim preclusion or to establish law of the case**.

(all emphasis added).

Since Breckenridge was dismissed from Case No. 83261 and the instant appeal was instituted after the district court order granting Defendants summary judgment (which was incorporated into the order granting Breckenridge summary judgment) was affirmed. This case is a subsequent appeal in that case. Thus, *Sables, LLC* is mandatory precedent.

C. Law of the Case mandates affirming the district court's June 23, 2021 summary judgment order in favor of Breckenridge.

The law-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases. *Recontrust Co. v. Zhang*, 130 Nev. 1, 7–8, 317 P.3d

814, 818 (2014). For the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication. *Id*.

The United State Supreme Court and this Court have explained the doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided. . ." *Hsu*, 123 Nev. at 630 *quoting Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). While not jurisdictional, the law of the case doctrine "is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *Hsu,* 123 Nev. at 630 quoting *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988) and citing multiple Nevada cases. The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity. *Hsu,* 123 Nev. at 630.

The Lincicome's Opening Brief is principally a repeat of its failed arguments before this Court in Case No. 83261. In a few places it brazenly challenges this Court's determinations. For example: "The Order of Affirmance however was factually incorrect in concluding that the Lincicomes agreed to provide 'Sables a deed in lieu of foreclosure.'" Opening Brief, p. 15. They also argue this Court did not address whether Sables had a duty to comply with the

foreclosure statutes, id. at p. 26-27, and did not determine whether the Lincicomes waived their rights under the Homeowners Bill of Rights. Id. at 28.

Any claim this Court did not address the issues now raised is both incorrect and unavailing, so further review of those issues is precluded by the law of the case doctrine. *See Shahrokhi v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 523 P.3d 534 (Nev. 2023)(unpublished)(repeating prior decisions "Ali's constitutional challenge to NRS 125C.0035 fails" and "Ali's due process claims fail" and finding law of the case applied). Further, the Lincicomes filed petitions for rehearing and en banc review before this Court and could have pointed out these alleged oversights then. Either they failed to do so, hence the arguments are waived, or this Court found them unpersuasive, hence the Lincicomes are bound by those decisions.

In *Sables LLC* this Court ruled: "This defeats the Lincicomes' wrongful foreclosure claim." Thus, the Lincicomes' arguments repeating the claim the foreclosure was wrongful – and therefore void – are precluded under the law of the case doctrine. The Lincicomes provide no intervening law which would render enforcing the Sable LLC determination improper. Nor do they raise any other recognized or unrecognized exception to the law of the case doctrine.

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D. Issue Preclusion also mandates affirming the district court's June 23, 2021 summary judgment order in favor of Breckenridge

Likewise, further review of issues related to Breckenridge's quiet title claim is barred by issue preclusion. Similar to the law of the case doctrine, issue preclusion recognizes litigation must come to an end, and preserves judicial resources from relitigating factual issues already resolved.

Issue preclusion applies if the following factors are present: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015).

An issue decided on summary judgment motion has a preclusive effect for issue preclusion purposes. *Bower v. Harrah's Laughlin, Inc.,* 125 Nev. 470, 484, 215 P.3d 709, 720 (2009), *holding modified by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013). The determination of an issue on a motion for judgment on the pleadings or a motion for summary judgment is sufficient to satisfy the "litigated" requirement for collateral estoppel. Restatement (Second) of

Judgments § 27 cmt. d (1982). *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997).

Here the June 23, 2021 order in favor of Defendants – which was incorporate by reference into the Breckenridge order – resolved the factual issues necessary to determine the Defendants substantially complied with statutory requirements to foreclose on the property, and that the foreclosure sale was proper. The Lincicomes plainly are the same individuals subject to the summary judgment ruling. That ruling became final and was affirmed by this Court. Obviously, these issues were actually and necessarily litigated to determine whether the Defendants violated appropriate Nevada statutes given the Lincicomes' claims for wrongful foreclosure and related claims).

Thus, the factual and legal findings of the June 23, 2021 order in Defendants' favor implicates issue preclusion on those issues. This is especially relevant here since that very same order – already affirmed by this Court – was expressly incorporated into the order granting Breckenridge summary judgment on its title claims.

In the few places the Lincicomes bother to mention Breckenridge rather than the Defendants in their Opening Brief, the factual issues are already established by way of law of the case or issue preclusion or both.

On pages 19-20 of its Opening Brief, the Lincicomes assert Breckenridge was not an innocent purchaser. See also id. at pp. 25-26, 43-45. Provided the lis pendens was properly recorded, then Breckenridge would not be a bona fide purchaser. Yet these arguments are irrelevant since the foreclosure sale was deemed valid by both this Court and the district court.

On pages 26-27 of its Opening Brief the Lincicomes argue did not consider the Lincicomes' claims of violations of the Homeowners' Bill of Rights when quieting title in Breckenridge. Yet the district court determined the Defendants substantially complied with the foreclosure statutes and otherwise found the foreclosure was proper in the June 23, 2019 order granting Defendants summary judgment. AAAA04049-66. The law, facts, and analysis was incorporated into the Breckenridge Order. Thus, the district court did consider the Lincicomes claims, found them unpersuasive, and this Court upheld those determinations.

On page 35 of its Opening Brief, the Lincicomes argue Sables violated the injunction and NRS 107.560(1) by selling the property to Breckenridge because notice issues identified in the injunction hearing were allegedly not corrected. Yet the district court later explained: "The evidence brought at the preliminary injunction hearing was in stark contrast to what was brought out in discovery." AA00022; *see also* AA03102-3322 (BANA's Statement of Undisputed Facts with

supporting documents).[3] Further, since the Lincicomes did not post the required bond, the order is "absolutely void."

E. The findings regarding injunctive relief do not assist the Lincicomes.

The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834, 68 L. Ed. 2d 175 (1981). This is because a party thus is not required to prove his case in full at a preliminary-injunction hearing since its limited purpose is to preserve the status quo. *Id.* Further, such rulings are customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. *Id.*

NRCP 65(c) provides, in part, that "(n)o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant . . ." Where a bond is required by statute before the issuance of an injunction, it must be exacted or the order will be absolutely void.' *Shelton v. District Court*, 64 Nev. 487, 494, 185 P.2d 320, 323—324 (1947). As the Lincicomes failed to post the required bond, the order is "absolutely void." The Lincicomes repeated references in its Opening brief to district court's the preliminary determination the Defendants did not comply with pre-foreclosure procedures is pointless because

[3] The Lincicomes' arguments regarding the injunction will be discussed *infra.*

the order was "absolutely void." Even if not "absolutely void," the findings were not final or binding on subsequent determinations by the district court or this Court. In those proceedings it was specifically found the Defendants *did* substantially comply. This is particularly true since the district court specifically found: "The evidence brought at the preliminary injunction hearing was in stark contrast to what was brought out in discovery." AA00022. The Lincicomes' stubborn refusal to accept these determinations does not make them any less true – or binding.

F. The district court's other decisions should be upheld.

The Lincicomes only argument on the district court's orders on Breckenridge's other claims is "[w]hether the district court erred in determining Breckenridge's remaining claims hinges upon whether the foreclosure sale was void." Opening Brief, pp. 23-24, 53. The brief only provides bare citations to four statutes. As this Court held the foreclosure was not wrongful, the Lincicomes arguments, by their admission, must fail.

It is appellants' responsibility to cogently argue, and present relevant authority, in support of their appellate concerns, and when these requirements are not met, the appellate court need not consider appellants' arguments. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006)(citing cases); NRAP 28(a)(10). Further, the absence of a clear allegation of

error, let alone one showing an abuse of discretion, prevents Breckenridge from formulating a response.

As such, this Court should not consider the Lincicomes' arguments regarding Breckenridge's Writ of Possession, Unlawful Detainer, and Unjust Enrichment Claims.

G. The district court's award of attorney's fees to Breckenridge should be upheld.

As with the discussion on Breckenridge's "remaining claims" the Lincicomes do not provide a cogent argument regarding the award of attorney's fee to Breckenridge. *Edwards,* 122 Nev. at 330 n. 38. The Lincicomes claim only "upon the record and even [this Court's] *Order of Affirmance* that the Lincicomes had sufficient basis to bring their claims for relief." Opening Brief, p. 53.

Despite the Defendants' motions for summary judgment and exhibits thereto, the grants of summary judgment, this Court's affirmance, and this Court's findings regarding the same, the Lincicomes brazenly assert "nothing in the record, including this Court's *Order of Affirmance* in Case No. 83261, establishes that US Bank, Fay Servicing, BANA, or Sables 'substantially complied with the requirements of NRS 107.080.'" Opening Brief, p. 22. Yet the record does establish this.

The district court made that determination as a finding of fact. AA04064. BANA provided a detailed record of substantial compliance as part of its motion for summary judgment. AA03102-3322. The law of substantial compliance was also discussed in the district court's order. AA04055-57.

Yet the district court also found: "Disturbing to the Court, the [Lincicomes] seem to believe they can game the system to avoid repaying the money borrowed and to remain in a house rent free." AA04063. The district court found: "The [Lincicomes] admit to engaging in bad faith." AA04064.

The district court found: "The evidence brought at the preliminary injunction hearing was in stark contrast to what was brought out in discovery." AA00022. The district court also ruled: "The evidence also establishes that the [Lincicomes] abused the foreclosure mediation process." *Id.* at 00022-23. It also found the Lincicomes' legal theories "unreasonable," noted the Lincicomes presented not legal authority on multiple legal theories advanced. AA00023.

Ultimately, the district court concluded: "[Lincicomes] claims were maintained without reasonable grounds to Breckenridge." Id.

The district court ultimately faulted the Lincicomes for continuing the action once it became clear the Defendants had substantially complied with the statutes meaning Breckenridge was clearly entitled to ownership. *See id.* The district court also ruled: "The evidence also establishes that the [Lincicomes] abused the

foreclosure mediation process." *Id.* at 00022-23. Ultimately, the district court concluded: [Lincicomes] claims were maintained without reasonable grounds to Breckenridge. *Id.* at 00023.

This raises a final point: The Lincicomes' continued appeal in this case is further evidence supporting the district court's ruling.

This is because this appeal is utterly pointless. While there was perhaps a glimmer of hope when the notice of appeal was filed since the petition for *en banc* review had not yet been rejected, that glimmer was extinguished when the petition was rejected on April 14, 2023. At that point, there was no possibility the foreclosure could be deemed void under NRS 107.080(5). Breckenridge did not publish the notices and was not required to follow the pre-foreclosure procedures. It was only at risk if it purchased the Property upon a determination the Defendants failed to substantially comply with the pre-foreclosure procedures. *The Sables LLC* determination conclusively established the Defendant had substantially complied and the foreclosure was proper.

Indeed, since the district court incorporated the facts, law and analysis of its June 23, 2021 order in favor of Defendants into the order granting Breckenridge summary judgment, it would be inherently unjust for this Court to revisit those issues here absent extraordinarily compelling circumstances.

The Lincicome barely mention the "other determination" in their Opening Brief while acknowledging these were tied to voiding the sale. The Lincicomes then choose to reargue aa previous appeal which is mandatory precedent under NRAP 36(c)(2) while citing to no procedure for opening the argument long after the provisions of NRAP 40 and 40A were closed.

If the Lincicomes had maintained this appeal solely regarding the attorney's fees award they may have strengthened their appeal. Instead their arguments on the topic are not substantive and do not specifically address the factual and legal findings of the district court. Instead, they attempt to reargue illusory issues regarding the Defendants who have already prevailed. Thus, the appeal shows the *modus operendi* mentioned by the district court – bad faith actions designed to delay or obstruct long after the argument is plainly wrong. Certainly, the Lincicomes have not established the facts established by the district court were clearly erroneous or that it abused its discretion based on those findings. Indeed, this Court could even find harmless error since this continued appeal – and the resistance to Breckenridge's efforts post-summary judgment indicate a desire to harass Breckenridge.

The Lincicomes have never contested that the amount of attorney's fees awarded was excessive or improper.

The district court award of attorney's fees should be upheld. Further, this Court should take any action it deems appropriate for the Lincicomes' continuing an frivolous appeal against Breckenridge given the determinations in Sable LLC.

VII. CONCLUSION

The principal issues raised by the Lincicomes in this appeal were decided in Sales LLC and constitute binding precedent under NRAP 36(c)(2), the law of the case, and issue preclusion. The secondary issues are linked to the foreclosure issue – already decided against the Lincicomes – or are without merit. The Lincicomes fail to show the district court was clearly erroneous and abused its discretion regarding the award of attorney's fees to Breckenridge.

As such, the district court orders should be affirmed, and this court should award relief it deems appropriate to Breckenridge for the Lincicomes' continued pursuit of this frivolous appeal.

DATED this 26th day of February, 2024.

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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.
2. I further certify that this brief complies with the 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 and contains 5,828 words.
3. Finally, I 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 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of February, 2024.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

ALL COUNSEL ON SERVICE LIST

DATED this 26th day of February, 2024.

/s/ Madelyn B. Carnate-Peralta

_____

An employee of Hutchison & Steffen, PLLC