



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

ASHOK KAUSHAL,

Appellant-Petition/Cross Respondent,

v.

No. S-1-SC-40119

SANTA FE COMMUNITY HOUSING TRUST,

Appellee-Respondent/Cross Petitioner.

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**ANSWER BRIEF**

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## Statement of Proceedings and Facts

As stated by the Petitioner Kaushal (“Kaushal”) in his brief in chief, these mortgage foreclosure proceedings involved the exercises of competing rights of redemption by Kaushal and the Santa Fe Community Housing Trust (“Trust”). Kaushal’s statement of proceedings accurately describes the proceedings up to the point that the Court of Appeals issued its Opinion (“Opinion”) in 2021-NMCA-010 (“Kaushal I”). Thereafter, the proceedings are inaccurately characterized by Kaushal as a Court of Appeals remand to the District Court for a *de novo* review of the Opinion’s holdings. In fact, the remand limited the District Court proceedings to a ministerial process of entering a judgment on the mandate - an uncomplicated process which only involves reducing the Opinion to a final judgment.

As identified by Kaushal, in the original District Court proceedings, the Trust filed a motion for summary judgment. (RP 420). The District Court granted the summary judgment motion and ruled that Kaushal, who had only secured redemption rights from two of the deceased mortgagee’s (“Linora”) four heirs, had not perfected a unified right of redemption, and the Trust, as a second mortgage holder, was now the sole redeemer of the foreclosed property. (RP 573, 577).

Kaushal appealed (RP 582), and the Court of Appeals in its published Opinion reversed in part the District Court and held that Kaushal redeemed a 50% undivided interest in the property as represented by his assignment of redemption rights from

50% of Linora's heirs. The Trust then redeemed the balance of the property, resulting in both Kaushal and the Trust holding 50% tenancy in common interests in the foreclosed and now redeemed property. No further motions or petitions were filed, and the Opinion became final.

After the time for post opinion motions passed (Rule 12-402, NMRA 2016 and Rule 12-404, NMRA 2022), the Court of Appeals issued its Mandate. (RP 633). The Trust presented to the District Court a form of judgment on the mandate which reflected the holdings of the Court of Appeal Opinion. (RP 660). Kaushal opposed the form of Judgment and argued that the Court of Appeals Opinion should be modified to hold that Kaushal redeemed the entire interest in the property. (RP 692). The Trust responded and argued that the time for reconsideration of the Opinion had long passed. (RP 696). The District Court agreed that the Trust's form of judgment on the Mandate reflected the holdings in the Opinion and entered the Trust's form of judgment. (RP 708).

Kaushal appealed from the Judgment on the Mandate (RP 713) and in his appeal continued to argue the merits of the case, contending that Kaushal should be held to have redeemed the entire property. (See Brief in Chief and Reply Brief in Appeal II, COA No. A-1-CA-39814).

The Court of Appeals accepted Kaushal's invitation to revisit its Opinion and reversed it, ruling that the Trust failed to redeem any interest in the property.

However, it further ruled that Kaushal redeemed the property on behalf of himself and all the other Linora heirs and was now their tenant in common, a result that neither party had expected. (See Memorandum Opinion in Kaushal II (“Memorandum Opinion”).

Both parties filed motions for reconsideration in Kaushal II. Both were denied. (see Kaushal II appeal denials)

## **ARGUMENT**

### **Standard of Review**

In the case before this Court, the issue is whether the Court of Appeal’s Memorandum Opinion is a defective attempt to amend its own Opinion after all jurisdiction was lost, and whether the Judgment on the Mandate properly reflects the holdings of the published Opinion. There are no factual disputes, and this Court should rule on these issues *de novo* and as a matter of law. See, *Losinski v. Drs. Corcoran, Barkoff & Stagnone, P. A.*, 1981-NMCA-127, ¶ 4, 97 N.M. 79, 80, 636 P.2d 898, 899; *Cadle Co. v. Seavall*, 2019-NMCA-062, ¶ 6, 450 P.3d 471, 473 (holding that a *de novo* review is appropriate for a statutory interpretation matter) and *State v. Esparza*, 2003-NMCA-075, ¶ 13, 133 N.M. 772, 70 P.3d 762 (stating that an appellate court reviews legal issues *de novo* where facts are not in dispute.).

### **Entering a Judgment on the Mandate**

A judgment on the mandate is based upon the rulings and holdings of the

Opinion attached to the mandate from the Court of Appeals. There is no opportunity to change or fine-tune an Opinion that has become final. There is no room for a party to argue that a District Court may reconsider a Court of Appeals Opinion or otherwise stray from the mandate. The following cases confirm this process:

- *State ex rel. King v. UU Bar Ranch Ltd. Partnership*, 2009-NMSC-010, ¶22, 145 N.M. 769 (“The Court of Appeals 1 opinion and mandate set forth the full extent of the jurisdiction of the district court on remand.”)
- *Matter of Miller*, 1976-NMSC-039, ¶4, 89 N.M. 547 (“Since mandate was issued on November 21 the Court of Appeals lost jurisdiction over the case on December 1”)
- *B & H Co. Inc. v. Moss*, 1976 -NMSC- 057, ¶1, 89 N.M. 549 (“The cost bill was not submitted until after the mandate had been issued and therefore the Court of Appeals lost jurisdiction over the case.”)
- *Hughes v. Hughes*, 1984-NMSC-035, ¶4, 101 N.M. 74: (“Our mandate and opinion in the prior appeal set forth the full extent of the jurisdiction of the district court on remand.”)
- *Vinton Eppsco Inc. of Albuquerque v. Showe Homes, Inc.*, 1981-NMSC-114, ¶4, 97 N.M. 225 (“It is well settled that the duty of a lower court on remand is to comply with the mandate of the appellate court, and to obey the directions therein without variation, even though the mandate may be erroneous.”)



- *Kaushal v. Santa Fe Community Housing Trust*, Opinion in Ct. App. No. A-1-CA-39814. ¶28 (“For the foregoing reasons, we reverse the District Court order granting the Trust’s redemption petition and summary judgment for the Trust and remand to the District Court to **allow for the exercise of Kaushal’s, along with the Trust’s, rights to redemption consistent with this opinion.**” (emphasis added).
- *Bank of N.Y. v Romero*, 2016-NMCA-091, ¶9, 382 P.3d 991 (“When there ‘is any doubt or ambiguity regarding the [appellate] mandate, the *meaning* of the [appellate] opinion governs”)
- *Wilson v. Emp. Sec. Comm’n*, 1966-NMSC-147, ¶ 5, 76 N.M. 652, 655, 417 P.2d 455, 457 (Upon remand, the district court must look to the opinion of the supreme court, not to the mandate, and, if there is any conflict in the supreme court's opinion and the mandate, the mandate must give way to the court's opinion as the law of the case.”)
- *Albuquerque Broad. Co. v. Bureau of Revenue*, 1950-NMSC-011, ¶ 5, 54 N.M. 133, 135, 215 P.2d 819, 820 (“... in case there is any conflict between this Court's opinion and its mandate, the mandate must give way to the opinion.”)

In the present case, the District Court did as instructed by the Mandate and the Opinion. On appeal of the Judgment on the Mandate, the Court of Appeals was restricted to the same extent as the District Court and could only determine whether

the Judgment on the Mandate followed the Opinion.

It is apparently being contended by Kaushal that the Opinion does not decide the issues between the parties and therefore Kaushal in some novel proceeding that summonses up jurisdiction from whole cloth has the opportunity to modify the Opinion. The simple answer to this contention is that the Opinion is final, and all opportunities to challenge it have long passed. If the Opinion was in fact incomplete and failed to address the core issue before it, that does not affect the finality of the Opinion, and it remains the law of the case and part of the *stare decisis* of New Mexico's judicial branch. The opportunity for modification is only presented when it arises in the ordinary course of some future litigation.

Returning to the substance of the Opinion, it clearly resolves that Kaushal and the Trust each redeemed a 50% tenancy in common interest in the foreclosed property: "However, we need not resolve that issue [the Trust's receipt of one heir's redemption rights] given our conclusion that Kaushal's interest is limited to the fifty percent he was assigned, which did not include the interest purportedly assigned by Urioste to the Trust." (Appeal Opinion p. 4, footnote 1). On the same page at ¶7, the Opinion restates its holding that Kaushal only redeemed a fifty percent interest in the property: "Kaushal's interest, however, is limited to those interests possessed by the assignees - two of Pacheco's four surviving sons – at the time of the assignment."

The Opinion also concluded that the "...Trust substantially complied with the statutory requirements applicable to its own right of action." *Id.* Unless the Trust had redeemed something i.e.: the remaining 50% interest in the property, there would have been no need to address this issue. See the Opinion footnote number 1, p.4 and *Santa Fe S. Ry. v. Baucis Ltd. Liab. Co.*, 1998-NMCA-002, ¶ 24, 124 N.M. 430, 952 P.2d 31 ("We will not issue an advisory opinion in the absence of a justiciable issue.")

The Opinion notes that Section 39-5-18(D) NMSA 1978 provides that mortgagees and their heirs have priority redemption rights. ¶10. The Opinion then states: "However, the statute is silent on whether a prioritized redeeming former defendant owner must possess a unified interest-i.e., one hundred percent (100%) of the redemption right." *Id.*

The Opinion then concludes that Section 39-5-18(D) did not require a unity of interest held by the mortgagee's heirs in order for redemption rights to be exercised on their behalf. *Id.* ¶14. "However, he [Kaushal] holds only a 50% redemption interest in the property." *Id.* ¶17.

At ¶¶15-17, the Opinion disposes of the argument that securing the redemption rights of one of several heirs allows for a redemption of the entire property interest. Instead, since tenancy in common interests are separately alienable, Kaushal only had a right to redeem 50% of the fee title to the property.

The Court then instructed the District Court “to allow for the exercise of Kaushal’s, *along with the Trust’s*, rights to redemption consistent with this Opinion.” *Id.* ¶ 28 (emphasis added).

The only plausible interpretation of this mandated directive is that both parties had redemption rights which were properly exercised and which redeemed something – 50% interests in the property.

There being no post Opinion motions for reconsideration or petitions for writs of certiorari filed, on February 22, 2001, the Court of Appeals issued its Mandate to the District Court with the Opinion attached and ordered the District Court to conduct such further “... proceedings consistent with said decision/order.” (RP 633). Following the Court of Appeal’s Mandate, the District Court issued its Judgment on the Mandate and, complying with the Opinion, confirmed that the parties had each successfully redeemed a 50% interest in the property. (RP 708).

### **The Memorandum Opinion**

Kaushal filed his appeal of the Judgment on the Mandate seeking to have the Court of Appeals modify or reverse its Opinion and treated the absence of jurisdiction as a minor inconvenience. Unfortunately for Kaushal, the Court of Appeals did open up the proceedings, but issued a Memorandum Opinion which restructured the parties’ rights, making matters worse for Kaushal.

Even a casual read of the Memorandum Opinion reveals that it is announcing

holdings totally foreign to anything found in the Opinion. For example, the Opinion found that the Trust had successfully exercised its redemption rights. (Opinion ¶¶10, 15-17, 28). Had this not have been the holding, there would have been no need for the extensive discussion about the Trust's successful enforcement of redemption rights. (Opinion ¶¶ 23-27). The Memorandum Opinion declared that Kaushal redeemed one-hundred percent (100%) of the property. However, the rub was that Kaushal's redemption was also on behalf of the other heirs of Linora who retained their tenancy in common interests. (Memorandum Opinion ¶¶ 8-9). According to the Memorandum Opinion, if Kaushal wants clean title, he needs to clear out the 50% title interests held by the other Linora heirs. None of this is found in the Opinion.

### **Statutory Ambiguity and its Judicial Resolution**

While the only issue that should be before this Court is whether the Judgment on the Mandate reflects the ruling of the Opinion that the Trust and Kaushal are each 50% tenants in common, the driving force of this litigation is that NMSA 1978 Section 39-5-18. NMSA 1978 is ambiguous about the status of a deceased mortgagee's redemption rights. This caused each of the parties to present their separate ambiguity resolutions and the Court of Appeals to describe two more different resolutions - one in its Opinion and another in its Memorandum Opinion, a total of four distinct resolutions.

NMSA 1978, Section 39-5-18, as amended by the 1987 Legislature and before

the latest 2007 amendment, provided equal redemption rights for “... defendant owner of the real estate, his heirs, personal representatives or assigns or by any junior mortgagee or other junior lienholder.” There were no redemption priorities provided for. Instead, the winner was the one who won a race to the courthouse or to the foreclosure purchaser.

In 2007, the statute was amended. Subparagraph A provided that the property could be redeemed “... by the former defendant owner of the real estate or by any junior mortgagee or other junior lienholder...” Subparagraph D provides that these permitted redeemers include their “... respective personal representatives, heirs, successors and assigns.” Significantly, each of these categories describe a unified right to redeem foreclosed property.

Subparagraph A (3) then provided that the “... former defendant owner shall have first priority to redeem the real estate. If the former defendant owner does not redeem the real estate as provided in this subsection, each junior mortgagee or junior lienholder shall have a right to redeem the real estate. The order of priority of such redemption right shall be the same priority as the underlying mortgages or liens...”

The legislative intent was clear. There would no longer be a race to the courthouse or to the foreclosure purchaser. This chaos was not a matter of speculation. It was the obvious motivation for the 2007 amendment to the statute.

The Opinion at ¶10 noted however that the statute was unclear whether one

needed a unified interest of all heirs for there to be a successful assignment a full right of redemption: (“However, the statute is silent on whether a prioritized redeeming former defendant owner must possess a unified interest—i.e., one-hundred-percent—of the redemption right.” Opinion at ¶10).

The Opinion then resolved the ambiguity as is required. (*State v. Thompson*, 2022-NMSC-023, 521 P. 3d 64). An ambiguity exists when a statute can be understood by reasonably well-informed persons in two or more different senses. (*Maestas v. Zager*, 2007-NMSC-003, ¶9, 141 N.M. 154, 152 P.3d 141). The Opinion resolution is that the speculator can redeem only that tenancy in common interest represented by the redemption assignments obtained by the speculator. This avoids the race to the courthouse, but it does present the problem of having a second mortgage holder and a speculator becoming unwilling tenants in common and having to agree on the future of the redeemed property or face a partition action.

Kaushal in his brief in support of his petition for writ of certiorari argues for a different resolution of the statute’s ambiguity. His proposed resolution of the statute’s ambiguity is that a speculator need only obtain a redemption assignment from one deceased mortgagee’s heirs, win the race to the courthouse and trump all other heirs’ redemption efforts. Under this system, no redemption efforts of any second mortgage holders who lost real money in the foreclosure would succeed. The Kaushal resolution has major problems in that it reinvigorates the former race to the

courthouse, encourages speculators to take advantage of the most vulnerable of a decedent's heirs and does nothing to promote keeping the foreclosed property in the decedent's family, the obvious policy behind the mortgagee priority. It is a formula for the unscrupulous.

The Memorandum Opinion resolution is different still. Here, a speculator who exercises the redemption rights of less than all of the heirs, redeems the property on behalf of all heirs. This will likely tie up the property for a year or more, as it will likely require a determination of heirship proceeding and battles over contribution obligations on the part of the non-assigning heirs. It would also not promote the statutory objective of keeping the property in the family.

The Trust's proposed resolution was that the speculator would need assignments from all of the heirs before any redemption rights could be exercised. That would prevent a re-energized race to the courthouse, recognize the rights of second lienholders who have a financial investment in the property and confirm whether the heirs are interested in keeping the property in the family. This would not be speculator friendly.

The purpose in describing these alternative resolutions is to point out that the method chosen by the Opinion to resolve the statutory ambiguity is clear and complete (even if unpopular), and that the District Court complied with the mandate and the holdings of the Opinion.



## **The *TAL* Opinion and the “Opinion”**

Kaushal relies on *Kaushal v. TAL Realty, LLC* No. A-1-CA-39459 (N.M. Ct. App. May 31, 2022) (non-precedential) as support for the proposition that tenants in common have no rights to participate in a redemption of foreclosed property after the time for exercising redemption rights has passed, and, therefore, the Memorandum Opinion is incorrect when it holds that Kaushal holds title to the property as a cotenant with the other Linora heirs.

In response, following the holdings of the *TAL* Memorandum Opinion does not lead to Kaushal’s proposed resolution. Instead, *TAL* offers support for the Kaushal I Opinion which holds that a tenant in common exercising his right of redemption only redeems that tenant’s tenancy in common interest.

The *TAL* Memorandum Opinion held that Kaushal, who had purchased redemption rights from a tenant in common, lost his redemption rights because he did not exercise them during the redemption period. “Once his right to redeem the foreclosed property in this case was terminated by the statutory deadline, Petitioner had no right to participate in that redemption, whether directly or by way of contribution.” *Id.* ¶ 4. More significantly, the court held that “... all cotenants have the same opportunity to redeem the property.” Further, [i]f [a] cotenant has no right to redeem, there is no right to contribute.” *Id.* ¶ 2. Accordingly, harmonizing the *TAL* Memorandum Opinion with the Kaushal I Opinion, since the rights of all tenants

in common are available for exercise during the entire redemption period, if one tenant in common or his assignee exercises a redemption right, that does not foreclose the redemption rights of the other tenants in common. Under this structure, the race to the courthouse is avoided and at the end of the redemption period, those tenants in common who exercised their redemption rights only redeemed their own tenancy in common rights, leaving open the opportunity for junior lien holders to redeem the balance of the property interest and salvage at least some of their lost investment. (“However, he [Kaushal] holds only a 50% redemption interest in the property.” Opinion ¶17.)

### **CONCLUSION**

The only jurisdiction that exists in this case is to craft a judgment on the mandate which accurately reflects the Opinion. Kaushal does not address why the Judgment on the Mandate entered by the District Court does not meet its mandate. Instead, Kaushal skips over the absence of jurisdiction and argues for his speculator friendly solution for resolving the redemption rights ambiguity presented by the statute. However, debating which ambiguity resolution is the most reasonable is a futile exercise, as any opportunity to challenge or supplement the Opinion has passed. The Opinion stands as is.

The Trust requests that this Court reverse or strike the Memorandum Opinion as being issued without jurisdiction and confirm the entry of the Judgment on the

Mandate.

Respectfully submitted,

VanAmberg, Rogers, Yepa,  
Abeita, Gomez and Wilkinson, LLP

/s/ Ronald J. VanAmberg

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### CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document to the following counsel of record electronically through the Odyssey System on January 26, 2024.

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