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WASHINGTON STATE
SUPREME COURT

In re Supreme Court Petition No. 96623-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

Case No. 48784-5-II
(as consolidated with Case No. 48910-4-II)

MARK OLLA, an individual,

Petitioner / Plaintiff

v.

ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka "THE ROBERT H. WAGNER PENSION PLAN") and DOES 3 through 50, Inclusive,

and

ROBERT H. WAGNER, as an individual and as a member of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (aka "THE ROBERT H. WAGNER PENSION PLAN"); THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN; and DIANNE WAGNER, as an individual and as a member of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN; and DOES 4 through 15, Inclusive,

Respondents / Defendants

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT

APPELLANT'S AMENDED PETITION FOR REVIEW

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Table of Contents

Authorities Cited

Washington Cases

Federal Cases

Constitutions

Washington Statutes

Washington Court Rules

Federal Statutes

Federal Reserve Board Regulations

C.F.R. § 226.23 et seq.

Other Authorities

I. INTRODUCTION

Both the Washington State Mortgage Broker's Practices Act, RCW 19.146 Et Seq. ("MBPA") and the Federal Truth In Lending Act, 15 U.S.C. §§ 1601 Et Seq. ("TILA"), are statutes enacted in the public interest to combat predatory lending[1]. Enforcement is of these Acts is thus strongly in the public interest.

It is a longstanding legal principle recognized by Washington State courts that a contract that is either illegal or violates public policy is void and wholly unenforceable[2].

Division Two of the Washington State Court of Appeals noted that an instrument that is "intimately connected" to an illegal instrument is

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[1] TILA at 15 U.S.C. § 1601 (a), as applied in years 2007 and 2008 states "...that it is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . ." MBPA at RCW 19.146.005 notes its purpose to be profoundly in the public interest: "The legislature finds and declares that the brokering of residential real estate loans substantially affects the public interest . . ."

[2] Bankston v. Pierce County No. 42850-4-II (May 21, 2013) Wash. Court of App, Div. II; see also, Fluke Corp. v. Hartford Accident Indus. Co., 102 Wash. App. 237, 245, 7 P. 3d 825 (2000), aff'd 145 Wn. 2d 137 (2001), citing to Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn. 2d 630, supra at 636, 409 P. 2d 160 (1965); see also, In re Marriage of Hammack, 114 Wash. App. 805, 810-811, 819-820, 60 P.3d 663 (2003), citing Helgeson v. City of Marysville, 75 Wash. App. 174, 180 n.4, 881 P. 2d 22 1042 (1994) citing BLACK'S LAW DICTIONARY 1574 (6th ed.) (RB 31); see also Golberg v. Sanglier, 96 Wn. 2d 874, 639 P. 2d 1347 (1982); see also, City of Raymond v.Runyon, 93 Wash. App. 127, 967 P. 2d 19 (1998) Court of Appeals of Washington, Division 2, No. 22915-3-II (November 20, 1998));see also, RB 28-29 discussing Lee v. Thaheld, No. 68417-5-I (March 2014), where Division One of the Washington Court of Appeals, treated the lack of the statutorily required license violation in question as destroying the entire relationship of the parties voiding the employment contract in question).

likewise tainted and unenforceable[3].

As a general rule, a contract that is contrary to the terms or policy of an express legislative enactment is illegal[4]. A contract that violates strong federal public policy is also void[5]. "Not only does TILA contemplate a public interest in the enforcement of individual rights, but the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act. McGowan v. King, Inc., 569 F.2d 845, 848 (5th Cir. 1978). If these private attorneys general are permitted to waive TILA claims in circumstances such as those presented in this case, the public interest in deterring inconsistent and undecipherable lending practices would be greatly hampered." Parker v. DeKalb Chrysler Plymouth, 673 F. 2d supra at 1181 (11th Cir. 1982)

So strong are the aforementioned legal principles that Washington State

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[3] In re Marriage of Hammack, 114 Wash. App. supra at 811, 60 P.3d 663 (2003), in which citing to Sherwood & Roberts v. Yakima-Leach, Inc., 67 Wn. 2d 630 at 637, 409 P. 2d 160 (1965).

[4] Machen, Inc. v. Aircraft Design, Inc., 65 Wn. App. 319, 333, 828 P. 2d 73 (1992); State v. Pelkey, 58 Wash. App. 610, 615, 794 P.2d 1286 (1990); Brown v Snohomish Board of Physicians, 120 Wn.2d 747, 845 P.2d 334 (1997). State Farm Gen Ins Co v Emerson, 102 Wn.2d 477 (1984). 687 P.2d 1139; Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn, 2d 630, 636-637, 409 P. 2d 160 (1965); see also, A.C. Frost & Co. v. Coeur D'Alene Mines Corp., 61 Sup. Ct. 434 (U.S. 1941).

[5] Parker v. DeKalb Chrysler Plymouth, 673 F. 2d 1178, 1180 (11th Cir. 1982) and Mills v. Home Equity Group, Inc., 871 F. Supp. 1482, 1485-86 (D.D.C. 1994), barring extension of any general release of private rights, granted in the public interest.

superior courts vacate judgments or orders that have anomalously given legal effect to a contract that, as unknown to the rendering court at the time its entry of that judgment or order, was void as against public policy, and do so based upon extraordinary circumstances involving irregularity extraneous to the action of the court, to prevent manifest injustice pursuant to Civil Rule 60 (b) (11). CR 60(b) (11) grants the trial court discretion to vacate an order or final judgment for `[a]ny other reason justifying relief' from judgment' but its operation is confined to situations involving 'extraordinary circumstances' not covered by any other section of CR 60(b). In re Matter of Styers, No. 30513-5-II, at ***1** (Wash. Ct. App. 2004). ' In fact, Washington State courts are pre-disposed to conclusions of law that judgments which are manifestly unjust, especially where the contract or agreement that was the subject of the subject judgment violated public policy or law, are void.")[6]. Consequently if the contract or agreement which was the subject of the judgment sought to be vacated violated public policy or law, that judgment must be vacated. Hammack, 114 Wash. App. supra at 811_60 P.3d 663, review denied, 149 Wn.2d 1033 (2003), the Court of Appeals found an extraordinary circumstance for permitting vacation of a property settlement agreement because the

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[6] In re Marriage of Hammack, 114 Wash. App. supra at 810-811, 819-820, 60 P.3d 663, review denied, 149 Wn.2d 1033 (2003) citing to Cascade Timber Co. v. N. Pac. Ry., 28 Wn. 2d 684, 708, 184 P.2d 90 (1977).

agreement was void for violating public policy. See also, In re Marriage of Pippins, 46 Wash. App. 805, 732 P. 2d 1005 (1987). .

Additionally, Washington State courts vigilantly enforce their strong policy against repose of final judgments shown to be void. A void judgment must be vacated. In Re Marriage of Leslie, 112 Wash.2d 612, 618-619, 772 P.2d 1013 (1989). Judgments entered in violation of due process must be set aside. Jaffe and Asher v. Van Brunt, S.D.N.Y. 1994, 158 F.R.D. 278. Washington State courts understand that a judgment is also a void judgment if the court that rendered the judgment acted in a manner inconsistent with due process."[7]

Based upon the aforementioned legal principles, public policy and availability of post-judgment relief matters not already adjudicated by or in issue before any court, including the Court of Appeals, and thus not conflicting with RAP 12.2 in any, that Petitioner sought relief from a Kitsap County Superior Court judgment which anomalously gave legal effect to a property sales agreement that purports to have been in settlement of three mortgage installment loans ("Loans"), all of which contracts, unknown to the court at the time of entry since not in plead nor relevant to the relief sought by the pleadings, had been illegally made,

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[7] BLACK'S LAW DICTIONARY, Sixth Edition, p. 1574 citing Klugh v. U.S., D.C.S.C., 610 F. Supp. 892, 901; see Fed. Rule Civ. Proc. Rule 60 (b) (4), 28 U.S.C. A.; U.S.C.A. Const. Amend.5-

arranged and extended in violation of multiple statutory prohibitions.

On the basis of the obvious manifest injustice of this anomalous judgment in contravention of public policy, whereby Olla has been prevented from any recourse of recovery of the millions of dollars of net equity in his Malibu, California home that Respondent lender THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN ("pension plan") obtained by way of the subject agreement as a backdoor loophole in avoidance of liability for illegal loans, for which that pension plan offered void excuse of indebtedness as consideration and inducement, as well as the trial court's refusal to adjudicate claims regarding acts by Respondent-Defendant ROBERT H. WAGNER in relation to a September 18, 2007 agreement to hold funds that he, as an individual, sold to Olla but which contemplated illegal terms for the first of the Loans and fraudulent misrepresentation achieved by ambiguous terms in relation to a second deed of trust as security sold to Olla, the Court of Appeals should have reversed the trial court's subject judgment and orders of Olla's above captioned consolidated appeal.

This Court should now accept review of The Court of Appeals' decision to affirm the trial court. Not only was the decision in part obtained by fraud on the part of Respondents' counsel and by way of false statements of material fact in the Court of Appeals' written opinion, but the decision

conflicts with case law of this Court and published cases of the Court of Appeals. Additionally, the circumstances presented by this case involve issues of substantial public interest, being the public's interest in ensuring that the legislative policy behind rights and prohibitions as enacted and conferred upon borrowers to protect them against predatory lending not be thwarted, and public's interest in and faith in the integrity of the courts what is right and to do substantial justice. Finally, the circumstances of this case involve a significant question of law under the Constitution of the State of Washington or of the United States as to whether a person can be deprived his right to his property without due process of law.

II. IDENTITY OF PETITIONER

The Petitioner is Mark Olla (hereinafter "Olla"), proceeding pro se, and as was plaintiff pro se in the trial court and appellant pro se in the Court of Appeals.

III. THE COURT OF APPEALS' OPINION AND DECISION

The Court of Appeals, Division Two entered its Unpublished Majority Opinion in re OLLA v. WAGNER ET AL., _____ on July 10, 2018 ("Decision" in the above captioned appeal No. 48784-5-II consolidating Appeal No. 48910-4-II. Consequently, the appeal is from March 7, 2016 judgment and orders in joint denial of Olla's

two CR 60 (b) motions for relief from judgment entered in Kitsap County Superior Court ("KCSC") original case #09 2 01654 4 (OLLA v. WAGNER ET AL.), as well as both a February 5, 2016 Order granting Respondents' CR 12 (b) (6) motion to dismiss and a March 24, 2016 summary judgment in favor Respondents' Counter-Claims, entered in KCSC case #15 2 01985 8 (OLLA v. WAGNER ET AL.) (collectively, "Subject Judgment and Orders")[8].

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in its Decision to affirm the trial court's Order granting the above captioned Respondents' CR 12 (b) (6) motion to dismiss Olla's consolidated case, which comprises Olla's September 28, 2015-filed complaint as filed KCSC case #15 2 01985 8 and Olla's October 5, 2015-filed first amended complaint as filed in KCSC case #09 2 01654 4 as its two operative complaints, for failure to have stated a cause of action or claim upon which relief may be granted?

2. Whether the Court of Appeals erred its de novo review of the trial court's Order granting the above captioned Respondents' CR 12 (b) (6)

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[8] Appendices A through C, which have been attached to this Amended Petition for Review to provide the court, in accordance with RAP 13.4 (c) (9), with a true and correct copy of each of the following: Court of Appeals' July 10, 2018 written opinion (Appendix A); Court of Appeals' Order in denial of Motion for Reconsideration (Appendix B), Court of Appeals' Order in denial of Motion to Publish (Appendix C).

motion to dismiss, by improperly disregarding all the evidence presented by Olla that the trial court had concealed Olla's consolidated case's actual stated causes of action for Vacatur to conclude that Olla sought by his action sought only to re-litigate causes of action contained in his 2009 pleadings, and as substantial evidence that Olla's two operative complaints failed to state any cause of action or claim upon which relief may be granted?

3.Whether the Court of Appeals erred by its Decision's page 15 false statement of material fact that while at January 12, 2018 Oral Argument proceedings, Olla stated he knew at the time of his 2009 pleadings that Respondent ROBERT H. WAGNER did not hold a Washington State mortgage broker's license required pursuant RCW 19.146.200 (1) to make and arrange the loans to him and that because of the each of the loans extended to him were illegal, so made to falsely legitimize the legal pretext for trial court's determination that Olla's consolidated case's claims sought to relitigate matters precluded by res judicata / collateral estoppel?

4.Whether the Court of Appeals erred in its Decision to affirm the trial court's March 24, 2016 Summary Judgment (CP 4873-4878) granting to the KCSC 09 2 01654 4 defendant-Respondents their attorney fees, sanctioning Olla $24,571.95, adjudging Olla to be a vexatious litigant on

the basis of his having filed his consolidated case against Respondents and ordering Olla to be permanently enjoined from making any further filings in the consolidated case or filing related claims in any case?

5.Whether the Court of Appeals erred in its Decision that the trial court had not abused its discretion by entering its March 7, 2016 Judgment and Orders in denial of Vacatur as actually sought by Olla pursuant to CR 60 (b) (11), based upon extraordinary circumstances of the irregularity extraneous to the action of the court, being that the January 15, 2010 judgment and orders were anomalously entered due to the trial court's lack of knowledge that the agreement that was their subject was illegal and void as a matter of Washington State public policy as well as strong federal public policy?

6.Whether the Court of Appeals erred in its Decision to affirm given that the the March 7, 2016 Judgment and Orders' page 4 (CP 1898) Findings of Fact , that Olla's December 22, 2015 filed CR 60 (b) motion for relief from judgment sought Vacatur on grounds that the rendering judge made an error of law in failing to adjudicate whether Olla's TILA right of rescission was not waived through the Loans' Settlement Agreement, and that Olla's February 4, 2016-filed motion for relief from judgment concerns whether Olla's TILA arguments were suppressed by Respondents' counsel, Isaac A. Anderson, could readily have been

confirmed by the Court of Appeals to be false and thereby to not constitute evidence that would persuade a fair-minded person of the truth of the statement asserted?

7. Whether the Court of Appeals erred in its de novo review of the second of the March 7, 2016 Judgment and Orders' pages 4-5 (CP 1898-1899) Conclusions of Law, that Olla's two CR 60 (b) motions for relief from judgment "are not well grounded in fact, not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or the establishment of new law and have been interposed for improper purposes"?

8. Whether the Court of Appeals erred in its Decision that Olla's December 22, 2015-filed motion for relief from judgment sought Vacatur of the January 15, 2010 judgment and orders on the basis of errors of law and only so, when in fact that judgment and orders were rendered without any adjudication of the illegality of the loans to which their subject agreement was intimately related and was not asked to?

9. Whether the Court of Appeals erred in its Decision to affirm the trial court's March 7, 2016 Judgment and Orders, regardless that the trial court did not actually address or discuss the actual grounds on which Olla sought Vacatur by means of his December 22, 2016 CR 60 (b) motion for relief from judgment?

10. Whether the Court of Appeals erred in its Decision affirming that the trial court's March 7, 2016 Judgment and Orders did not erroneously deny Olla his December 22, 2015-filed motion, pursuant to CR 60 (b) (5), for relief from judgment on grounds that the January 15, 2010 judgment and orders Olla sought to vacate were void for having been rendered in deprivation of Olla's right to due process and otherwise entered as a product of bias?

11. Whether the Court of Appeals erred in its Decision to affirm those portions of trial court's March 7, 2016 Judgment and Order adjudging Olla to be a vexatious litigant and ordering him on that basis to be forever enjoined, restrained and restricted from any further filings in the case unless Olla will have obtained determination from KCSC such prospective filing has merit and until Olla will have paid the monetary sanction of $6,099 plus statutory interest imposed in response to Olla's filing his two CR 60 (b) motions for relief the court did not even read the actual stated grounds of, was entered by the trial court in abuse of its discretion to exercise its authority, pursuant to RCW 2.28.010 (3), to "provide for the orderly conduct of proceedings before it."?

V. STATEMENT OF THE CASE

In 2015-2106, Olla sought relief by various means at the Kitsap County Superior Court ("KCSC") from judgment and orders (CP 1266-1268) ("2009 judgment") that were entered, based upon Findings of Fact and Conclusions of Law (CP 538-553), on January 15, 2010. The 2009 judgment gave legal effect (CP 1259-1265; CP 226-27; see also RB page 12) to an October 16, 2008 property settlement agreement between Olla and Respondent-Defendant THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN ("pension plan"), which is titled Real Estate Purchase and Sale Agreement (CP 2814-2818) (hereinafter "Settlement Agreement"), which, per its Recitals, purports to have been in resolution of Olla's purported indebtedness and purported defaults (CP 538-53; RP at 635-45; see also, Respondents' Brief page 12) under three mortgage installment loans ("Loans") CP 2940-2941, 2972-2973 and 2990-2991 that had been extended to Olla by the pension plan, and which includes at its paragraph 9, a general release of the pension plan and its agents from liability for all acts performed in connection with the Loans. The Findings of Fact and Conclusions of Law determined and concluded that any and all claims Olla may have or could have against the pension plan and its agents for

including inter alia, both claims of extended statutory rights of rescission pursuant to 12 C.F.R. § 226.23 ("Regulation Z") and the Truth in Lending Act at 15 U.S.C. § 1635, for failure of the pension plan to provide notice to Olla of his three-business-day right to cancel as to each of the Loans, and claims of fraudulent inducement into the Loan Settlement Agreement, were effectively barred per the Settlement Agreement's paragraph 9 term of general release of the imputed defendant pension plan and its agents from liability for acts performed in connection with said Loans (CP 552; RP at 635-45; see also, Respondents' Brief at its page 12). Notably, Olla's Complaint included no causes of action or claims seeking rescission of the Settlement Agreement.

The 2009 judgment was in relation to pleadings set forth by Olla's June 25, 2009 Complaint (CP 1-144), which was a real property / quiet title action, KCSC case #09 2 01654 4 (OLLA v. WAGNER ET AL.) against the first set of above captioned Respondents (hereinafter, whenever collectively, "KCSC defendant-Respondents"). Olla primarily sought thereby, as a first cause of action (CP 55-59) the rescission of each of the Loans. Rescission was solely sought pursuant to TILA, pursuant to

15 U.S.C. § 1635 and as based upon Olla's three-year extended statutory right rescission of rescission, as to each of the Loans, pursuant to TILA's Federal Reserve Board implementing legislation known as Regulation Z,12 C.F.R. § 226.23 et seq., due to the uncontested and indisputable failure of the pension plan to have provided to Olla notice of his three-business-day right to cancel for any of the Loans CP 56-57).

' By means of an October 5, 2015-filed first amended complaint filed in KCSC case #15 2 01441 (OLLA v. WAGNER ET AL.), the first of the two operative complaints comprised (CP 4520-4521; CP 2644-3460; 3462-3952)) by Olla's consolidated KCSC case #15 2 01985 8 (OLLA v. WAGNER ET AL.) and a December 22, 2015-filed CR 60 (b) motion for relief from judgment CP 1285-1739), Olla sought Vacatur on the basis of extraordinary circumstances involving irregularity extraneous to the action of the court, due to the court's lack of knowledge that the judgment was in conflict with the public policy of the State of Washington, as enunciated by the case law of the Washington State courts, against enforcement of contracts that are illegal as in violation of a statute or law as well as contracts intimately connected to such type of illegal contract and thus bearing its taint

in order to correct a manifest injustice. OAB 31, referring to CP 2686, 2690-2699.

Both Olla's December 22, 2015-filed CR 60 (b) motion for relief from judgment and October 5, 2015-filed first amended complaint provided the trial court an enumeration of all of the Loans' respective violations of MBPA and TILA (CP 1316-1323; 1338-1357; 2644-3460 and as reiterated CP 3462-3952). It certainly was certainly made readily apparent to the trial court, as per Silver Surprize, Inc. v. Sunshine Mining Co., 74 Wn. 2d 519, 522, 445 P. 2d 334 (1968) (the nature of a claim for relief is determined by the facts alleged in the Complaint and as adduced thereunder, and by the relief requested), that Olla's 2009 pleadings did not include any allegation as to illegality of any of the loans or any cause of action or related claim seeking relief on that basis of the aforementioned violations of statutory prohibitions, unknown to the court at the time of entry of the 2009 judgment[9],

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[9] Among which were: first loan's violation of RCW 19.146.0201 (1);violation of RCW 19.146.0201 (6): violation of RCW 19.146.0201 (3) CP 2713); violations of RCW 19.146.0201 (11): by way of violations of 15 U. S. C. 1639 (m) inter alia restriction against financing points and fees (CP 2712-2713; 2705-2709) TILA; by way of violation of 15 U. S. C. § 1611 ((CP 125, 2674-; 2678); by way of violation of TILA's 15 U. S. C. § 1632 (a), 15 U. S. C. § 1638 (a) (1), 15 U. S. C. § 1638 (a) (2) (A) (CP 2704-2705), 15 U. S. C.§ 1635 (a), 15 U. S. C. § 1635 (b);15 U. S. C. § 1639 (s)(CP 2712) per 15 U.S.C.§ 1639 (j), 15 U. S. C. § 1639 (e) (CP 2713-2718) and 15 U. S. C. § 1633 (a) (4); violation of RCW 19.146.0201 (13) and / or RCW 19.146.070 (1) (CP 1353; 2714; violation of RCW 19.146.095 (1) (CP 2715); and CP 2717-2719: Each of the three Loans was usuriously extended (CP 2674, FN 67; 2717-2719).

‘ Vacatur was sought pursuant to standards recognized by Washington State courts under CR 60 (b) (5 &11) and by way of a consolidated CR 60 (c) independent action at Equity and two separate CR 60 (b) motions for relief from judgment. The Court of Appeals, Division Two's September 13, 2011 Unpublished Opinion (Appeal No. 40367-6-II) (Olla v. Wagner, 163 Wash. App. 1028) did not decide on matters or issues relating to the grounds on which relief was being sought, and therefore Olla was in no contravened RAP 12.2. Relief was sought pursuant to CR 60 (b) (11) specifically on the basis of extraordinary circumstances in justification of prevention of manifest injustice, given that unbeknownst to the court at the time it entered the judgment and orders in question, (i) the Loans that the agreement that was the subject of that judgment and orders had each been illegally made, arranged and extended in violation of one or more statutory prohibitions set forth by MBPA and TILA, and (ii) the subject agreement was in contravention of strong federal public policy against release of rights and protections granted in the public interest also unknown to the court at the time of entry since not in issue in the case and thus not included in the pleadings. in deprivation of Olla's right to due process of law. Olla argued the obvious manifest injustice in allowing Respondents to be unjustly enriched as derived by both backdoor loophole tactics in avoidance of their liability for illegal loans. Olla also argued the manifest

injustice apparent given that there is no obligation to perform in the case of an illegal loan in which case, also unknow, to the court at the time of judgment, the consideration offered under the subject agreement by Respondents in the form of excuse of indebtedness was void given the loans were void. Vacatur was also sought per CR 60 (b) (11) by Olla's September 28, 2015-filed complaint on additional grounds that the Settlement Agreement was in any case also void per strong federal public policy in Olla's September 28, 2015 Complaint barring extension of any general release of private rights[10] granted in the public interest as applied to the settlement Agreement's paragraph 9 general release as adjudicated by Judge Hartman to be inclusive of Olla's June 25, 2009 Regulation Z statutory right of rescission as to each of the three Loans. Olla made clear in all his instant attempts at Vacatur (OAB 60, 65).

On February 5, 2016, Respondents' CR 12 (b) (6) motion to dismiss (CP 4537-4538) was granted and Olla's consolidated case ordered dismissed with Prejudice (CP 4873-4878). On March 24, 2016 Summary Judgment (CP 4873-4878) granting Respondents' Counter-Claims (CP 4695-4722), based upon Respondents' Motion for Summary Judgment (CP 5166-5167; CP 4822-4846) was entered, On March 7, 2016, judgment

[10] (OAB 32, citing CP 3463 and referencing Parker v. DeKalb, 673 F.2d 1178 (1982); OAB 35-38)

and orders in joint denial of Olla's two CR 60 (b) motions was entered in favor of the 09 2 01654 4 Respondent-Defendants. Olla timely filed an appeal from each of the two sets of judgment and orders (CP 1906-1916;1902-1905, 4879-4882; 4887-4895). The Court of Appeals, Division Two consolidated them in July 2017.

On appeal, Olla argued that denial of Vacatur as requested by Olla was manifestly unreasonable as an abuse of discretion (OAB 16). The Court of Appeals, Division Two on July 10, 2018 entered its written Majority Unpublished Opinion / Decision affirming the trial court's combined Judgments and Orders denying Olla relief of Vacatur, which Opinion / Decision was incomplete for failure to have reviewed and analyzed Olla's assigned errors pertaining to his February 4, 2016-filed CR 60 (b) motion; on November 5, 2018 denied Olla's July 30, 2018 prospective Motion for Reconsideration without realizing it yet to complete a written opinion disposing of all matters assigned to it; and separately also on November 5, 2018 denied Olla's Motion to Publish. In its Decision, the Court of Appeals substituted its own analysis of whether Vacatur should have been granted by the trial court without remarking that the trial court's March 7, 2015 Findings of Fact, at their page 4 (CP 1898), had not even determined the actual grounds on which Olla sought Vacatur at which Findings of Fact had to be reviewed according to the substantial evidence standard

(Notably also, at page 4 of its written Opinion, Division Two Judge Thomas Bjorgen falsely states in writing that Olla stated at January 12, 2018 Oral Argument he not only knew at the time of his 2009 pleadings that Respondent ROBERT H. WAGNER did not possess a Washington State mortgage broker's license and that the lack of such license made the Loans illegal, which was a gross falsehood as is readily verified by resort to the audio recording of such proceedings and the July 30, 2018 Affidavit of Susan Clarke submitted in as Appendix 2 to Olla's Motion for Reconsideration.

VI. ARGUMENT FOR ACCEPTANCE OF REVIEW

Review should be accepted by this Court for multiple reasons under one or more of the tests established in RAP section RAP 13.4 (b)[11]:

A. The Decision to affirm both the February 4, 2016 Order in dismissal of Olla's consolidated CR 60 (c) case and March 24, 2016 Summary Judgment

The trial court's Order in dismissal of Olla's consolidated CR 60 (c) action and the Respondents' CR 12 (b) (6) motion to

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[11] RAP 13.4 (b) provides that: "A petition for review will be accepted by the Supreme Court only: (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the If Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

dismiss it granted to do so with Prejudice should have been reversed by the Court of Appeals since none of Olla's actual stated causes of action for Vacatur, in Olla's two operative complaints comprised by his CR 60 (c) action for Vacatur, none of which involved issues already determined by the Court of Appeals (see, Olla v. Wagner, 163 Wash. App. 1028) or raise previously. The Court of Appeals' Decision page 15 resort to false statements that Olla knew at the time of his 2009 pleadings, easily confirmable to be untrue by any review of the Court of Appeals' audio of January 12, 2018 Oral Argument proceedings as buttressed by the aforementioned Affidavit of Susan Clarke in Appendix 2 of Olla's Motion for Reconsideration was a violation of the code of judicial conduct as an attempt unconscientious attempt to falsely justify the trial court's travesty of justice.

' The trial court's March 24, 2016 Summary Judgment imposing sanctions, granting attorney fees, forever restraining and enjoining Olla from future filings based upon that action not even fully determined was improper, deprived Olla of his due process right to complete defense of his property, ignored all cited MBPA and TILA statutory prohibitions as well pertinent case law and their progeny cited by Olla[12]; secondly, is bereft of any construction or

interpretation of CR 60 (b) (5), 60 (b) (11), and 60 (c) as pertained based upon Olla's 2015 pleadings before it, involves a Constitutional question of whether a court can act to conceal a complainant's causes of action in order to meld a false basis upon which to dismiss a case and thereby deprive a party of his right to defend his property and involves a question of judicial integrity at and fraud by a Washington State superior court as an issue of substantial public interest which should be decided by this Court. The fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense[13]. The Court of Appeals' Decision to affirm these judgments and orders is in conflict with decisions of the Supreme Court[14] and published decisions of the Court of Appeals, as well as both involves an

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[12] Chief among which are Fluke Corp. v. Hartford Accident Indus. Co., 102 Wash. App. supra at 245, 7 P. 3d 825 (2000), aff'd 145 Wn. 2d 137 (2001), citing to Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn. 2d 630, supra at 636, 409 P. 2d 160 (1965); In re Marriage of Hammack, 114 Wash. App. supra at 810-811, 819-820, 60 P.3d 663 (2003), Parker v. DeKalb Chrysler Plymouth, 673 F. 2d supra at 1180 (11th Cir. 1982) and Mills v. Home Equity Group, Inc., 871 F. Supp. supra at 1485-86 (D.D.C. 1994) (OAB 35-38).

[13] Peoples State Bank, 55 Wn. App. at 372.

[14] These Bravo v. Dolsen Cos., 125 Wn.2d 745 ,750, 888 P.2d 147 (1995) (quoting Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107 , 120, 744 P.2d 1032, 750 P.2d 254 (1987)) ("When entertaining a motion for dismissal for failure to state a claim under CR 12(b) (6), a court should dismiss a claim "only if 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'"

issue of substantial public interest that should be decided by the Supreme Court and involves a question of law under the Washington State Constitution.

B. Decision to affirm the trial court's March 7, 2016 judgment and orders; Vacatur was not sought on the basis of errors of law as to the legality of any contract

The Court of Appeals did not properly review page 4 of the Finding of Fact contained in the trial court's March 7, 2016 judgment and orders in joint denial of Olla's two CR 60 (b) which Findings of Fact thereat falsely state the grounds on which Olla sought Vacatur thereby, for which reason they were not substantial evidence that would persuade a fair-minded person of the truth of the statement asserted[15] for which reason all of the grounds on which Olla sought Vacatur pursuant to CR 60 (b) (5 & 11) have been marooned since 2016. Evidence is substantial if it could persuade a rational fair-minded person of the factual finding. Moreover, the Decision's erred in its attempt to compensate for the trial court's shortcomings by confirming the trial court's conclusions of law that Olla's motions were not well grounded in fact and brought for an improper purpose, and justifying denial of Olla's December 22, 2015 CR 60 (b) motion that was made in relation to its falsely found grounds of

[15] (Cingular Wireless, L.L. C. v. Thurston County, 131 Wash. App. 756, 768, 129 P.3d 300 (2006); see also, Pardee v. Jolly, 163 Wn. 2d 558, 566, 182 P. 3d 967 (2008) (OAB 44).

Olla's CR 60 (b) motion, as brought on basis of errors of law reserved for direct appeal. Yet, the Court of Appeals' instead at its Decision's page 15 determines that Olla had sought Vacatur only on the basis of errors of law of the rendering judge in determination of legality of the Loans and / or the Settlement Agreement in relation to the question of the legality of the Loans was a manifest abuse of discretion. Nowhere in Olla's December 22, 2015 CR 60 (b) motion is there mention of any basis for seeking Vacatur on grounds that the rendering judge erroneously determined the legality of the Loans, in relation to their multiple MBPA and TILA statutory violations. The Court of Appeals falsely attempted to justify the trial court's denial of Vacatur that was not based upon tenable grounds and not within the bounds of reasonableness. No reasonable person would take the position adopted by the trial court. Cox v. Spangler, 141 Wn. 2d 431, 439, 5 P.3d 1265 (2000) since the legality of the Loans was not in issue in Olla's 2009 pleadings or at trial, for which reason it should have been obvious to the Court of Appeals that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable[16].

The Decision thus conflicts with the cases of this Court and the published cases of the Court of Appeals[17] which relate to the basis of

[16]Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

extraordinary circumstances due to the anomalous nature of the 2009 judgment that was unknowingly entered in contravention of public policy, on which Olla sought Vacatur pursuant to CR 60 (b) (11) in order to prevent manifest injustice[18]. The Decision also involves fraud as to material fact by an appellate court, which is an issue that should be decided by this Court[19].

VII. CONCLUSION

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[17] In re Marriage of Pippins, 46 Wn. App. 805, 732 P. 2d 1005 (1987) (which held that if the contract or agreement which was the subject of the subject judgment in question violated public policy or law, that judgment must be vacated) (OAB 58; RB 34, 35); see also, In re Marriage of Hammack, 114 Wn. App. supra at 810-11, 60 P. 3d 663 (2003).

[18] Olla was not required to have known at the time of entry of the 2009 judgment that the Loans were in illegal violation of statutory prohibition making the Settlement Agreement intimately connected thereto illegal and against public policy just as the motioning party in Hammack did not have to know at the time of the judgment in question there that the subject agreement was illegal as in violation of statutory Extraordinary circumstances to prevent manifest injustice is a CR 60 (b) (11) standard that has never been confined to the marital context. The cases where courts have found extraordinary circumstances all involve circumstances previously unknown to the court or that had changed since the earlier judgment. Foster v. Washington Department of Ecology, Washington State Court of Appeals, Division One (Appeal No. 75374-6-I, September 5, 2017); see also, Matia Investment Fund, Inc., v. The City of Tacoma, (Washington State Court of Appeals, Division Two, No. 32189-1-II Decided: September 13, 2005) at its ¶s 25, 42 and 43; see also, Tatham v. Rogers. 170 Wn. App. 76, 100, 283 P.3d 583 (2012). Most such cases involve irregularity extraneous to the action of the court (OAB 59) as constituted by an anomalous judgment entered in reliance on mistaken information constituted by an anomalous judgment entered in reliance on mistaken information. In re Marriage of Hammack, 114 Wash. App. supra at 810-811, 819-820, 60 P.3d 663, review denied, 149 Wn.2d 1033 (2003) citing to Cascade Timber Co. v. N. Pac. Ry., 28 Wn. 2d 684, 708, 184 P.2d 90 (1977).

[19] The fraudulent conduct or misrepresentation must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. Peoples State Bank, 55 Wn. App. at 372.

Based upon the foregoing, this Court should accept review of the Court of Appeals' Decision to affirm and reverse it, regardless of the November 5, 2018 Order denying Olla's motion to publish.

Respectfully submitted on this 28th day of January, 2019,

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CERTIFICATE OF SERVICE

On Monday, January 28, 2019, I, Mark Olla, electronically served my Amended Petition for Review upon Respondents' counsel of record, Isaac A. Anderson, PS via the Court of Appeals, Division II upload portal, addressed to:

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Additionally, a paper copy was mailed to the Respondents at:

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Appendix A

Filed
Washington State
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Division Two

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual, Appellant, v. ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (a/k/a "THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through 50, Inclusive, Respondents.	No. 48784-5-II (Consolidated with No. 48910-4-II) UNPUBLISHED OPINION

BJORGEN, J. — In this consolidated appeal, Mark Olla appeals the superior court decisions (1) dismissing his consolidated 2015 complaint against Robert H. Wagner under CR 12(b)(6), (2) granting summary judgment to Wagner on Wagner's counterclaims, and (3) denying Olla's motions to vacate the 2010 and 2011 orders and judgments in prior, related litigation. We hold that Olla's arguments fail and affirm the superior court.

FACTS

A. First Litigation

From 2007 to 2008, Wagner, acting on behalf of The Robert H. Wagner Money Purchase Pension Plan (Pension Plan), made three loans to Olla so that Olla could purchase and move to a home in Washington while he waited to sell his home in California. The first loan was for $1,700,000, the second loan was for $150,000, and the third loan was for $160,000. The first

loan was secured by a deed of trust on Olla's California residence and his Washington residence, although the deed of trust on the California residence was secondary to a prior deed of trust held by Washington Mutual. The second loan was secured by a third deed of trust on the California residence. The third loan was secured by a fourth deed of trust on the California residence. All three loans became collectable in September 2008.

By September 2008, Olla was experiencing financial difficulties and Wagner became concerned that Olla would not be able to pay off the loans as Olla had made no interest payments on any of the loans. Wagner and Olla disagreed about how best to resolve the loan obligations and the two began negotiating a settlement of their obligations through third parties. On October 18, Olla and Wagner completed a settlement agreement under which Olla would transfer the deeds for his California and Washington properties to Wagner in exchange for $165,000 and Wagner would extinguish the loans and agree to not sue Olla for any liability that may have arisen as a consequence of the three loans. The settlement also contained release language pertaining to possible claims by Olla against Wagner:

> [I]n consideration for the terms of the settlement agreement, Olla "hereby releases and forever discharges Buyer [i.e., Wagner], Buyer's agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of actions whatsoever which Seller [i.e., Olla] might now have or claim to have against Buyer, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way concerning, arising out of or founded on the [Wagner] Loan Documents or the [Wagner] Loans.

Clerk's Papers (CP) at 1259-60.[1]

On February 4, 2009, Olla recorded a lis pendens against the Washington property that he had deeded to Wagner. On June 25, Olla filed a complaint against Wagner and the Pension Plan

[1] This is the settlement agreement that is disputed by the parties and referred to in the facts and analysis below.

alleging numerous causes of action, including violations of the federal Truth in Lending Act (TLA), chapter 19.86 RCW, and the Washington's Mortgage Broker Practices Act (MBPA), chapter 19.146 RCW, fraud and intentional deceit, breach of implied covenant of good faith and fair dealing, breach of oral contract, undue influence, economic duress, unjust enrichment, intentional infliction of emotional distress, and intentional interference with prospective economic gain. In part, Olla argued that because the loans violated the TLA and MBPA, the court should rescind the three loan transactions. The complaint listed Wagner as a defendant both individually and in his capacity as trustee of the Pension Plan and was assigned cause number 09-2-01654-4. On June 29, Olla recorded a second lis pendens against the Washington property, and on July 16, Wagner expunged the first lis pendens. On November 17, Olla's complaint went to a bench trial.

On January 15, 2010, the superior court dismissed all of Olla's claims with prejudice and entered findings of fact and conclusions of law. The superior court determined that Olla had failed to prove fraud, misrepresentation or intentional deceit, undue influence, duress or coercion, as well as "all of his remaining claims and causes of action seeking the rescission of the settlement agreement." CP at 1261-65. The superior court further concluded that "[t]he settlement agreement is . . . valid and fully enforceable in its entirety." CP at 1264. Finally, the superior court held that "Olla is [equitably] estopped from advancing any and all of his claims against Wagner," because "it was Olla's plan to initiate litigation against Wagner when he entered into the settlement agreement despite his knowledge that the settlement agreement contained full mutual releases." CP at 1264. The superior court also expunged Olla's second lis pendens on the Washington property. On February 10, Olla filed a notice of appeal with our court.

On March 30, Olla recorded a third lis pendens against the Washington property. On April 2, Wagner expunged the third lis pendens. On March 28, 2011, a second trial under the same cause number was held to resolve Wagner's counterclaims against Olla for breach of contract and violation of RCW 4.28.328(3).[2] On May 23, the superior court ruled in Wagner's favor, entered findings of fact and conclusions of law, and awarded Wagner $107,683.64 in damages, attorney fees, and costs.

On September 13, our court filed an unpublished opinion resolving Olla's appeal. *Olla v. Wagner*, noted at 163 Wn. App. 1028 (2011). We rejected Olla's argument that the superior court lacked subject matter jurisdiction over the case and held that the superior court properly determined that dismissal of Olla's causes of actions was warranted based on equitable estoppel. *Olla*, noted at 163 Wn. App. 1028, 2011 WL 4062244, at *6-7.

B. Second Litigation

1. Complaint and Counterclaims (Cause Nos. 15-2-01441-1 and 15-2-01985-8)

On July 21, 2015, Olla filed another complaint in superior court based on the 2007-2008 loans and property transfer. The complaint was assigned cause number 15-2-01441-4. Olla requested a declaratory judgment that the three Wagner loans and subsequent acquisition of the California and Washington properties were illegal, along with restitution, compensatory and punitive damages, and vacation of the January 15, 2010 and May 23, 2011 orders and judgments

[2] RCW 4.28.328(3) states,

> Unless the claimant [in a lis pendens action] establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

under CR 60(c).[3] Olla claimed that Wagner had committed 21 violations of the MBPA related to the three loan transactions. On October 5, Olla filed an amended complaint under this cause number.

On September 28, Olla filed an additional complaint under cause number 15-2-01985-8 based on the 2007-2008 loans, settlement, and property transfer. In this complaint, Olla alleged that the 2008 settlement agreement violated the TLA and was therefore illegal and against public policy. Olla requested vacation of the January 15, 2010 and May 23, 2011 orders and judgments under CR 60(c), a declaratory judgment that the 2008 property transfer was fraudulent and against public policy, rescission of the three Wagner loans, and damages as equitable relief. On December 4, the superior court consolidated Olla's complaints (15-2-01441-4 and 15-2-01985-8) under cause number 15-2-01985-8.

On January 29, 2016, Wagner filed a motion to dismiss Olla's complaint under CR 12(b)(6), for failure to state a claim upon which relief can be granted. On February 4, Wagner filed an answer, affirmative defenses, and counterclaims against Olla under consolidated cause number 15-2-01985-8. Wagner raised release, waiver, estoppel, payment, collateral estoppel, res judicata, and accord and satisfaction as affirmative defenses, and alleged that Olla's complaint violated the settlement agreement between Olla and Wagner. On February 5, the superior court granted Wagner's CR 12(b)(6) motion and dismissed Olla's consolidated complaints. At the hearing, the superior court explained that it granted the CR 12(b)(6) motion on the basis of res judicata and collateral estoppel. On February 16, Olla filed a motion for reconsideration of the superior court's order dismissing his complaint under CR 12(b)(6). On February 17, the superior

[3] CR 60(c) states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding."

court denied reconsideration. On March 18, Olla filed his first notice of appeal with our court, appealing the superior court's February 5 dismissal of his consolidated complaint. On February 18, 2016, Wagner filed a motion for summary judgment with regard to his counterclaims under cause number 15-2-01985-8. On March 24, the superior court granted Wagner summary judgment and entered findings of fact and conclusions of law. The record indicates that Olla did not file a response to Wagner's motion for summary judgment and did not attend the hearing on summary judgment. The same day, Olla filed his second notice of appeal with our court, appealing the superior court's grant of summary judgment to Wagner.

2. Motion to Vacate Under CR 60(b)(5), (11) (Cause No. 09-2-01654-4)

On December 22, 2015, Olla filed a separate motion to vacate the January 15, 2010 and May 23, 2011 orders and judgments pursuant to CR 60(b)(5) and (11) under cause number 09-2-01654-4. On March 7, 2016, the superior court denied Olla's motion to vacate the January 15, 2010 and May 23, 2011 orders and judgments and imposed sanctions on Olla for engaging in frivolous litigation under CR 11.[4] On March 24, Olla filed his third notice of appeal with our court, appealing the superior court's denial of his motion to vacate.

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[4] CR 11(a) states, in part:

> The signature of a party . . . constitutes a certificate by the party . . . that the party . . . has read the pleading, motion, or legal memorandum, and that to the best of the party's . . . knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Olla appeals the dismissal of his consolidated 2015 complaint under CR 12(b)(6), the grant of summary judgment to Wagner on Wagner's 2016 counterclaims, and the superior court's denial of Olla's motions to vacate the 2010 and 2011 orders and judgments.

ANALYSIS

I. SCOPE AND STANDARDS OF REVIEW

A. Scope of Review

This consolidated appeal raises two primary issues: (1) whether the superior court properly denied Olla's motion under CR 60(b)(5) and (11) to vacate the superior court's January 15, 2010 and May 23, 2011 orders and judgments, and (2) whether the superior court properly dismissed Olla's consolidated 2015 complaint pursuant to CR 12(b)(6) under the doctrines of res judicata and collateral estoppel. Although Olla also appealed the superior court's grant of summary judgment to Wagner, he addresses Wagner's counterclaims for the first time in his reply brief. We have previously held that issues and arguments raised for the first time in a reply brief are untimely and waived. *Ives v. Ramsden*, 142 Wn. App. 369, 396, 174 P.3d 1231 (2008). Therefore, Olla has waived any arguments regarding Wagner's counterclaims.

B. Standards of Review

1. CR 60(b)

We review a trial court's ruling under CR 60(b) for an abuse of discretion. *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App. 366, 370, 203 P.3d 1069 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision

is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.*

2. CR 12(b)(6)

We review a dismissal under CR 12(b)(6) de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014), *aff'd*, 413 P.3d 1 (2018). Our Supreme Court has explained that "'[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.'" *FutureSelect*, 180 Wn.2d at 962 (internal quotation marks omitted) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)). On review of a CR 12(b)(6) motion, we consider all of the alleged facts in a complaint as true and will deny the motion if it appears that any set of facts could exist that would justify recovery. *FutureSelect*, 180 Wn.2d at 962-63. However, "'[i]f a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.'" *FutureSelect*, 180 Wn.2d at 963 (alteration in original) (quoting *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

II. MOTION TO VACATE UNDER CR 60(b)

A. CR 60(b)(5)—Voidness

Olla argues that because the three Wagner loans and the settlement agreement were illegal and contrary to public policy, the superior court should have determined that its January 15, 2010 and May 23, 2011 orders and judgments were also void. We disagree.

Under CR 60(b)(5), a party may obtain relief from a judgment and order if "[t]he judgment is void." Division One of our court has held that a judgment is void "[w]here a court

lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order." *Chai v. Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004). Olla does not argue that the superior court in 2010 or 2011 lacked jurisdiction over the parties or subject matter or lacked the inherent power to issue the judgments and orders that he seeks to vacate. Therefore, Olla's argument fails.

B. CR 60(b)(11)—Manifest Injustice

Olla contends that the superior court erred by not vacating the January 15, 2010 and May 23, 2011 orders and judgments on the grounds of manifest injustice. We disagree.

Under CR 60(b)(11), a party may obtain relief from a judgment and order for "[a]ny other reason justifying relief from the operation of the judgment." Division One has explained that "the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b)." *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). Additionally, "those circumstances must relate to 'irregularities extraneous to the action of the courts or questions concerning the regularity of the court's proceedings.'" *In re Furrow*, 115 Wn. App. at 673-74 (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)). Finally,

> "irregularities justify vacation [under CR 60(b)(11)] *whereas errors of law do not*. For the latter the only remedy is by appeal from the judgment. The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen."

In re Furrow, 115 Wn. App. at 674 (emphasis added) (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 515 (1960)).

Olla maintains that his argument that the loans and settlement are illegal and against public policy are factual and therefore appropriate under CR 60(b)(11). However, whether a

contract is legal presents a question of law. *Fallahzadeh v. Ghorbanian*, 119 Wn. App. 596, 601, 82 P.3d 684 (2004). Similarly, "whether a contractual provision contravenes public policy [is a] question[] of law." *Hanks v. Grace*, 167 Wn. App. 542, 548, 273 P.3d 1029 (2012). Therefore, we hold that the superior court properly determined that Olla was not entitled to relief under CR 60(b)(11) because his motion was predicated on alleged errors of law and not on irregularities extraneous to the court's actions or on questions concerning the regularity of court proceedings.

III. CR 12(b)(6)

Olla argues that the superior court improperly applied the doctrine of res judicata in dismissing his consolidated 2015 complaint under CR 12(b)(6). We disagree.

A. Res Judicata

Res judicata is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment. *Emeson v. Dep't of Corrs.*, 194 Wn. App. 617, 626, 376 P.3d 430 (2016). We review whether the doctrine of res judicata applies de novo as a question of law. *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227, 308 P.3d 681 (2013). We have previously held that "[f]iling two separate lawsuits based on the same event is precluded under Washington law." *Emeson*, 194 Wn. App. at 626. Res judicata applies to matters that were actually litigated and those that could and should have been raised in the previous proceeding through the exercise of reasonable diligence. *Emeson*, 194 Wn. App. at 626.

As a threshold matter, the party seeking to assert res judicata must show that it obtained a final judgment on the merits in a prior suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). A dismissal with prejudice is considered a final judgment on the merits for the purpose of res judicata. *Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P.2d 916 (1986).

In addition, our Supreme Court has identified four requirements for res judicata to apply: identity of (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

1. Final Judgment

On January 15, 2010, the superior court entered an order and judgment dismissing Olla's 2009 claims with prejudice. This is a final judgment on the merits in a prior litigation that may serve as the basis for res judicata.

2. Subject Matter

Olla's 2009 action claimed in part that the superior court should rescind the three Wagner loan agreements and the settlement agreement because of violations of the TLA and MBPA. Olla also argued in his 2009 action that he was entitled to statutory, actual, and punitive damages arising out of the loan and settlement transaction. Olla's 2015 consolidated complaint similarly maintained that the superior court should rescind the loan agreements and settlement because they violate the TLA and MBPA. Olla's consolidated complaint also requested compensatory and punitive damages arising out of the loan and settlement transaction. Therefore, identity of subject matter is met.

3. Cause of Action

We use a four-factor test to determine whether there is identity of cause of action under res judicata. *Emeson*, 194 Wn. App. at 628. The factors are:

> "(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Emeson, 194 Wn. App. at 628 (quoting *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000)).

i. Rights or Interests Destroyed or Impaired

In Olla's 2009 case, the superior court determined that "[t]he settlement agreement [between Olla and Wagner] is . . . valid and fully enforceable in its entirety." CP at 1264. The superior court also held that "Olla is estopped from advancing any and all of his claims [arising out of or founded on the Wagner Loan Documents or the Wagner Loans] against Wagner." CP at 1259-60, 1264. Olla's attempt to relitigate the legality of the three loans and the effect of the settlement agreement in his 2015 consolidated complaint would destroy or impair Wagner's right to rely on the superior court's earlier judgment upholding the enforceability of the settlement agreement. As such, this factor favors Wagner.

ii. Substantially Similar Evidence

Olla argues that the evidence in the 2015 case is not substantially similar to the evidence in his 2009 case because he intends to show that Wagner did not have a Washington mortgage broker license at the time he made the three loans. Although Wagner's lack of a license was not an issue in the 2009 litigation, both the 2009 and 2015 litigation would call for examination of the circumstances surrounding the formation of the three loans and settlement agreement and interpretation of those documents. Furthermore, to the extent that Olla argues that the superior court erred in its adjudication of his 2009 complaint and that the 2010 and 2011 judgments and orders should be vacated, his 2015 claim necessarily presented substantially the same evidence

as his 2009 claim. Therefore, although the 2015 case may involve some evidence that was not presented in the 2009 case, this factor favors Wagner.

iii. Infringement of the Same Right

Olla argues that his 2009 litigation concerned different rights because it sought to rescind the three loan agreements based on violations of the TLA and the MBPA. He argues that different rights are implicated by his 2015 action alleging that the three loans and settlement are illegal and against public policy.

Although Olla attempts to distinguish the right at issue in this case, the 2009 and 2015 litigation involved violations of the same statutory schemes. In his 2009 case, Olla argued that the three loan agreements should be rescinded because of violations of the TLA and MBPA. In his 2015 case, Olla argued that the three loans were illegal because of various violations of the MBPA. Olla also maintained that the settlement agreement was illegal and against public policy because it attempted to waive a violation of the same provisions of the TLA that Olla argued the three loans violated in his 2009 case. Although Olla focused his TLA argument on the settlement agreement in the 2015 case, his argument arises out of the same error he raised in his 2009 case, that the loans violated the TLA, which in turn, cannot be waived by a settlement agreement, thereby making the settlement illegal and against public policy. Because Olla's 2009 and 2015 litigation concerned violations of the same statutory schemes and rights, this factor favors Wagner.

iv. Same Transactional Nucleus of Fact

Olla's 2009 and 2015 litigation concerned the negotiation and execution of the three Wagner loans and the settlement agreement. Therefore, this factor favors Wagner.

Based on the above analysis, the identity of the cause of action element of res judicata is satisfied because all four factors favor Wagner.

4. Persons and Parties

Olla's 2009 case listed Olla as the plaintiff and Wagner as an individual and trustee of the Pension Plan and Does 3-50 as defendants. In the 2015 case, Olla was the plaintiff and Wagner was named as an individual, trustee, and member of the Pension Plan. Dianne Wagner and Does 3-50 were also named as defendants. Our Supreme Court has explained that for the purpose of res judicata, parties will be considered identical if the parties are "qualitatively" the same. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). Olla does not appear to make any arguments specifically regarding Dianne Wagner or the Does that are not related to actions by Wagner. Therefore, the identity of party element is met because the 2009 and 2015 litigation involved the same qualitative parties: Olla as plaintiff and Wagner as an individual, a trustee, and a member of the Pension Plan.

5. Quality of the Persons

As explained above, the identity of persons element is satisfied because the parties in this case are qualitatively the same. Therefore, the quality of the persons element is satisfied.

6. Claims Raised or Could Have Been Raised

Olla maintains that res judicata does not apply because his 2015 claims are sufficiently distinct from the claims he raised in his 2009 complaint. However, the doctrine of res judicata applies to matters that were actually litigated and those that could and should have been raised in the previous proceeding through the exercise of reasonable diligence. *Emeson*, 194 Wn. App. at

626. Therefore, even if Olla's 2015 claims regarding the TLA were different from those raised in the 2009 complaint, the similarity of the claims suggests that Olla could have raised his 2015 claims in his 2009 complaint through the exercise of reasonable diligence. Furthermore, Olla acknowledged at oral argument that he knew at the time he filed his 2009 complaint that Wagner did not have a Washington mortgage brokers license. Wash. Court of Appeals, *Olla v. Wagner, et. al*, No. 48784-5-II (Consolidated with No. 48910-4-II), oral argument (Jan. 12, 2018), at 8 min., 24 sec. (on file with the court). Because Olla raised claims under the MBPA in his 2009 complaint and knew at that time that Wagner did not have a Washington mortgage brokers license, Olla could have brought his 2015 MBPA claims in 2009 through the exercise of reasonable diligence.

We hold that Olla's claims are precluded under the doctrine of res judicata. As such, we hold that the superior court properly dismissed Olla's 2015 case under CR 12(b)(6) because his claims were barred under that doctrine.[5]

III. FRAUD ON THE COURT

Olla argues that Wagner and the superior court have committed a "fraud upon the court." Br. of Appellant at 34, 41. Olla does not cite to any authority for this claim and does not offer any explanation or analysis. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, we decline to consider this argument.

[5] Because we hold that res judicata precludes Olla's claims, we do not reach the issue of whether collateral estoppel bars relitigation of the claims raised by Olla.

IV. ATTORNEY FEES AND COSTS

Wagner argues that he is entitled to attorney fees and costs on appeal based on the settlement agreement between him and Olla and RCW 4.84.185. We agree that Wagner is entitled to attorney fees and costs on appeal based on the settlement agreement.

Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal. *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008). RCW 4.84.185 authorizes a court to award attorney fees and costs on appeal to a party that has defended a lawsuit that was "frivolous and . . . without reasonable cause." Wagner does not offer any explanation as to why Olla's complaint is frivolous. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *Mason*, 170 Wn. App. at 384. Therefore, we decline to award attorney fees and costs to Wagner on this basis.

However, the settlement agreement between Wagner and Olla stated, in part, "If legal action is required to enforce the provisions of this agreement, the prevailing party shall be entitled to recover its [attorney fees] and costs from the nonprevailing party." CP at 768. Our Supreme Court has explained that "[a] 'prevailing party' is any party that receives some judgment in its favor." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (quoting *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)). The court further reasoned that "[i]f neither party completely prevails, the court must decide which, if either, substantially prevailed," based on "'the extent of the relief afforded [to] the parties'" *Id.* (quoting *Riss*, 131 Wn.2d at 633-34). Wagner is the prevailing party in this appeal because he prevailed on the motion to vacate and motion to dismiss issues. Therefore, we award attorney fees and costs on appeal to Wagner based on the settlement agreement.

CONCLUSION

We affirm the superior court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Johanson, P.J.

Sutton, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

November 5, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual,

Appellant,

v.

ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (a/k/a "THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through 50, Inclusive,

Respondents.

No. 48784-5-II
(Consolidated with No. 48910-4-II)

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND GRANTING MOTION FOR EXTENSION OF TIME TO FILE OVERLENGTH MOTION

The appellant filed a motion for extension of time to file an overlength motion for reconsideration of the opinion filed on July 10, 2018. The appellant has also filed a motion for reconsideration of the filed opinion. After review, it is hereby

ORDERED that appellant's motion for extension of time to file an overlength motion for reconsideration is granted; it is further

ORDERED that appellant's motion for reconsideration of the filed opinion is denied.

Jjs.: Bjorgen, Johanson, Sutton

FOR THE COURT:

Bjorgen, J.

Bjorgen, J.

Appendix C

Filed
Washington State
Court of Appeals
Division Two

November 5, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual,

Appellant,

v.

ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (a/k/a "THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through 50, Inclusive,

Respondents.

No. 48784-5-II
(Consolidated with No. 48910-4-II)

ORDER DENYING APPELLANT'S MOTION TO PUBLISH OPINION

The appellant has filed a motion to publish the opinion filed in this matter on July 10, 2018. After review, it is hereby

ORDERED that appellant's motion to publish the opinion is denied.

Jjs: Bjorgen, Johanson, Sutton

FOR THE COURT:

Bjorgen, J.

OFFICE RECEPTIONIST, CLERK

From: Mark Olla <markolla@aol.com>
Sent: Tuesday, January 29, 2019 11:12 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sherman, Harper
Subject: Re: Appeal No. 48784-5-II (OLLA v. WAGNER ET AL.) Appellant's Amended Petition for Review (96623-1)

TO Washington State Supreme Court Clerk
From: Mark Olla, Petitioner, Pro Se
Re: #96623-1 (in re Appeal No. 48784-5-II, OLLA v. WAGNER ET AL.) / timely filed Amended Petition for Review
current time / date: 11:12 a.m. PST, Tuesday, January 29, 2019

Both are the same.
Sorry for any confusion generated by the two emails yesterday afternoon, the 4:46 p.m-received Amended Petition was in copy of as sent to Harper Sherman at COAD2 and the 4:51 p.m.-received attached Amended Petition was was as direct filing to the Supreme Court in lieu of the malfunctioning COAD2 e-filing portal.

I do not understand why the Court of Appeals' e-portal gave me trouble yesterday, once again. I checked it perhaps an hour before to see if it was functioning and it had then appeared so, but later circa 4:38 p.m. it was down again.

Thank you for your attention in seeing to it that my Amended Petition for Review is file-stamped yesterday, Monday, January 28, 2019 and timely so as it was.

I have duly copied opposing counsel and the COAD2's case manager Harper Sherman.

Thank you,

Mark Olla, Petitioner, Appellant & Plaintiff, Pro Se

-----Original Message-----
From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
To: 'Mark Olla' <markolla@aol.com>
Cc: Sherman, Harper <Harper.Sherman@courts.wa.gov>
Sent: Tue, Jan 29, 2019 8:16 am
Subject: RE: Appeal No. 48784-5-II (OLLA v. WAGNER ET AL.) Appellant's Amended Petition for Review (96623-1)

Mr. Olla:

The Supreme Court received two filings from you on 1-28-19, one at 4:46 p.m. and one at 4:51 p.m. Please confirm which filing you would like to submit as they both appear to be amended petitions.

Thank you,

Receptionist

Supreme Court Clerk's Office

360-357-2077

From: Mark Olla [mailto:markolla@aol.com]
Sent: Monday, January 28, 2019 4:50 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Sherman, Harper <Harper.Sherman@courts.wa.gov>
Subject: Fwd: Appeal No. 48784-5-II (OLLA v. WAGNER ET AL.) Appellant's Amended Petition for Review (96623-1)

Ms. Sherman, Washingotn State Court of Appeals, Division Two and the Washington Supreme Court:

Please find attached pdf of the Appellant MARK OLLA'S Amended Petition for Review, due today

Monday, January 28, 2019.

I encountered the same e-portal filing problem as last time.

My login and failed attempt at approximately at 4:35 p.m. PST today can be verified by contacting

COAD2 tech support, Gary Halstead, also noticed hererby.

Thank you,

Mark Olla, Petitioner, Appellant & Plantiff, Pro Se