Court of Appeals Docket Number 339386-III

**COURT OF APPEALS, DIVISION III**

**OF THE STATE OF WASHINGTON**

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SAMUEL AND ROXY SALMON,

*Appellants and Plaintiffs,*

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

*Respondent and Defendant.*

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Appeal from the Stevens County Superior Court
Case No. 2013-2-00-2815

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# RESPONDENT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S ANSWERING BRIEF

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William G. Fig, WSBA 33943
Laurie R. Hager, WSBA 38643
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205
Telephone: (503) 227-1111
Facsimile: (503) 248-0130
Attorneys for Respondent and Defendant MERS

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## I. INTRODUCTION

Appellants Samuel and Roxy Salmon ("the Salmons") have filed multiple lawsuits in an attempt to avoid or delay the pending foreclosure of their home. In this action on appeal, the Salmons' third action, they asserted claims against Mortgage Electronic Registration Systems, Inc. ("MERS") related to its authority to assign any interest it had in a Deed of Trust to Bank of America. The Salmons obtained an Order of Default against MERS based on its alleged failure to timely appear in the action. However, the Salmons failed to serve MERS with a copy of the summons and complaint. Instead, the Salmons served process on a bogus MERS entity that was inappropriately incorporated in the State of Washington and improperly using the name Mortgage Electronic Registration Systems, Inc. ("Fake MERS").

As soon as MERS learned of this action, it filed a motion to set aside the Order of Default based on lack of service of process. The court properly granted this motion. Thereafter, MERS moved for a dismissal of this action because it was barred

by *res judicata* and collateral estoppel. The trial court properly granted this motion and dismissed the case.

MERS respectfully requests that this Court affirm the orders of the trial court challenged by the Salmons.

## II. STATEMENT OF THE CASE

### A. Statement of Facts

#### 1. MERS.

MERS is a Delaware corporation, with its principal place of business in Reston, Virginia. CP 162. MERS is not licensed to do business in Washington, nor does it have a registered agent in Washington. CP 163. MERS was not served with the summons and complaint in this action. CP 150.

#### 2. Fake MERS.

On June 3, 2009, an individual named Robert Jacobson ("Jacobson") set up Fake MERS as a Washington domestic corporation. CP 176-178. Fake MERS has the same UBI No. as a company called "Mortgage Electronic Registry System." CP 173-182. Jacobson improperly established Fake MERS in

order to trick people into thinking that he was a proper registered agent who could accept service on behalf of MERS. CP 162-163. Jacobson would then solicit payment from MERS to obtain the legal notices and documents received by fake MERS. CP 163. Jacobson has never been MERS' registered agent. CP 162-163.

MERS sued Jacobson in the US District Court, Northern District of California, Case No. 4:09-03600-SBA. On or about February 3, 2010, MERS obtained a permanent injunction against Jacobson, permanently enjoining him from using the name of Mortgage Electronic Registration Systems, Inc. CP 162-163; CP 194-196. Fake MERS' Washington registration expired in June 2010. CP 202.

**3. The Salmons Served Fake MERS, not MERS.**

The Salmons served Fake MERS through the Washington Secretary of State. CP 1-3. The Salmons erroneously contended that service on Fake MERS somehow effected service on MERS.

### 4. Motion and Order to Vacate the Default.

The Salmons obtained a Default Order against MERS for its alleged failure to appear in the action. CP 017. As soon as MERS learned of the Order of Default, it filed a Motion to Vacate the Default Order based on the Salmons' improper service of the Summons and Complaint ("the Motion"). CP 148-152; CP 154.

Based on the record presented to the trial court that the Salmons had served Fake MERS instead of MERS, the trial court properly granted the Motion and entered an order vacating the default order against MERS. CP 019-021 ("Order Vacating the Default"). The Court should affirm that decision on appeal.

Moreover, because the record clearly supported the trial court's Order Vacating the Default, there was no need for the Salmons' further requested discovery on the issue of MERS, Fake MERS, and whether MERS had been served.

### 5. The Salmons' Multiple Bites at the Same Apple.

In an attempt to stop the foreclosure of their property located at 917 A Philpott Rd., Colville, WA 99114-8278 (the "Property"), the Salmons filed two prior actions. In November 2010, the Salmons filed a lawsuit in Stevens County Superior Court against several defendants, including MERS. CP 215-236. That lawsuit was removed to the United States District Court for the Eastern District of Washington, Case No. CV-10-446-RMP ("First Lawsuit"). The Salmons argued that the foreclosure could not proceed because MERS had not proven itself to be the original beneficiary of the Deed of Trust and, therefore, could not assign the Deed of Trust to BAC Home Loans. *See* CP 124. As a result, BAC Home Loans was not the proper beneficiary of the Deed of Trust and, therefore, could not foreclose the Deed of Trust. CP 229. The District Court considered and rejected this argument. CP 215-236. After giving the parties an opportunity to fully litigate and argue the

issues, on May 25, 2011, the District Court entered a judgment dismissing the First Lawsuit with prejudice. CP 215-236.

Three months after the District Court dismissed the First Lawsuit with prejudice, the Salmons filed a second lawsuit in Stevens County Superior Court, Case No. 11-2-00426-9 ("Second Lawsuit") to stop the foreclosure of the Property. CP 214, ¶¶ 4, 5, CP 237-245. In the Second Lawsuit, the Salmons challenged BAC Home Loans' authority to foreclose because MERS executed an assignment of any interest it may have had in the Deed of Trust to BAC Home Loans. CP 237-244. Based on the preclusive effect of the First Lawsuit, on April 10, 2012, the Court entered a judgment dismissing the Second Lawsuit with prejudice. CP 237-244.

Like the First and Second Lawsuits, this lawsuit also asserted that the assignment of the Deed of Trust from MERS is "unlawful" and void and, therefore, the foreclosure process cannot continue. CP 53, 56-57. MERS filed a CR 12(b)(6) Motion to Dismiss this action based on *res judicata* and

collateral estoppel.[1] CP 204-212. The trial court properly granted the CR 12(b)(6) motion. CP 024-026. This decision should also be affirmed on appeal.

### 6. The Salmons' Motion for Reconsideration and Sour Grapes Motion to Recuse.

Disappointed that they did not receive a windfall for defaulting MERS without even serving it, the Salmons filed a motion for reconsideration and, after that motion was denied, the Salmons blamed their loss on the judge that ruled on the issues. Each one of Judge Nielson's rulings, Orders, and Judgment is supported by the appropriate evidence and authorities. Judge Nielson properly denied the Salmons'

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[1] On a Rule 12(b)(6) motion to dismiss based on *res judicata*, a court may consider documents outside the complaint, including public court documents from the prior litigation. ER 201(b) and (f); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008) (holding that a court may take judicial notice of public documents when ruling on a motion to dismiss if their authenticity cannot be reasonably disputed); *Yurtis v. Phipps*, 143 Wn. App. 680, 689-93, 181 P.3d 849 (2008) (relying on pleadings from prior litigation to affirm trial court's grant of motion to dismiss plaintiff's claims based on *res judicata*). Accordingly, the Court may consider pleadings from the First Lawsuit and the Second Lawsuit, as those terms are defined.

motion for reconsideration and their motion for recusal. These decisions should be affirmed on appeal.

**B. Statement of Procedure**

On or about June 28, 2013, the Salmons filed the present lawsuit against MERS, seeking to set aside the deeds of trust against their home, in an effort to avoid foreclosure. CP 046-147. The Salmons did not serve the lawsuit on MERS but, instead, served the lawsuit on Fake MERS. CP 001-003. The Salmons obtained an Order of Default in this action based on the service on Fake MERS. CP 031-033. Immediately upon MERS' notice of the Order of Default, MERS filed the Motion to Vacate Order of Default. CP 148-152; CP 154.

Based on the record establishing that the Salmons did not serve MERS, but rather only served Fake MERS, the trial court appropriately entered the Order Vacating the Default. CP 019-021.

Thereafter, MERS filed a Motion to Dismiss, because the Salmons had already filed two prior actions to achieve the same

goal, which is to avoid foreclosure despite default on their loan. CP 204-212. The Salmons lost both prior lawsuits seeking substantially the same relief. Accordingly, the trial court appropriately dismissed this case on *res judicata* and collateral estoppel grounds. CP 024-026.

The other accusations and information in the Salmons' Opening Brief are irrelevant to this appeal.

## III. ARGUMENT

### A. Standard of Review

Because the Salmons challenge various rulings by the trial court, there are several standards of review at issue in this appeal.

#### 1. Default Judgments.

"Default judgments are generally disfavored in Washington." *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 446 (2014). CR 55(c)(1) provides in relevant part that, "[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered * * *." "The decision to set aside an

order of default or judgment by default rests within the discretion of the trial court. CR 55(c)(1)." *Batterman v. Red Lion Hotels*, 106 Wn. App. 54, 58 (2001).

Because MERS is not attacking the Salmons' service of the Summons and Complaint on Fake MERS, the "clear and convincing" standard discussed throughout the Salmons' Opening Brief does not apply. Rather, the issue on appeal is whether, under CR 55(c), the trial court abused its discretion in holding that the Salmons' service of process on Fake MERS was not effective service on MERS. CP 19.

**2. The CR 12(b)(6) Motion.**

"Whether res judicata bars an action is a question of law we review de novo." *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 680 (Wash. Ct. App. 2014). Thus, the Court reviews the motion to dismiss *de novo*.

**3. Motions to Reconsider and to Recuse.**

The standard of review of a trial court's order on motion for reconsideration is for an abuse of discretion. "Motions for

reconsideration are addressed to the sound discretion of the trial court and will not be reversed absent a clear or manifest abuse of that discretion." *In re Marriage of Kinnan*, 131 Wn. App. 738, 753 (2006).

The standard of review of a trial court's recusal decision is for an abuse of discretion. *Tatham v. Rogers*, 170 Wn. App. 76, 87 (2012).

## B. Setting Aside the Order of Default was Appropriate Because MERS was Never Served

### 1. The record is clear that the Salmons only served Fake MERS and not MERS.

Fake MERS was a Washington domestic corporation incorporated by Robert Jacobsen on June 3, 2009. CP 176-178. The Salmons contend that, on July 30, 2013, they served Fake MERS through the Secretary of State. CP 1-3. Although the Salmons argue that they served a registered agent, the Washington Secretary of State's July 19, 2013 letter confirms that their assertion is incorrect. CP 1-3. Indeed, Fake MERS was

dissolved in June 2010 and, therefore, there was no registered agent to serve in July of 2013. CP 202.

The Washington Secretary of State made service on Fake MERS by mailing the Summons and Complaint to Fake MERS at the principal office of Fake MERS, through Robert Jacobsen, PO Box 1386, Lafayette, CA 94549. *See* RCW 23B.05.040; CP 001-003 and CP 176-178.

There is no record that MERS was served with the Summons and Complaint. MERS was not served with process and, therefore, had no notice of the Salmons' lawsuit. *See* CP 154, ¶4. MERS is a Delaware corporation with its principal place of business in Reston, Virginia. CP 162. It is not registered to do business in Washington and does not have a registered agent in Washington. CP 163, ¶ 6-7.

Fake MERS is a separate corporation, improperly established by Robert Jacobsen to defraud third parties and harm MERS' business practices by making it appear Fake MERS could accept service of process intended for MERS. CP 162-

163. On February 2, 2010, in the United States District Court for the Northern District of California, MERS obtained a permanent injunction against Robert Jacobsen, preventing him from improperly using the name Mortgage Electronic Registration Systems, Inc. The permanent injunction provides in pertinent part:

> "(1) Mr. Jacobsen, together with any entity under his control or anyone acting on his behalf in any capacity, shall not engage in, commit or perform, directly or indirectly, any of the following acts:
>
> (a) Using or applying to register MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (with or without an "S"), MERS or any confusingly similar designations, as a mark, business name, domain name, email address, meta-tag, keyword, or otherwise; and
>
> (b) Accepting service of process or other documents intended for MERS, including summonses, complaints, subpoenas, or any other legally-required notices naming or involving mortgage liens held by Mortgage Electronic Registration Systems, Inc., a Delaware corporation." CP 194-196.

Here, the problem is that the Salmons purport that the service and default they obtained based on service of process on Fake MERS is effective against MERS. To support their erroneous position, the Salmons rely solely on the fact that Fake MERS has the same name as MERS. This argument is without merit or any legal support. The purpose of requiring proper service of process is to put a defendant on notice of an action so it has an opportunity to defend the claims against it. *See Sheldon v. Fettig*, 77 Wn.App. 775, 781 (1995). MERS did not receive proper notice of the Salmons' action and, under CR 55(c), the trial court properly used its discretion and vacated the default order entered against MERS.

Service on Fake MERS is not effective against MERS. Because the Salmons did not serve MERS, but instead claimed that the service on Fake MERS was valid against MERS, the trial court properly entered the Order Vacating the Default. CP 19-21. MERS requests the court affirm the trial court's order.

### 2. The Trial Court Properly Denied the Salmons' "Motion for Discovery."

After the trial court entered the Order Vacating the Default, and after MERS filed a CR 12(b)(6) Motion to Dismiss, the Salmons filed a Motion for Discovery seeking documents on the issues that were already addressed in MERS' Motion to Vacate Order of Default.

The Salmons do not cite any legal authority supporting their right to file a Motion for Discovery. Discovery is governed by Court Rules 26 through 37. Discovery motions are only proper after a party has failed to respond to discovery requests propounded upon it under these court rules. The prerequisites to a discovery motion in this case did not occur. The Salmons did not issue any discovery requests upon MERS. MERS did not fail to respond to any proper discovery requests and, therefore, there was no basis for the Salmons' discovery motion. The trial court properly denied this motion.

### C. Salmons' Claims Against MERS are Barred by *Res Judicata* and Collateral Estoppel

A claim for relief should be dismissed under CR 12(b)(6) when "it is clear from the complaint that the allegations set forth do not support a claim[.]" *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

For purposes of a CR 12(b)(6) motion, the allegations in a plaintiff's complaint are taken as true. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion should be granted 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." *Zabka v. Bank of America*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005) (quoting *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987)). Dismissal of the Salmons' suit was proper because, taking as true the facts alleged in the Salmons' Complaint and the pleadings from the

First Lawsuit, of which the Court properly took judicial notice, the Salmons' claims fail as a matter of law.

**1. Claim Preclusion Bars the Salmons' Claims.**

The purpose of *res judicata*, or claim preclusion, is to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts." *Bordeaux v. Ingersoll Rand Co*., 71 Wn.2d 392, 395, 429 P.2d 207 (1967). In other words, *res judicata* "puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Marino Prop. Co. v. Port Commissioners*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). *Res judicata* extends not only to every claim actually litigated in the prior proceeding, but also extends to claims that "should have been decided among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980).

In determining which claims are barred by *res judicata*, courts hold that the doctrine bars every claim "which properly belonged to the subject of the litigation, and which the parties,

exercising reasonable diligence, might have brought forward at that time." *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (quoting *Golden v. McGill*, 3 Wn.2d 708, 720, 102 P.2d 219(1940)).

Claim preclusion occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. *Rains v. State*, 100 Wn. 2d 660, 663, 674 P.2d 165, 168 (1983). There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Rains, supra*, at 663 (citing *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978)). All four elements of *res judicata* are present in this case.

**a. The Salmons' lawsuits have the "same subject matter" and "cause of action," satisfying the first two *res judicata* factors.**

The first two factors of the *res judicata* test, *i.e.*, the "same subject matter" element and "identity of causes of action," are often conflated into one element. Article: Claim

And Issue Preclusion In Civil Litigation In Washington., 60 Wash. L. Rev. 805, 812-813 (1985). While identity of causes of action "cannot be determined precisely by mechanistic application of a simple test," the following criteria have been considered: (1) whether 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. *Rains*, 100 Wn. 2d 660 at 663. The subject matter and causes of action in all three lawsuits are the same, as demonstrated through application of the four-factor test stated in *Rains*.

In all three lawsuits, the Salmons challenge the validity of the foreclosure based on MERS' execution of an assignment of any interest it may have in the Deed of Trust. The suits arise out of an identical transactional nucleus of facts, which is: the

Salmons obtained a loan secured by a Deed of Trust recorded against the Property, MERS' execution of an assignment to Bank of America of any interest MERS may have had in the Deed of Trust, the Salmons defaulted on their loan, and Bank of America, the then-current Deed of Trust beneficiary, attempted to foreclose on the Deed of Trust on the Property. Thus, all criteria establishing the first and second factors for *res judicata*, namely the same subject matter and same causes of action, exist.

**b. The parties are the same, satisfying the third and fourth factors.**

The Salmons and MERS were parties to the First Lawsuit and to this action. Therefore, the parties are identical and satisfy the third factor (requiring the parties, or those in privity with the parties, to be the same in both lawsuits) and the fourth factor (requiring the parties to be qualitatively the same). *Rains, supra*, at 663; *Ensley v. Pitcher*, 152 Wn. App. 891, 902

(2009)(explaining that parties in privity satisfy the same party factor for *res judicata*).

**c. The Salmons' allegations that the *Bain* decision creates legal authority has no effect on *res judicata*.**

In their Complaint, the Salmons incorrectly allege that the decision in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 (2012) (hereafter, *"Bain*"), is legal support for this action.[2] CP 52-53. In the Complaint, the Salmons allege:

> "MERS has been acting outside the Washington State Laws since it began transferring beneficial loan interest as only the true, and legal beneficiary may. *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al.*" CP 52-53.

As MERS successfully established in the trial court proceeding, the *Bain* decision, entered after the First Lawsuit and the Second Lawsuit were dismissed, has no bearing on the preclusive effect of the dismissal in the First Lawsuit.

[2] Whether MERS was a proper beneficiary is not relevant because it did not appoint the foreclosing trustee. CP 125-126.

The *res judicata* effect of a final, unappealed judgment on the merits is not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981). Explaining its decision, the Court said:

> As this Court explained in *Baltimore S.S. Co*. v. *Phillips*, 274 U.S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[the] indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

*Moitie*, 452 U.S. 394 at 398-99, quoting *Reed* v. *Allen*, 286 U.S. 191, 201 (1932). Likewise, in *Columbia Rentals v. State*, 89 Wn.2d 819 (Wash. 1978), the Supreme Court of Washington

rejected an attempt to avoid *res judicata* on the grounds of a changed judicial interpretation of the law in a subsequent case. *Columbia Rentals, supra*, at 822 (citing *Pacific Tel. & Tel. Co. v. Henneford*, 199 Wash. 462, 92 P.2d 214 (1939). Claim preclusion bars the Salmons' attempt to relitigate their failed arguments from the First Lawsuit, which were dismissed with prejudice. The court must affirm the trial court's dismissal of the Salmons' claims against MERS.

**d. The Salmons' new argument, raised for the first time on appeal, that the *Bain* decision creates new facts, is not consistent with the record.**

The Salmons apparently concede that any potential change in the law caused by the *Bain* decision does not prevent *res judicata*. The Salmons now make a new argument for the first time on appeal. This Court should not consider this new argument because it was not preserved below. RAP 2.5(a).

Regardless, the Salmons' new argument fails because it is not supported by the record. The Salmons' new argument is

that they could not litigate the claims asserted in this lawsuit until the 2012 *Bain* decision revealed that MERS had a "monopoly in the mortgage assignment business in Washington State." *See* Brief of Appellant, pp. 6 and 33.

The Salmons did not make such an allegation in their Complaint. Accordingly, regardless of the Salmons' repeated reference to a "monopoly" in their Opening Brief, a purported "monopoly" is not the basis of the claims alleged against MERS in the Complaint in this lawsuit. To the contrary, in their Complaint, the Salmons only rely upon *Bain* to support the following allegation against MERS:

> "1. MERS' claim of beneficiary on the Washington State deeds of trust has been RULED unlawful under Washington State Supreme Court decision No. 86206-1 which states:
>
> A. CERTIFIED QUESTION No. 1: "Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust? [Short answer: No.]" This ruling disallows MERS any rights to transfer the note or its security.

> MERS has been acting outside the Washington State Laws since it began transferring beneficial loan interest as only the true, and legal beneficiary may. *Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al*." CP 52-53.

Indeed, the basis of this lawsuit is the Salmons' erroneous contention that MERS could not assign the Deed of Trust to BAC Home Loans, which was necessary to allow the foreclosure to proceed. That is the *same argument* the Salmons made in the First Lawsuit and the Second Lawsuit. The *Bain* decision does not create any new fact that would justify avoiding *res judicata*.

Moreover, in this action, the Salmons seek to avoid foreclosure, *the exact same* relief they sought in the First Lawsuit and Second Lawsuit. *Res judicata* applies to a matter that "is merely an alternate theory of recovery, or an alternate remedy," because that is a matter that should have been raised and decided earlier. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 331 (1997). Thus, even if the Salmons sought the

relief of avoiding foreclosure under alternate theories of recovery, *res judicata* is appropriate.

### D. Collateral Estoppel Bars the Salmons' Claims in this Lawsuit

For collateral estoppel, or issue preclusion, to apply, the party seeking application of the doctrine must establish that: (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen v. Grant County Hosp*., 152 Wn.2d 299, 307 (2004). Issue preclusion applies to issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Id.* All of the required elements for issue preclusion are present in this case.

As set forth above, the issue decided in the First and Second Lawsuits – namely, can MERS assign its interest in the Deed of Trust – is the same issue that the Salmons improperly attempted to re-raise here, thus satisfying the first element. The dismissal of the First Lawsuit with prejudice is a judgment on the merits and satisfies the second element. *Banchero v. City Council of Seattle*, 2 Wn. App. 519, 525, 468 P.2d 724, 729 (1970). The Salmons and MERS were parties in each lawsuit, so the privity element is satisfied.

With respect to the fourth element, invoking issue preclusion would not result in an injustice against the Salmons. The issue regarding MERS' ability to assign its interest in the Deed of Trust was actually and necessarily litigated and determined in the First Lawsuit. The First Lawsuit Dismissal Order shows that the court considered the parties' briefing on the issue and explicitly rejected the Salmons' position. CP 215-236. The Salmons had every incentive to (and, in fact, did) vigorously, fully, and fairly litigate the issue of MERS' ability

to assign its interest in the Deed of Trust. They lost. The Salmons' complaint was barred by issue preclusion, and the trial court properly dismissed it.[3]

The trial court properly dismissed the third lawsuit, and its order should be affirmed.

### E. The Trial Court did not Err in Denying the Salmons' Motion to Reconsider

"A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision." CR 59(b). The Order of Dismissal with Prejudice was entered on September 30, 2015. CP 24-26. The deadline to file the motion to reconsider was 10 days from the date of that Order. *See* CR 59(b). The Salmons did not file their Motion to Reconsider until October 30, 2015, 30 days after the Order was entered. *See* MERS' Response to Plaintiffs'

[3] In their Second Lawsuit, the Salmons challenged the ability of Bank of America to foreclose the Deed of Trust on the ground that the assignment of the Deed of Trust was not valid. The court entered an Order and Judgment dismissing the Second Lawsuit because collateral estoppel and *res judicata* from the First Lawsuit barred the claims.

Motion to Reconsider, pp. 1-2, CP 251-255. Thus, the Salmons' Motion to Reconsider was not timely made.

Also, there was no basis to reconsider the Order of Dismissal with Prejudice, because it is supported by the facts and legal authorities argued by MERS. *See* CP 192-197, 204-212, and 246-250.

Thus, the trial court's denial of the motion to reconsider was appropriate and should be affirmed by this court.

CP 37-38.

**F. The Trial Court Properly Denied the Salmons' Request that Judge Neilson Recuse Himself**

In a sour grapes argument, the Salmons contend that simply because Judge Neilson ruled against them on the various motions, he should recuse himself. That is not the standard on a motion for recusal.

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The Salmons never established that Judge Neilson was biased. To the contrary, he simply entered appropriate orders based on the facts and law in the record.

Even if the Salmons were able to prove that Judge Neilson was prejudiced against them, the Salmons had no right to request Judge Neilson's recusal after he had already ruled against them. *See* RCW 4.12.050(1). The Salmons did not move for recusal of Judge Neilson until after he had already entered the Order re MERS' Motion to Vacate Order of Default and after he had already entered the Order Re MERS' Motion to Dismiss. Accordingly, it was appropriate for Judge Neilson to deny the motion for recusal. RCW 4.12.050(1); CP 36.

## G. The Trial Court did not "Ignore" or "Erase" any Original Orders

The Salmons contend that the trial court "erased" the Salmons' original Order of Default. *See* Opening Brief, pp. 13 and 18. The Salmons further accuse the trial court of a "felony" for such alleged "erasing." *See* Opening Brief, pp. 13 and 18.

There is no merit to the Salmons' contentions. The court did not ignore or erase the Order of Default. Rather, the court acknowledged the Order of Default and, after considering the parties' respective arguments and evidence, entered an Order Vacating the Default. CP 19-21.

## IV. CONCLUSION

For all of the foregoing reasons, the trial court did not err by granting MERS' motion to set aside the default or by granting MERS' motion to dismiss the Salmons' claims. Likewise, the court did not err in denying the Salmons' motion to reconsider. Accordingly, the Court should affirm the decisions of the trial court in their entirety.

Dated this 8th day of August, 2016.

SUSSMAN SHANK LLP

By *s/ William G. Fig*
William G. Fig, WSBA 33943
wfig@sussmanshank.com
Laurie R. Hager, WSBA 38643
lhager@sussmanshank.com
Attorneys for Defendant-Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION III**

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| SAMUEL AND ROXY SALMON,<br><br>Appellants and Plaintiffs,<br><br>v.<br>MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,<br><br>Respondent and Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 339386-III |

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, KAREN D. MUIR, STATE THAT ON THE 8th DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **ANSWERING BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION III** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|---|---|---|
| [x] | Samuel and Roxy Salmon<br>917C Philpott Rd.<br>Colville, WA 99114 | (x) First Class Mail |

SIGNED in Portland, Oregon, this 8th day of August, 2016.

*s/ Karen D. Muir*
Karen D. Muir, Legal Assistant