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Supreme Court No. 95537-9

Court of Appeals No. **49844-8-II**

FILED
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WASHINGTON STATE
SUPREME COURT

**IN THE SUPREME COURT OF
THE STATE OF WASHINGTON**

JOHN CHOQUER, a married man, as his sole and separate property,

Petitioner,

vs.

GUY WAY AND ZENAIDA WAY, husband and wife,

Respondents.

APPELLANT CHOQUER'S PETITION FOR REVIEW

**JOHN CHOQUER, Plaintiff Pro se
9213 NE Mason Creek Rd.
Battle Ground, WA 98604
(503) 819-5115**

ORIGINAL

filed via
PORTAL

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I IDENTITY OF PETITIONER

Petitioner asks this Court to accept review of the Court of Appeals decision designated in Part II of this Petition for Review ("Petition"). The decision terminated review.

II COURT OF APPEALS DECISION

The Court issued and filed the unpublished opinion on January 17, 2018. A copy of the Opinion is in the Appendix at pages A-1 through A-5.

III ISSUES PRESENTED FOR REVIEW

1. Whether Petitioner's property ("Property") was *agricultural land* on the day he purchased it and on the day it was sold at public auction.

2. If the Property was agricultural land on the day of purchase and on the day of sale at public auction, was the Court of Appeals entitled to ignore this Court's holding in *Schroeder v. Excelsior Management Grp., LLC,* and uphold the trial court's ruling that res judicata and/or collateral estoppel prevented Petitioner from arguing -- during the unlawful detainer proceeding that is the subject of this Petition ("UD 2") -- that the June 5, 2015 trustee's sale was void?

IV STATEMENT OF THE CASE

Petitioner purchased the Property for $350,000 in June 2004. *CP*, at 7. The Property had been continuously utilized for agricultural purposes for more than 140 years on the day Petitioner purchased the Property. *CP,* at 13. Attached hereto as Appendix ("A")-6 thru A-7 is a true and correct

copy of a document that was filed in the Clark County Tax Assessor's Office on June 3, 2004. The document proves the Property was designated as open space, farm and agricultural land on the day Petitioner purchased the Property.

Petitioner began working to convert the property from a farm to a vineyard a few days after Petitioner purchased the Property. *CP,* at 8-9. Over several years, he shaped the land for drainage; installed a drainage system; groomed the Property's slope to most efficiently accommodate the drainage system; and began to install, and substantially completed the installation of, an irrigation system.[1] *CP,* at 10. Petitioner also constructed 3 bio-swale ponds on the property. Clark County issued a permit for the construction of each of these ponds.[2] *CP,* at 10.

After working for years to create the proper conditions for a vineyard on the Property, on March 6, 2009, Petitioner began planting the first grafted grapevines. *CP,* at 9. That year Petitioner planted more than 8000 grafted grapevines on 7 acres of vineyard-ready land. *CP,* at 9. Petitioner has been exclusively engaged in growing grapes on the land, without interruption, ever since. *CP,* at 17.

In both 2015 and 2016, before the Property was sold at public auction, Petitioner produced hundreds of cases of various types of wine.

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[1] The trial court ruled Petitioner never completed installation of the irrigation system and that the land therefore was not agricultural land. Whether land has a completed irrigation system or not is not determinative of the land's vineyard status. Grapes can be – and in this case were – irrigated manually.

[2] Clark County Commissioner Tom Mielke helped me to obtain the necessary permits. A true and correct copy of Commissioner Mielke's Declaration is included in the Appendix at A-8 thru A-10.

Plaintiff was utilizing the Property as a vineyard on June 5, 2015. *CP,* at 10.

After producing small batches of wine – in the two-hundred-fifty to three-hundred-fifty case range -- in 2015 and 2016, Petitioner expected to have a full grape-production run in 2017. The wines produced were scheduled to have been sold to Vinesynergy, j. *CP,* at 10.

A. Respondents purchased Petitioner's second mortgage.

On Juned 5, 2015 the Property was valued at approximately $600,000. The Property secured a first and second mortgage. The first mortgage was approximately $200,000, and the second mortgage was approximately $25,000. The second mortgagee foreclosed and the first mortgagee did not.

Respondents purchased the second mortgagee's interest in the Property for $25,570. Petitioner remains obligated on the first mortgage. The first mortgage is current.

Shortly after submitting the best bid at the trustee's sale and being awarded the Property, Respondents brought an unlawful detainer action ("UD 1"). Petitioner defended against UD 1 by arguing that Respondents had not properly notified Petitioner's spouse of the pending action. The trial court held in favor of Respondents and issued an order for writ of restitution. Appellant timely appealed.

The Appellate Court affirmed the trial court's ruling in a decision issued on December 28, 2016.

Following the Appellate Court's December 28th decision, Respondents initiated UD 2. In UD 2, Respondents sought the issuance of a new order for writ of restitution.[3] Because I was determined maintain control of the Property,[4] I continued to search for legal solutions.

In late November 2016, my research revealed this Court's ruling in *Schroeder v. Excelsior Management Grp., LLC*, 177 Wn.2d 94 (2013). After discovering *Schroeder*, I filed a motion in UD 2 to Reverse the Trial Court's Decision and to Rescind the Trustee's Sale ("Motion"). Respondents' sale of the Property at public auction in violation of RCW 61.24.030(2) formed the basis for the motion. Respondents replied that the Motion was barred by res judicata and/or collateral estoppel.

After considering both positions, the trial court denied the Motion and granted Respondents' Motion for Writ of Restitution.

Petitioner timely appealed.

On January 17, 2018, the Appellate Court agreed with Respondents and the trial court. It held that "[b]ecause Choquer's claim could and should have been brought in his previous lawsuit, it is barred by res judicata." *Opinion,* at 1. It then affirmed the trial court's dismissal of my claim and awarded the Respondents attorney fees. *Id.*

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[3] The original order had expired.

[4] The holder of the second mortgage foreclosed at the June 5, 2015 sale. I had paid that mortgage down from a little over $100,000 to $24,000 by June 5, 2015. Respondents bought this $24,000 second position. I have never stopped paying the first mortgage, and the first mortgage is current.

In the Opinion, the Appellate Court took no position, and did not discuss, whether the Property was agricultural land.

Petitioner has timely sought this discretionary review.

V ARGUMENT

A. Acceptance of Review authorized by RAP 13.4(b)(1).

1. Appellate Court decision conflicts with *Schroeder v. Excelsior Management Group, LLC.*

The legal dispute is crystal clear.

By its ruling, the Appellate Court has taken the position that Petitioner's failure to assert the legal ineffectiveness of the June 5, 2015 sale *before* the trial court granted the writ of restitution – thereby, in effect, affirming the legality of the sale – prevented Petitioner from asserting the invalidity of the sale as a defense during UD 2. In other words, the trial court has the power to ratify a trustee's sale that a trustee conducts in violation of RCW 61.24.030(2).

Petitioner disagrees. RCW 61.24.030 is not a rights-creating statute. RCW 61.24.030's requirements are limitations on the power of the trustee to conduct trustee's sale. Whenever a court finds out that trustee has conducted a trustee's sale in violation of one or more of the subsections of RCW 61.24.030, whether it finds out before or after a sale occurs, it must invalidate that sale. A sale in violation of RCW 61.24.030 is void ab initio. The court does not have the power to override the will of the legislature by allowing a writ of restitution to issue following such a sale.

If, instead of being agricultural land, Petitioner's deed of trust ("DOT") did not contain a *power of sale* clause, the Property could not be the subject of a trustee's sale. RCW 61.24.030(1). Further, if Petitioner did not discover the DOT lacked a power of sale clause until after the Property had been sold at public auction by a trustee, Petitioner would still be entitled to have the sale reversed – or to receive the money equivalent of the Property. The sale would not be invalid from its inception because of some right I possess. The sale would be invalid from its inception because it violates RCW 61.24.030(1). And it would be void ab initio whether I asserted its invalidity before, during, or after the sale, or failed ever to assert its invalidity.

There can be no lawful trustee's sale in Washington unless the DOT contains a *power of sale* clause. *Id.* If Petitioner's DOT did not contain a power of sale clause, there would be no way to *make operative* the power to sell the Property. Thus, if the DOT did not contain a *power of sale* clause, a trustee's sale would also violate RCW 61.24.030(3). These violations could not be waived by Petitioner because they are not Petitioner's personal rights. They are statutory imperatives for a lawful trustee's sale. This Court correctly held to the same effect in *Schroeder*. The Appellate Court's ruling conflicts with this Court's holding in *Schroeder*, and therefore should be overturned.

2. Issue of substantial public interest.

Each of the nine requirements contained in RCW 61.24.030 must be considered in every trustee's sale conducted in Washington. Hence, the Appellate Court's ruling affects every trustee's sale.

This case is of substantial public interest.

B. Non-judicial foreclosure of agricultural land is void.

RCW 61.24.030 sets up a list of nine *requisites* for a lawful trustee's sale. A public action of a foreclosed upon property that does not comply with all nine requirements in RCW 61.24.030 is not a *trustee's sale*. Since a sale in compliance with the nine requirements is the only way to conduct a lawful trustee's sale in Washington, a sale conducted in violation of one of the nine requirements is a nullity. The sale never happened as far as Washington law is concerned. And if it never happened, how can it be the basis for issuance of a writ of restitution, notwithstanding any action that I take or do not take.

Under Washington law, agricultural land must be foreclosed judicially. *RCW 61.24.030(2); Schroeder v. Excelsior Management Grp., LLC,* 177 Wn.2d 94, 106, 297 P.3d 677 (2013). Land that is used primarily for agricultural purposes on both the day the deed of trust is granted and the day the land is scheduled to be sold must be foreclosed judicially. *Schroeder,* 177 Wn.2d at 105; *Brown v. Dept. of Commerce,* 184 Wn.2d 509, 519, 359 P.3d 771 (2015); *Gardner v. First Heritage Bank,* 175 Wn. App. 650, 669-670 (2013).

C. *Schroeder v. Excelsior Management Grp., LLC*

In *Schroeder,* Excelsior Management Group ("Excelsior") *sold Schroeder's land non-judicially*. Schroeder had always farmed the land. *Schroeder,* 177 Wn.2d at 99. Nevertheless, Excelsior sold the land by public auction and claimed the sale was lawful. In support of its claim, Excelsior pointed out that Schroeder, in return for a $425,000 loan, had settled a previous lawsuit against an earlier attempt to foreclose by signing a new deed of trust -- and a settlement agreement -- that indicated the land *was not agricultural for purposes of non-judicial foreclosure.*[5] *Id.,* at 100 and 106. Moreover, the settlement was memorialized in a stipulated trial court order, which, in relevant part, read as follows:

> For valuable consideration, the receipt of which is hereby acknowledged, Schroeder, through his attorney, knowingly waives his right, pursuant to RCW 61.24.030(2) to judicial foreclosure on the subject property on the grounds it is used for agricultural purposes.
>
> . . . .
>
> 1. Schroeder has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes,
> 2. Schroeder shall not be allowed to again allege that the subject property is used for agricultural purposes,
> 3. Any future deed of trust executed by Schroeder to the defendant, an associated company or assigns, need not be judicially foreclosed but may be foreclosed nonjudicially in accordance with RCW Chapter 61.24.

Schroeder, 177 Wn.2d at 100.[6]

---

[5] Defendant herein has not signed a new deed of trust and has not signed a settlement agreement of any kind.

[6] Petitioner has not signed a stipulation of any kind with Respondents.

Excelsior argued the parties had a right to agree by contract to a waiver of the judicial foreclosure requirement, and the parties had in fact entered into such an agreement. *Id.*

This Court disagreed with Excelsior. Despite the deed of trust, the contractual agreement, and the terms of the above-quoted stipulation, the Court held the sale was void if the property was agricultural land on the date Schroeder purchased the property and on the date of the trustee's sale. *Id.*, at 115.[7]

This Court supported its holding by sagely explaining that RCW 61.24.030 is not a "rights-or-privileges-creating statute." *Id.*, at 106. Instead the provision sets up a list of requirements for a lawful trustee's sale. *Id.* If any one of the requirements is not met, the sale is void, not voidable.[8] Since, to this Court, the land appeared to be agricultural land, you reversed the appellate and trial court decisions and remanded for further proceedings consistent with the Court's opinion. *Id.*, at 115. Petitioner is asking the Court to review this case so that it can take the same position in this case that it took in Schroeder, and can order the same remedy.

[7] In the case before this Court, the Property had been agricultural land for more than 140 years on the date Appellant purchased the Property, and the Property was agricultural land every day from the date Petitioner purchased it until the Property was sold at public auction on June 5, 2015.

[8] *See Lyons v. U.S. Bank, NA,* 181 Wn.2d 775 (2014); *Deutsche Bank National Trust Co. v. Slotke,* 192 Wn.2d 166 (2016).

D. Petitioner's Land is Agricultural Land

Before Petitioner purchased the Property in 2004, the Property had been designated and used primarily as agricultural land for more than 140 years. And from the day Petitioner purchased the Property until June 5, 2015, the day the Property was sold non-judicially, Petitioner utilized the Property as agricultural land -- to sell hay, apple cider, and wine.

Pursuant to RCW 61.24.030(2), the Property was not subject to foreclosure sale without judicial supervision; and the June 5, 2015 sale was void at its inception. As such, legal title to the Property has never legally passed.

E. Equitable principals dictate that Petitioner's challenge should be allowed.

Statutes that allow foreclosure under a power of sale clause contained in a deed of trust ("DOT") are strictly construed against the exercise of that power[9] because, compared to *mortgage* foreclosure requirements, DTA procedures make it far easier for lender's to forefeit the borrower's interest in the real property that secures a loan. The DTA also revokes the right of redemption after sale guaranteed by a mortgage foreclosure (RCW 61.24.050); deprives the borrower of the right to an upset price (RCW 61.12.060); and eliminates the homestead right. *Felton v. Citizens Fed. Sav. & Loan Ass'n,* 101 Wn.2d 416, 679 P.2d 928 (1984). These losses of borrower rights should not be compounded by liberal construction of the DTA for the benefit of lenders.

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[9] 3A N. Singer, *Statutory Construction* § 69.04 (4th ed. 1986).

Since the judiciary is not involved in DOT foreclosures, only the words of the DTA stand between the borrower and a lender that is eager to foreclose. Unless this Court – and all other Washington courts – stand as bulwarks against lender's unlawful actions by strictly construing the DTA, the DTA's protections are meaningless.

F. As a matter of law, the Property has never been sold.

Land which is used primarily for agricultural purposes must be foreclosed judicially. *RCW 61.24.030(2); Schroeder v. Excelsior Management Grp., LLC,* 177 Wn.2d 94, 106, 297 P.3d 677 (2013); *Brown v. Dept. of Commerce,* 184 Wn.2d 509, 519, 359 P.3d 771 (2015); *Gardner v. First Heritage Bank,* 175 Wn. App. 650, 669-670 (2013). Thus, under the terms of the DTA, the sale of agricultural land non-judicially is not a sale at all. As far as the DTA is concerned, the sale has never occurred. Moreover, even if the trustee claims to have faithfully fulfilled all the DTA's requirements, the sale is still void. *Schroeder,* 177 Wn.2d at 106-107. That is, the sale has no legal force or effect. *See* BLACK'S LAW DICTIONARY 1411 (5th ed. 1979).

In the absence of a legal sale, judicial or non-judicial, the concepts of res judicata and collateral estoppel have no application. Waiver also does not apply.

G. Petitioner has not waived his right to object to the sale.

Waiver does not apply in this case.

Waiver is the voluntary relinquishment of a known right. The key to the concept is that the existence of the right must be known by the person who waives it. *Bowman v. Webster,* 44 Wn.2d 667, 670 (1954). Petitioner was not aware of the requirements of RCW 61.24.030(2) until long after the unlawful sale occurred. And even if Petitioner had been aware of the requirements and had failed to act, Petitioner's awareness and failure to act would not have made a difference.

The requirements of RCW 61.24.030 do not create rights in Petitioner. RCW 61.24.030 is not a rights-creating statute. Instead, the requirements of RCW 61.24.030 are limitations on the power of the trustee to conduct a lawful trustee's sale. If the trustee violates any one of those nine requirements in conducting a trustee's sale, he conducts the sale without legal authority.

When a trustee acts without statutory authority, his actions are without legal effect because his power to sell the property emanates directly and solely from the statute. Moreover, since the actions are legally ineffective, Petitioner is free to point out the legal ineffectiveness of the trustee's actions at any point in time. Petitioner cannot waive legal requirements.

H. Res Judicata does not apply to this case.

"In Washington res judicata applies when a prior judgment has a concurrence of identity in four respects with a subsequent action. *Id.,* at 108. 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. *Mellor v. Chamberlin,* 100 Wn.2d 643, 645-46, 673 P.2d 610 (1983) (citing *Seattle First National Bank v. Kawachi,* 91 Wn.2d 223, 588 P.2d 725 (1978). This Court does not have to evaluate any one of the four elements because it is undisputed that there is *no prior judgment* regarding the propriety or impropriety of foreclosing on Appellant's land non-judicially. Not only was this issue [the issue of whether the land could lawfully be foreclosed non-judicially] not previously raised within an action to contest the foreclosure, but it was also not previously raised in connection with the unlawful detainer action. The trial court precluded Petitioner from raising the issue as a defense to the second unlawful detainer action. *CP,* at 25.

I. Trial Court made no ruling concerning the character of the Property.

The trial court precluded Petitioner from raising the RCW 61.24.030(2) issue as a defense during UD 2 because (1) Petitioner had not raised the issue in a lawsuit prior to the sale, and (2) Petitioner had not raised the issue in the first unlawful detainer action. *Reply,* at 9. But the trial court did not rule that the Property was not agricultural land. *Id.* On this subject – the subject of whether the Property was agricultural land -- the lower court made the following observations:

> Even *if* Mr. Choquer was not precluded from raising the issue as a defense at this time, it appears based on the information contained in the Defendants' Declarations that while Mr. Choquer may have intended to develop a vineyard on the subject property, the necessary irrigation

> system was never completed and wine production never occurred. Based on the uncontested applicability of RCW 59.12, the presence of a primary residence on the subject property that has allegedly even been improved by Mr. Choquer, and the absence of a primary agricultural use of the subject property, the property would not meet the RCW 61.24 definition of being primarily used for agricultural purposes.

CP, at 25.

The presence or absence of an irrigation system does not determine whether land is agricultural land under the DTA. Additionally, the fact that there is a residence on the Property is irrelevant to a determination of whether the land is agricultural. Land can contain an irrigation system and not be agricultural land; and agricultural and can lack an irrigation system. And I am certain that every farmer that lives on the land he farms would be astonished to learn that his residence prevents the farm from being agricultural land.

Wholly apart from these facts, please notice that the trial court's observation is in the conditional: "*if* Mr. Choquer was not precluded from raising the issue as a defense at this time . . . . the property would not meet the RCW 61.24 definition of being primarily used for agricultural purposes." But the trial court *did preclude* Petitioner from raising the RCW 61.24.030(2) issue as a defense.

The court decided Appellant's RCW 61.24.030(2)-violation claim by *refusing to consider the merits of that claim.* The undeniable result of that refusal is that the court's observations regarding the merits of the claim, though interesting, were not necessary to its decision of the claim.

Thus, by definition, the trial court's observations about characteristics of the Property were dictum. *State ex rel. Lemon v. Langlie,* 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

VI CONCLUSION

For the reasons listed and briefly discussed herein above, the Court should review the Appellate Court's decision in this case.

DATED this 16th day of February, 2018.

Respectfully submitted,
JOHN CHOQUER

____
John Choquer, Petitioner Pro se

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused Petitioner's Petition for Review to be served on the following representative for Respondents at the below stated address by email and by U.S. Mail as previously agreed between the parties to this litigation:

Quinn H. Posner,
Attorney for Respondents

DONE this 16th day of February, 2018 at Tacoma, WA.

JOHN CHOQUER

____
John Choquer,
Petitioner Pro se

JOHN CHOQUER - FILING PRO SE

February 16, 2018 - 4:56 PM

Filing Petition for Review

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Washington State
Court of Appeals
Division Two

January 17, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GUY WAY and ZENAIDA WAY, Respondents, v. JOHN CHOQUER, and all other persons occupying 9213 NE Mason Creek Road, Battle Ground, WA, 98604. Appellants.	No. 49844-8-II UNPUBLISHED OPINION

MELNICK, J. — John Choquer appeals the trial court's 2015 grant of a writ of restitution against him in an unlawful detainer action brought by Guy and Zenaida Way. The Ways purchased the property at a nonjudicial foreclosure sale. In an unpublished opinion, this court affirmed the trial court's grant of a writ of restitution. *Way v. Choquer*, No. 48191-0-II (Wash. Ct. App. Dec. 28, 2016) (unpublished), http://www.courts.wa.gov/opinions. Choquer now argues the nonjudicial foreclosure process was unlawful under RCW 61.24.030(2) because the land was for agricultural use. Because Choquer's claim could and should have been brought in his previous lawsuit, it is barred by res judicata. We affirm the trial court's dismissal of his claim and award the Ways attorney fees.

FACTS

Choquer owned a house located on NE Mason Creek Road in Battle Ground. The mortgage owners began a nonjudicial foreclosure process and publicly auctioned the house. The Ways purchased the house and recorded a trustee's deed in their favor. Because Choquer remained in the residence, he was served with a 20-day notice to end tenancy.

Choquer did not vacate the premises, so on September 1, 2015, the Ways filed a complaint for an unlawful detainer action against Choquer. At a show cause hearing to determine whether a writ of restitution should be issued, Choquer argued that service of the unlawful detainer complaint was defective. The trial court disagreed, ruled that proper service occurred, and granted the writ of restitution. Choquer appealed and the trial court stayed enforcement of the writ. We affirmed the writ of restitution.

Following this court's opinion, the Ways requested a hearing to lift the stay and set the correct time line on the writ of restitution. At a January 9, 2017 hearing on the Ways' request, Choquer again objected to the writ. He argued for the first time that the original mortgage owners should not have initiated a nonjudicial foreclosure process because the land was used for agricultural purposes. He argued they should have proceeded with a judicial foreclosure. Choquer also filed a Motion to Reverse Trial Court Decision and Rescind Trustee's Sale. The trial court denied Choquer's motion, finding that Choquer failed to raise his issue "within an action to contest the foreclosure" or to raise it "in connection with [the] unlawful detainer action." Clerk's Papers (CP) at 25. The trial court concluded, "Choquer is precluded from raising the issue as a defense to the unlawful detainer action at this time." CP at 25. Choquer appealed.

ANALYSIS

As a preliminary matter, both parties attached documents in the appendices of their briefs, which are outside the official record. Under RAP 10.3(a)(8), "[a]n appendix may not include materials not contained in the record on review without permission from the appellate court." Since neither party has obtained the requisite permission, we do not consider these documents.

I. RES JUDICATA

Choquer contends the trial court erred in ordering a writ of restitution because the foreclosure procedure was improper under RCW 61.24.030(2). The Ways respond that this claim is barred based on res judicata principles. We agree with the Ways

Whether an action is barred by res judicata is a question of law that we review de novo. *Berschauer Phillips Const. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227, 308 P.3d 681 (2013). The doctrine of res judicata bars a claim that was or *could have been* litigated in a previous action. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009). The doctrine applies where the current and previous actions have the same "'(1) persons and parties; (2) causes of action; (3) subject matter; and (4) quality of the persons for, or against, the claim is made.'" *Ensley*, 152 Wn. App. at 902 (quoting *Landry v. Luscher*, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999)).

Here, the parties are the same in both causes of action; the causes of action regarding whether a writ of restitution should be ordered are the same; the subject matter of whether Choquer should vacate his home is the same in both actions; and, since both parties litigated in "their respective . . . capacities" in both proceedings, the quality of the parties is the same. *Eugster v. Wash. State Bar Ass'n*, 198 Wn. App. 758, 787, 397 P.3d 131, *review denied*, 189 Wn2d 1018 (2017).

In *Eugster*, Eugster initiated a sixth proceeding against the Washington State Bar Association (WSBA), claiming the WSBA's disciplinary system violated his due process and First Amendment rights under the United States Constitution and that the WSBA retaliated against him for an earlier lawsuit. 198 Wn. App. at 763. WSBA moved to dismiss the suit on several grounds, including res judicata. *Eugster*, 198 Wn. App. at 763. The trial court granted the motion on all grounds. *Eugster*, 198 Wn. App. at 763. On appeal, the court affirmed, holding that res judicata bars this lawsuit because Eugster could have asserted his due process arguments in at least one earlier proceeding. *Eugster*, 198 Wn. App. at 763.

Similarly, here, Choquer could have asserted his argument regarding the validity of the foreclosure process in an earlier proceeding. He failed to do so. Thus, res judicata bars Choquer's claim.

II. ATTORNEY FEES

The Ways request attorney fees on appeal under RAP 18.1 and RCW 4.84.185 for having to defend against Choquer's frivolous appeal. An appeal is frivolous if it "is so totally devoid of merit that no reasonable possibility of reversal exists." *Hernandez v. Stender*, 182 Wn. App. 52, 61, 358 P.3d 1169 (2014). We conclude that the issues asserted on appeal are meritless and that Choquer had no reasonable possibility of prevailing based on res judicata principles. We hold that the appeal is frivolous and award attorney fees to the Ways.

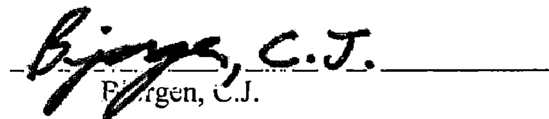
We affirm.

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.

Melnick, J.

We concur:

Worswick, J.



Bjorgen, C.J.