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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

In the matter of the application of frank warren: Schnarrs & cheri lynn: Schnarrs together Husband and wife to register title to land hereinafter described,

Appellants/Plaintiffs

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB, DBA CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR PRETIUM MORTGAGE ACQUISITION TRUST, ITS SUCCESSORS AND/OR ASSIGNS; JOHN DOE; JANE DOE; ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST INTO, OR UPON THE REAL PROPERTY DESCRIBED HEREIN,

Respondents/Defendants

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

This Court should affirm the trial court's Order dismissing with prejudice the claims of Cheri L. Schnarrs and her deceased husband, Appellant Frank W. Schnarrs, against Respondent Wilmington Savings Fund Society, FSB, DBA Christiana Trust, Not Individually But as Trustee for Pretium Mortgage Acquisition Trust, Its Successors and/or Assigns ("Wilmington"). Mrs. Schnarrs did not appeal the ruling, only Mr. Schnarrs did.[1] [CP 463.] However, Mr. Schnarrs died after filing this appeal and his counsel has taken no steps to substitute a proper party as Appellant.[2] [Opening Brief, p. 6.]

Wilmington is Grantee of a Trustee's Deed to real property formerly owned by the Schnarrses and recorded four months before they filed their action. Mr. Schnarrs' Opening Brief primarily rails against the abuses ostensibly visited on the couple by "Thurston County officials" and its Superior Court Judges in refusing to act on the Schnarrses' Torrens Act Petition, "proximately causing" Mr. Schnarrs' death.

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[1] Wilmington refers to Appellant herein as "Mr. Schnarrs," even though his estate or successor is the real party in interest. Wilmington refers to Mr. and Mrs. Schnarrs collectively as the "Schnarrses."

[2] Appellant's action, originally brought *pro se*, has been plagued by procedural defects. Despite being represented by counsel on appeal, those defects continue—including a fundamental standing problem: the one and only Appellant has died, and there currently is no Appellant.

But Torrens registration was not available to the Schnarrses because they were not "owners" of the property. A non-judicial foreclosure of the Schnarrses' property had been properly conducted and completed well before they filed their petition. Therefore, by the time they filed for Torrens registration they no longer held any ownership interest and thus could not invoke the Torrens Act.

Further, in a previous action against Wilmington the Schnarrses had challenged the propriety of that foreclosure and the consequent transfer of title. That action was dismissed with prejudice, and no appeal taken. Thus, the validity of the foreclosure and transfer of title to Wilmington was already established against the Schnarrses.

The Schnarrses tried to use their petition in this action to do an end-run around that prior dismissal ruling. They tried to invoke the Torrens Act to revive their ownership claims, even though the prior dismissal with prejudice was a final judgment overruling such claims. The trial court here properly rejected the Schnarrses' attempt to use their Torrens Petition to invalidate and collaterally attack the prior judgment, awarding Wilmington dismissal with prejudice.

Appellant's challenge to that ruling is largely a misguided and unsupported attack on Thurston County officials, including its judicial officers and other public servants in the Superior Court and County

Recorder's office. These attacks are unfounded and do nothing to carry Appellant's burden on appeal. Mr. Schnarrs' arguments are unpersuasive and fail to establish reversible error.[3] The judgment was proper and should be affirmed.

II. STATEMENT OF THE CASE

A. The Schnarrses Default, the Property is Non-Judicially Foreclosed, and the Trustee's Deed to Wilmington is Recorded.

The Schnarrses resided at 504 Devoe Street Northeast, Olympia, Washington, their home since 1983 (the "Property"). [CP 162-63, 381-82.] They entered a Deed of Trust conveying an interest in the Property to secure their obligations under a Promissory Note to Eagle Home Mortgage, Inc. in the principal amount of $187,500, dated February 28, 2005 (the "Note"). [CP 321-24, 327 (section F).] The Deed of Trust was recorded on March 7, 2005. [CP 326-40.]

The Schnarrses defaulted on the Note, failed to cure their default, and the Property was non-judicially foreclosed. Wilmington purchased the Property at the Trustee's sale, a Trustee's Deed was issued to it, and recorded on December 20, 2016. [CP 342-44.] Despite Wilmington's

[3] This Court denied Mr. Schnarrs' Motion for Judicial Notice or Alternatively Direction to an Appropriate Forum Pursuant to ER 9.11 *(sic)* on October 30, 2018, but for taking notice of Exhibit 1 thereto ("10/30/18 Order"). Nevertheless the Opening Brief impermissibly cites to and argues "evidence" not in the record in contravention of this Court's denial Order. Wilmington moves the following portions of the Opening Brief be stricken to the extent they address anything other than Exhibit 1: pages 24-26, 33, 40, 42, and 44, and fns. 6-10.

title, the Schnarrses continued to reside at the Property until at least December 22, 2017. [CP 381-82 (ordering that "Defendant will not commence an unlawful detainer action until this case is concluded."); ROP 10/27/17, p. 5, lns. 19-21; p. 7, ln. 8 – p. 8, ln. 25.]

B. **The Schnarrses File a Previous Foreclosure Defense Lawsuit Against Wilmington, Which is Dismissed with Prejudice.**

Three months after the Trustee's Deed was recorded, the Schnarrses filed a previous foreclosure defense lawsuit against Wilmington and five other defendants in Thurston County Superior Court under Case No. 17-2-01429-34 (the "First State Court Case"). The Complaint pleaded causes of action to set aside the Trustee's sale and cancel or void the Trustee's Deed, based on the Schnarrses' allegations that: (1) Mortgage Electronic Registration Systems, Inc. ("MERS") was not a lawful beneficiary; (2) the Deed of Trust was not recorded; (3) there was no assignment of the Deed of Trust to MERS; (4) MERS' assignment of the Deed of Trust was invalid; (5) the original lender was not properly licensed, could not make loans, and did not fund the loan; (6) an "unnamed lender" was referenced on the Deed of Trust; and (7) the Deed of Trust was improperly notarized. [CP 306.]

Wilmington and the other defendants filed a CR 12(b)(6) motion, supported by a Request for Judicial Notice. On September 8, 2017, both

their Request for Judicial Notice and dismissal motion were granted, and the First State Court Case was dismissed with prejudice. [CP 346-48.]

C. A Third Party Improperly Files a Petition for the Schnarrses, and Procedurally Fails Four Attempts to Default Wilmington.

Mr. Schnarrs claims the couple filed their Torrens Petition on April 20, 2017. [Opening Brief, p. 10.] That is incorrect. On that date, "micah james of the Christian family Anderson ... without the assistance of a member of the ... WASHINGTON STATE BAR ASSOCIATION" signed and filed as "attorney in fact for" the Schnarrses their "Torrens Petition & Application for Registration of Land Titles." [CP 10, 15.] Mr. Anderson was not a licensed attorney at the time.[4] [CP 9, 17, 23, 103-08; ROP, 7/21/17, p. 4, lns. 2-15; ROP, 12/22/17, p. 5, lns. 7-21.]

Mr. Anderson filed the Petition nearly four months to the day after the Trustee's Deed granting title to Wilmington was recorded [CP 342-44] and a month after the Schnarrses filed the First State Court Case [CP 305]. Along with the Petition, Mr. Anderson also signed and filed an "Abstract of Title History" [CP 16-18] and a "Request for Notation of Pendency of Action" [CP 19-22].

[4] Mr. Anderson was apparently assisted by David Olive, who is also not a licensed attorney. [CP 103-08, 114; ROP 7/28/17, p. 3, ln. 15 – p. 4, ln. 11.] Mr. Schnarrs' accommodation request [CP 112] that he be assisted in court by Anderson and Olive [CP 103-08] was denied by the Court Administrator and trial court [CP 109-11; ROP 7/28/17, p. 3, ln. 15 – p. 4, ln. 11].

In addition, Mr. Anderson filed an "Affidavit of Service & Proof of Payment" swearing that on October 21, 2016, he delivered "consideration of like kind in the sum of $165,000 for PAYMENT IN FULL REGARDING ... [the Loan], with a reference to an instrument with ... recording number 3713982" to two entities he described as debt collectors for Wilmington.[5] [CP 25.] Finally, Mr. Anderson also filed a Declaration of Homestead in which he purported to make a homestead declaration on behalf of the Schnarrses. [CP 26-27.]

Mr. Anderson then unsuccessfully moved four times for a default order against Wilmington after it was ostensibly served by publication [CP 40-41]—despite no publication motion being made or order entered [CP 1-6]. The first default motion filed June 13, 2017,[6] was denied because it was not properly noted for consideration and was not signed by Mr. Schnarrs. [CP 42-45, 50-55; ROP 7/21/17, p. 8, ln. 20 – p. 9, ln. 21.]

On June 26, 2017, Mr. Anderson noted the previous default motion [CP 60-69] for hearing on June 30, 2017 [CP 56-59].[7] It was denied for

[5] No other references to this purported payment appear in the Opening Brief other than in its quote of the Petition's allegations. [Opening Brief, p. 10.] Further, there are no other references to the "consideration of like kind," although it appears that "consideration" is included in the record at CP 38-39.

[6] Identified as sub number 9. [CP 2.]

[7] Identified as sub number 11. [CP 2.]

untimely noting, and again because it was not signed by Mr. Schnarrs. [ROP 7/21/17, p. 8, ln. 20 – p. 9, ln. 22.]

The second default motion was filed a few days later on June 30, 2017, and set for hearing on July 7, 2017.[8] [CP 70-82.] It was denied for the same reasons of untimeliness and not being signed by a party. [ROP 7/21/17, p. 8, ln. 24 – p. 9, ln. 22.]

The third notice of hearing was filed on July 6, 2017, and noted for July 21, 2017.[9] Mr. Schnarrs finally signed the Notice of Hearing, but Mr. Anderson signed all the other pleadings. [CP 83-98.] This motion was originally denied because the Notice of Issue was not signed by Mr. Schnarrs, but subsequently continued for hearing to July 28, 2017. [CP 113; ROP 7/21/17, p. 9, ln. 11 – p. 11, ln. 17.]

On the continued hearing date, David Olive attempted to represent Mr. Schnarrs pursuant to a power of attorney, but the trial court would not allow it since he was not a licensed attorney. The court again denied the default motion because the original Torrens Petition was not executed by the Schnarrses. [CP 114; ROP 7/28/17, p. 3, ln. 15 – p. 4, ln. 11; p. 5, ln. 2-20.] Indeed, no document filed in the litigation was represented or shown to have been signed by Mrs. Schnarrs.

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[8] Identified as sub numbers 12-15. [CP 2.]

[9] Identified as sub number 16. [CP 2.]

The fourth default motion was filed on July 28, 2017, and scheduled for consideration on August 11, 2017. On this filing, Mr. Schnarrs—but not Mrs. Schnarrs—signed all the pleadings [CP 115-25, 130-47], other than Mr. Anderson's supporting Declaration [CP 126-29]. The day before the noting date, the hearing was struck. [CP 248-50; ROP 8/11/17, p. 3, lns. 3-8.]

D. Mr. Schnarrs Finally Files His Own Torrens Petition to Which Mrs. Schnarrs "Consents," and One Week Later Fails to Obtain an Order Defaulting Wilmington.

On August 8, 2017, Mr. Schnarrs filed an "Amended Torrens Petition & Application for Torren *(sic)* Title." [CP 160.] This pleading is substantively similar to the original Petition except it was brought by "frank warren from the Christian family Schnarrs" himself "without the assistance of the British Accreditation Regency d/b/a Washington State Bar Association[.]" [CP 160-61.] Although Mrs. Schnarrs is named in the caption [CP 160], the petition was brought only by Mr. Schnarrs "with the consent" of Mrs. Schnarrs [CP 162, ¶2]. Only Mr. Schnarrs, not Mrs. Schnarrs, signed and acknowledged the Amended Petition. [CP 164-65.]

Despite that the Amended Petition appears intended to take the place of and supplant the original Petition, Mr. Schnarrs made no apparent effort to serve it. Instead, he filed an "Ex Parte Motion for an Order

Referring the Application to Examiner of Title as required by RCW 65.12.110," and several related documents [CP 166-94, 239-47], including an "Amended Abstract of Title" [CP 195-215] attaching a Stewart Title Company "review of the title commitment" [CP 200] and "commitment for title insurance" [CP 202].

Mr. Schnarrs also filed a document titled "Notice: Consent of Spouse" whereby "cheri lynn from the Christian family Schnarrs ... authorized and consent to the Registration of land, as requested by" Mr. Schnarrs. [CP 192-94.] Mrs. Schnarrs signed and acknowledged the document [CP 194], but her signature does not appear on any other pleadings filed by Mr. Schnarrs or Mr. Anderson.

Mr. Schnarrs filed the fifth and final motion for entry of Wilmington's default—this one ex parte—and other pleadings on August 17, 2017, just nine days after he filed his Amended Petition. [CP 251-66, 270-73.] For the fifth time, the trial court denied the default motion. [CP 277-78.]

E. <u>Wilmington Appears and Moves to Dismiss the Amended Petition, and Dismissal is Granted With Prejudice.</u>

On August 30, 2017, Wilmington filed a notice of appearance in the action. [CP 274-76.] One month later, Mr. Schnarrs renewed his

Motion for an Order Referring Application to Examiner of Title [CP 281-89] and noticed it for hearing on October 6, 2017 [CP 279-80].

On September 29, 2017, Wilmington filed its CR 12(b)(6) Motion to Dismiss [CP 303-16], setting it for hearing on November 3, 2017 [CP 294-95]. It was supported by Wilmington's Request for Judicial Notice [CP 317-19] of: (a) the Schnarrses' Note indorsed in blank [CP 320-24]; (b) their recorded Deed of Trust against the Property referencing and securing their obligations under the Note [CP 326-40]; (c) the recorded Trustee's Deed of the Property issued to Wilmington [CP 342-44]; and (d) the Order Granting Wilmington's and other defendants' Motion to Dismiss the Schnarrses' Complaint in the First State Court Case, entered September 22, 2017 [CP 346-48].

Both parties re-noticed the hearing dates for their motions. [CP 356-58.] The Schnarrses' motion for reference to a title examiner was heard on October 27, 2017. After being assured Wilmington would not commence eviction proceedings, the court ordered the motion be held in abeyance until hearing of Wilmington's dismissal motion. [CP 381-82; ROP 10/27/17, p. 7, ln. 8 – p. 9, ln. 9.]

Mr. Schnarrs then filed opposition to Wilmington's dismissal motion, substantially the same as his examiner motion reply briefing [CP 383-91], supported by his Declaration concerning the litigation history and

service efforts [CP 392-95]. Wilmington's Reply reiterated its dismissal motion arguments. [CP 418-25.]

Four days after Wilmington filed its dismissal Reply brief, Mr. Schnarrs filed an Amended Response in Opposition to Defendant's Motion to Dismiss. [CP 426-40.] The Amended Response was essentially identical to the original [*compare,* CP 383-91 with CP 426-40], as was Mr. Schnarrs' supporting Affidavit [*compare,* CP 392-95 with CP 441-46].

Wilmington's dismissal motion and Mr. Schnarrs' title examiner motion were heard on December 22, 2017, with the parties waiving oral argument.[10] [ROP 12/22/17, p. 3, ln. 16 – p. 4, ln. 6.] The court took judicial notice of Wilmington's submitted documents [ROP 12/22/17, p. 6, ln. 18 – p. 7, ln. 2], and: (a) granted the dismissal motion with prejudice; (b) denied the title examiner motion with prejudice; and (c) denied Wilmington's request for a fee award. [CP 460-61.]

The trial court ruled that dismissal with prejudice of the First State Court Case precluded all claims in the present suit by way of res judicata and claim preclusion. [ROP 12/22/17, p. 4, lns. 7-15.] It also held that

[10] Mr. Schnarrs' comment that the trial court did "not indicate whether Mrs. Schnarrs ... consented to proceeding without some sort of accommodation or representation" [Opening Brief, p. 23, n. 4] is inapposite and meaningless. Mrs. Schnarrs did not appear at the hearing [ROP 12/22/17, p. 2, ___], and she did not appeal the ruling in any event [CP 463]. Mr. Schnarrs' estate has no standing to maintain this argument on her behalf.

regardless of those doctrines, the completed foreclosure extinguished the Schnarrses' alleged claims. [ROP 12/22/17, p. 4, lns. 15-23.]

The court explained its denial of Wilmington's fee request as an exercise of its discretion because in representing himself Mr. Schnarrs had "gotten some bad advice, quite frankly [and] ... others perhaps ha[d] not been giving [him] the best advice[.]" [ROP 12/22/17, p. 5, lns. 3-21.] It cautioned Mr. Schnarrs, however, that "given the resolution here, I want to advise you that with respect to this property, if these issues came up again – and I trust that they won't – the Court might take a different position." [ROP 12/22/17, p. 5, ln. 21 – p. 6, ln. 1.]

The court clarified that its ruling would be the same regardless whether Wilmington's motion was treated as a CR 12(b)(6) one for dismissal as captioned, or a CR 56(c) summary judgment motion, as the court described it. [ROP 12/22/17, p. 6, ln. 2 – p. 7, ln. 6.]

Mr. Schnarrs—but not Mrs. Schnarrs—appealed the dismissal on January 22, 2018. [CP 463-65.]

III. ARGUMENT

A. <u>Procedural Defects Undermine the Petition and Appeal.</u>

1. Because There is No Appellant, the Opening Brief and Judicial Notice Request Should Be Stricken.

The Opening Brief starts with the revelation that Mr. Schnarrs, the only Appellant, died more than four months ago. [Opening Brief, p. 6.] It then includes an off-hand request that Mrs. Schnarrs be substituted as the Appellant pursuant to RAP 3.2. [*Id.*] But there are several problems with this approach.

First, the Rule requires a request to substitute a party be made by motion "promptly." RAP 3.2(b). The motion must be served on all parties and the personal representative or successor in interest to the decedent. *Id.* While the decedent's attorney has leave to file some pleadings prior to the substitution being ordered, an appellate brief is not among those allowed pre-substitution pleadings. RAP 3.2(d).

Motions, in turn, are governed by Title 17 of the Rules of Appellate Procedure. Rule 17.4(d) specifically limits the type of motions which may be made in a brief to those which, *if granted,* would preclude hearing the case on the merits.[11] The Rules simply do not permit Mr. Schnarrs' former counsel to seek substitution via a single line in a brief which was not served on Mr. Schnarrs' personal representative and successors in interest.

Second, the brief fails to establish that Mrs. Schnarrs is the proper successor in interest to be substituted in Mr. Schnarrs' place. In this

[11] Wilmington's present request that the Opening Brief be stricken due to the absence of a valid Appellant is just such a motion allowed by RAP 17.4(d).

regard, it is noteworthy that she signed no pleadings in the underlying action—other than an unclear and ambiguous "consent" with no defined scope [CP 192-94]—and did not participate in appealing the dismissal order against her [CP 463-65]. Her desire to be involved in this appeal is, thus, questionable.

Third, Mr. Schnarrs had a unique view of his status and those who could speak for him. He repeatedly referred to himself as "frank warren from the Christian family Schnarrs, known as the lawful-man, real party of interest, respondent, 3rd party interest intervener under injury," and "the sovereign people constituent of 'The People of the State of Washington[.]'" [*See, e.g.*, CP 161.]

And Mr. Schnarrs purportedly designated someone other than Mrs. Schnarrs to act as his attorney-in-fact, at least with respect to his rights in the subject property. [CP 23.] He also entered into a legally unenforceable agreement with Mr. Anderson and Mr. Olive—who are described as "Non Combatant Neutral according to Kings 1:10-15"—to act as his "Advocate/Counselor." [CP 103-104.] Notably, Mrs. Schnarrs did not similarly agree to utilize the services of any "Non Combatant Neutrals." [CP 104.]

These unique facts mean it is far from a foregone conclusion that Mrs. Schnarrs is actually Mr. Schnarrs' successor in interest. He may well

have named someone else to fill that role in a will, trust, or other documentation. That information does not appear in the record on appeal.

Under these circumstances, a showing beyond a casual statement in a brief prepared by her deceased husband's former counsel is necessary to prove that Mrs. Schnarrs is Mr. Schnarrs' successor and wishes to participate in this action in that capacity. Given Mr. Anderson's and Mr. Olive's dubious claims and attempts to act on Mr. Schnarrs' behalf, it would be remarkably unfair to have this action proceed without affording Wilmington the certainty of knowing that no one else may try to re-litigate the issues on behalf of the decedent later on.

Fourth, Rule 3.2 requires that a motion to substitute a party should be brought promptly. RAP 3.2(b). Mr. Schnarrs' counsel not only failed to file such a motion, he did not even raise the issue of substitution until four months after Mr. Schnarrs' death. In the interim, he filed a "Motion for Judicial Notice or Alternatively Direction to an Appropriate Forum Pursuant to ER 9.11 *(sic)*."

Absent formal substitution, an attorney for a deceased party may not file such pleadings or otherwise purport to pursue the interests of the decedent. *Stella Sales, Inc. v. Johnson*, 97 Wash. App. 11, 18, 985 P.2d 391 (1999). Rule 3.2(d) itself sets out the filings that may be made prior

to substitution. They do not include a judicial notice request or opening brief. As such, these filings were improper and should be stricken.

2. The Petition Was Procedurally Flawed from the Outset.

Any pleading filed with the court must be signed either by an unrepresented party or counsel of record. CR 11(a). A party who is not represented by an attorney shall sign and date the party's pleading, and state the party's address. *Id.* "If a pleading, motion, or legal memorandum is not signed, it *shall* be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." CR 11(a)(4) (emphasis supplied).

Here the original Petition and Mr. Anderson's repeated motions for entry of default were not signed by either of the Schnarrses or any licensed attorney. The court repeatedly advised Mr. Schnarrs of the need for a party to sign filings. [ROP 7/21/17, p. 9, lns.16-25; ROP 7/28/17, p. 5, lns. 2-14.] Yet Mr. Schnarrs did not correct those defects.

The pleadings, therefore, had to be stricken and could not form the basis for any relief—nor can anything the trial court did or did not do with respect to them constitute prejudicial error. These unsigned filing were, for all practical purposes, legal nullities. *See, Crowley v. McDonough*, 30 Wash. 57, 65, 70 P. 261 (1902).

An Amended Petition actually signed by an interested party was not filed until August 3, 2017. [CP 160-165.] Even this pleading was signed only by Mr. Schnarrs—it violated CR 11 as to Mrs. Schnarrs.

The Amended Petition was the first pleading sufficient to commence the action. Any assignments of error or challenges to the trial court's actions or rulings before the date it was filed are improper. And such actions and rulings certainly could not be prejudicial to Mr. Schnarrs, since the trial court was required to strike all unsigned pleadings.

In sum, before this Court even considers the merits of this appeal, it is confronted with a procedural quagmire created by Appellant's failure to follow the Civil Rules. The entire appeal is improper and the Opening Brief should be stricken.

B. <u>Standard of Review.</u>

If the Court reaches the merits of the appeal, it will examine the trial court's ruling on Wilmington's dismissal motion *de novo*. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007); *Leskovar v. Nickels*, 140 Wn. App. 770, 774, 166 P.3d 1251 (2007). The same standard applies when, as here, the trial court elects to treat a dismissal motion as one for summary judgment under CR 56. *Michael v.*

Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009); *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 485, 309 P.3d 636 (2013).

Because constitutional challenges are questions of law subject to *de novo* review, Mr. Schnarrs' claim that he was denied due process is also reviewed *de novo*. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004); *In re Marriage of McCann*, 4 Wn. App. 2d 896, 916, 424 P.3d 234 (2018).

C. Because the Schnarrses' Torrens Petition was Fatally Flawed, the Trial Court Properly Dismissed it Under Either CR 12(b)(6) or 56(c).

The trial court analyzed Mr. Schnarrs' Torrens Petition under both CR 12(b)(6) and 56(c). Under either standard, it correctly concluded the Petition failed for two reasons.

First, a Torrens Petition is available only to someone with an ownership interest in real property. Because the Schnarrses lost their ownership interest as a result of foreclosure, neither of them could bring a petition under the Torrens Act.

Second, res judicata barred the Schnarrses from claiming an ownership interest despite the foreclosure. Their First Civil Court Case challenged the foreclosure, their loss of ownership, and Wilmington's title interest. Because all those issues were decided against them in the prior judgment, they could not reassert them here.

1. The Torrens Act Did Not Apply Because the Schnarrses were Not "Owners" of the Property.

Mr. Schnarrs' Amended Petition was brought under the Torrens Act, RCW 65.12, *et seq.* [CP 160-65.] He sought an order "referring the Torren *(sic)* Land Title Application to an Examiner of Titles as described in RCW 65.12.090 to perform an Examination of Title" concerning the Property. [CP 168.] His Amended Petition claimed that the Schnarrses were the "Owner[s] of [the Property] free and clear[.]" [CP 163, ¶4.]

But the Schnarrses had no right to that relief. The Act provides: "The *owner* of any estate or interest in land, whether legal or equitable, ..., may apply as hereinafter provided to have the title of said land registered." RCW 65.12.005 (emphasis supplied).

By the time the original "Torrens Petition & Application for Registration of Land Titles" was filed on April 20, 2017,[12] the Schnarrses were no longer "owners" of the Property. Five months earlier, on November 4, 2016, the Property was auctioned at the Trustee's sale and purchased by Wilmington. [CP 342-44.] The Trustee's Deed issued to Wilmington was recorded on December 20, 2016. [CP 342-44.]

As a result of the Trustee's sale, and issuance and recording of its Deed, as a matter of law the Property title transferred to Wilmington. A

[12] By Mr. Anderson, not the Schnarrses.

non-judicial foreclosure sale "transfers title to the property ... to the successful bidder at the public foreclosure sale." *In re Marriage of Kaseburg*, 126 Wash. App. 546, 558, 108 P.3d 1278 (2005); *see also, CHD, Inc. v. Boyles*, 138 Wash. App. 131, 136-37, 157 P.3d 415 (2007). Having lost ownership of the Property, the Schnarrses were not entitled to apply to register title to it under the Torrens Act.

Mr. Schnarrs offers a series of arguments why the trial court should nevertheless have granted him the requested relief under the Torrens Act. He asserts: "When the Schnarrs filed their Torrens Application they were in possession of their home and had declared it their homestead[.]" [Opening Brief, p. 27.]

But RCW 65.12.005 authorizes only "[t]he *owner*" of a property interest to apply for title registration. The statute does not suggest that a *former* owner who remains on the property, or a holdover tenant without color of title, may exercise the rights of a property owner.

Mr. Schnarrs' reference to his homestead rights under the Homestead Act, RCW § 6.13 *et seq.*, is also unavailing. Any homestead rights the couple may have had were extinguished by the Trustee's sale. An owner's homestead interest in property is subordinate to the interest of the deed of trust beneficiary. *In re Trustee's Sale of Upton*, 102 Wn. App.

220, 223, 6 P.3d 1231 (2000). The *In re Trustee's Sale of Upton* court ruled:

> *The homestead exemption is not available against* an execution or forced sale in satisfaction of judgments obtained ... on debts secured (a) by security agreements describing as collateral the property that is claimed as a homestead or (b) by mortgages or *deeds of trust on the premises* that have been executed and acknowledged by the husband and wife ....

Id. (emphasis supplied). Thus, a borrower's homestead rights are surrendered in a non-judicial foreclosure sale. *Wash. Fed. v. Harvey*, 182 Wn.2d 335, 337 n.1, 340 P.3d 846 (2015).

Mr. Schnarrs cites *Finley v. Finley*, 43 Wn.2d 755, 762, 265 P.2d 246 (1953), for the proposition that the Trustee's sale "alone did not prevent the Schnarrs from obtaining appropriate relief under the Torrens Act." [Opening Brief, p. 27.] But *Finley* is not on-point. The plaintiff in *Finley* registered title to the subject property under the Torrens Act *before* the foreclosure sale, while the property was her "sole and separate property." *Id.*, at 757. Mr. Schnarrs sought to invoke the Torrens Act only *after* he ceased to be the Property owner.

Finally, Mr. Schnarrs argues that the trial court should not have taken judicial notice of the Trustee's Deed [CP 342-44], as requested by Wilmington [CP 317-19]. But Mr. Schnarrs did not object to

Wilmington's Request for Judicial Notice before the trial court. His failure to object to the admissibility of the evidence does not preserve the alleged error, and waives appellate review of the issue. RAP 2.5(a); ER 103(a)(1); *State v. Newbern*, 95 Wn. App. 277, 291, 975 P.2d 1041 (1999); *State v. Cross*, 156 Wn. App. 568, 578, 234 P.3d 288 (2010).

Moreover, a trial court "may take judicial notice of public documents if their authenticity cannot be reasonably disputed in ruling on a motion to dismiss." *Rodriguez v. Loudeye Corp.*, 144 Wash. App. 709, 725-26, 189 P.3d 168 (2008) (citing *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977)). A court is authorized to judicially notice a fact that is "not subject to reasonable dispute in that it is … capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b)(2)

Further, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez, supra*, 144 Wn. App. at 726; *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 827 n.2, 355 P.3d 1100 (2015). Mr. Schnarrs' Amended Petition described Wilmington's claimed Property interest by way of the Trustee's Deed, specifically referencing it by the Trustee's name, date, and recording number [CP 163, ¶5(b)]—but neglected to attach a copy.

The Trustee's Deed Wilmington provided with its Request for Judicial Notice was dated, signed by the same Trustee named in the Amended Petition, and notarized, and bore the stamp and recording numbers of the Thurston County Auditor—exactly as Mr. Schnarrs described. [*Compare,* CP 163, ¶5(b), to CP 342-44.] Mr. Schnarrs did not dispute the authenticity of the Trustee's Deed below and did not object to the Request for Judicial Notice—nor does he contest the authenticity of the Trustee's Deed on appeal. Judicial notice of the Trustee's Deed was proper under ER 201(b)(2).[13] The trial court was therefore entitled to consider it when ruling on Wilmington's dismissal motion.

Because the Schnarrses did not own the Property when either the original or the Amended Torrens Act Petitions were filed, the trial court did not err in dismissing the Petition with prejudice, as a matter of law.

2. Any Purported Error by the Trial Court was Harmless.

Precisely because the Schnarrses were not entitled to relief under the Torrens Act, any purported error by the trial court in not providing that

[13] RCW 5.44.040 requires certified copies of "documents on record or on file in the offices of the various departments of ... this state" be admitted in evidence. It does not, as Mr. Schnarrs asserts [Opening Brief, p. 34], establish that the sole method of introducing recorded documents is by certification. Indeed, this Court has chosen to judicially notice apparently uncertified recorded documents. *See, Stanchfield v. Jones*, No. 39445-6-II, 2010 Wash. App. LEXIS 1059, at *7 n.6 (Ct. App. May 20, 2010) ("Although not part of the record before the trial court, we take judicial notice of these documents and of the fact that the parties recorded the quit claim deed and filed the excise tax document."). Regardless, because Mr. Schnarrs did not object to the Request for Judicial Notice before the trial court, he has waived any evidentiary objections he might have had on appeal.

relief, or in otherwise failing to comply with the Torrens Act [Opening Brief, pp. 7, 9, 27-34], did not prejudice Appellant. A non-constitutional error is prejudicial only if, "within reasonable probabilities, the outcome of the case would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wash. 2d 591, 599, 637 P.2d 961 (1981).

Mr. Schnarrs makes no showing to satisfy this standard—nor could he. Had the trial court referred his application to a title examiner in April 2017, the examiner would have been obliged under RCW 65.12.110 to "examine into the title" of the Property and "search the records and investigate all the facts brought to his or her notice." He or she would have seen the Trustee's Deed recorded on December 20, 2016, which conveyed all of the Property interest to Wilmington. He or she thus would have been unable to register the title for the Schnarrses because they had no such title interest to register.

Thus, Mr. Schnarrs cannot show how he was harmed by the denial of the couple's Petition or the lack of an examiner. Had the Petition been granted and an examiner appointed, Mr. Schnarrs' estate would be in the same position it is today—without any ownership interest in the Property.

D. <u>The Trial Court Did Not Err in Holding the Trustee's Deed was Conclusive Evidence of Proper Foreclosure Proceedings and the Schnarrses' Post-Sale Defensive Claims Were Waived</u>.

1. The Trial Court Correctly Applied the Waiver Doctrine Due to the Conclusive Evidence of DTA Compliance.

The Deeds of Trust Act, RCW 61.24, *et seq*. (the "DTA"), governs the procedures for non-judicial foreclosure in the State of Washington. *Rucker v. NovaStar Mortg., Inc*., 177 Wn. App. 1, 10, 311 P.3d 31 (2013) (citing, 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 20.1, at 403 (2d ed. 2004)). One section of the DTA provides:

> The purchaser [at the Trustee's sale] shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which *recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, ...*

RCW 61.24.040(11) (emphasis supplied).

The Washington Supreme Court relied on that DTA provision last year, holding that a party who purchased foreclosed property from the original Trustee's sale purchaser was entitled to evict the foreclosed former owner who remained in possession, as here.[14] *See, Selene RMOF*

[14] *See*, n. 2, *supra.*

II REO Acquisitions II, LLC v. Ward, 189 Wn.2d 72, 80 n.4, 399 P.3d 1118 (2017). Quoting RCW 61.24.040(7), the *Selene* court noted:

> *The trust[ee's] deed*, which contained recitals that it complied with the requirements of chapter 61.24 RCW (deeds of trust act), is "prima facie evidence" of a proper sale and *"conclusive evidence thereof in favor of bona fide purchasers."*

Id.[15]

The court relied on the statute to defeat the foreclosed owner's claim that "she was the victim of mortgage fraud regarding the property in 2004 and that all subsequent property transfers were therefore void." *Id.*, at 74. It reasoned that "the purchaser at the foreclosure sale ... took 'all of the right, title, and interest' in the property[.]'" *Id.*, at 80 (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 910, 154 P.3d 882 (2007)).

Based on the conclusive evidence of the Trustee's Deed, the *Selene* court applied the waiver doctrine. That doctrine extinguishes the majority of post-sale claims[16] brought by borrowers who—despite knowledge of

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[15] RCW 61.24.040(7) is addressed in a number of federal court and unpublished opinions, all of which hold the same as *Selene. See, e.g.*; *Batson v. Deutsche Bank Tr. Ams.*, No. 2:15-cv-00193-SAB, 2017 U.S. Dist. LEXIS 140380, at *12-13 (E.D. Wash. Aug. 30, 2017)("The trustee sale complied with the DTA, and the Trustee Deed provided prima facie evidence of compliance."); *Bruce v. ReconTrust Co.*, N.A., No. 15-5866 RJB, 2016 U.S. Dist. LEXIS 9009, at *19-21 (W.D. Wash. Jan. 26, 2016) ("[T]he Act requires that the trustee's deed issued to the purchaser recite the facts showing that the sale was conducted in compliance with all of the requirements of the Act and the particular deed of trust. This recital of statutory compliance is prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.").

[16] Excepting only those claims and circumstances not applicable here. RCW 61.24.127.

material DTA violations—fail to restrain the non-judicial foreclosure sale of their property. *See, Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 195, 352 P.3d 830 (2015); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150 (1988); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 139, 157 P.3d 415 (2007). Due to the Trustee's Deed's recitals of DTA compliance, the Supreme Court in *Selene* held the former owner "cannot bring her title challenge [now because] ... the appropriate time to assert such challenge was prior to foreclosure." *Id.*, at 83; *accord, Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003) ("[T]he [DTA] requires that the trustee's deed ... 'recite the facts showing that the sale was conducted in compliance with all of the requirements' of the Act and the particular deed of trust. This recital of statutory compliance is '... conclusive evidence ... in favor of bona fide purchasers and encumbrancers for value.'").

The issuance and contents of the Trustee's Deed is undisputed. Mr. Schnarrs did not object to Wilmington's request that the trial court judicially notice the recorded instrument[17]—nor, as discussed above,

[17] The Opening Brief cites CP 385, stating Mr. Schnarrs "objected to the [trial] court's taking judicial notice of these hearsay documents[.]" [Opening Brief, p. 17.] This is not accurate. The pleading cited contains no objection to Wilmington's Request for Judicial Notice, and asserts "hearsay" only with reference to unspecified "statements of the Defendant by and through it's *(sic)* agents[.]" [*Id.*] No such "statements" appear in the record, other than Wilmington's pleadings.

would any such objections have merit. The trial court correctly considered the Trustee's Deed in ruling on Wilmington's dismissal motion.

Further, the Trustee's Deed issued to Wilmington is no different than those analyzed in the foregoing opinions. It contains recitals in full compliance with the DTA. [*Compare*, CP 343-44 with RCW 61.24.040.] As such under *Selene, supra*, and RCW 61.24.040, it "is 'prima facie evidence' of a proper sale and 'conclusive evidence thereof in favor of bona fide purchasers [and encumbrancers].'" *Id.* (quoting RCW 61.24.040(11) (emphasis supplied)). Mr. Schnarrs presented no evidence or even allegations that the sale was improper. As such, he cannot establish error in the trial court's waiver analysis.

"A bona fide purchaser [or encumbrancer] for value is one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960). Whether a party qualifies as a bona fide purchaser or encumbrancer is a mixed question of law and fact. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984) (citing *Hudesman v. Foley*, 73 Wn.2d 880, 889-91, 441 P.2d 532 (1968)); *Steward, supra*, 51 Wn. App. at 513.

Mr. Schnarrs never contended that Wilmington was not a bona fide purchaser or encumbrancer, nor did he introduce any controverting evidence concerning that issue. All evidence before the court below supports it finding Wilmington was entitled to the conclusive evidence established by RCW 61.24.040(11).

The Trustee's Deed establishes that the Schnarrses received all appropriate notices and did not enjoin the sale. They presented no allegations or evidence to the contrary. To the extent they had any foreclosure defenses but failed to act on them prior to the sale means all such defenses were waived. *See, Plein, supra*, 149 Wn.2d at 227-29. Due to the conclusive evidence of DTA compliance in the foreclosure, the trial court correctly applied the waiver doctrine to dismiss the Torrens Petition.

As such, the trial court did not err in ruling: "[T]he foreclosure action would have extinguished any claims that would have accrued that are alleged in this case. And so for [that] ... independent reason[], the foreclosure, ..., I am granting the defendant's motion ... and dismissing this case with prejudice." [ROP 12/22/17, p. 4, lns. 15-18.] This Court should affirm the trial court's Order granting dismissal with prejudice.

2. Mr. Schnarrs Did Not Prove Any Fact Dispute Existed.

Because the propriety and validity of the sale were conclusively established by the Trustee's Deed under RCW 61.24.040(11), the trial

court need not have considered any of Mr. Schnarrs' evidence on this issue. Even if it chose to, however, that evidence was insufficient to create a triable fact issue.

Mr. Schnarrs' opposition to Wilmington's dismissal motion relied on Mr. Anderson's Declaration. Mr. Anderson swore that he attended the Trustee's sale of the Property on the scheduled date and time, and "did not witness the Defendant being a success *(sic)* bidder ... [and] did not witness anyone bidding and/or attempting to bid and/or a successful bidder with regards to [the Property.]" [CP 370.] But under the holding in *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 11-13, 311 P.3d 31 (2013), Mr. Anderson's Declaration does not create a material factual dispute as a matter of law.

In *Rucker*, both an interested party and her husband submitted Declarations quite similar to Mr. Anderson's, asserting that:

> [U]pon arriving at the King County Administration Building at the appointed time, she spoke to several persons about the sale. She stated, "No one we spoke with had any information about the property or the sale. We stayed in the sale area for some time after 10:00 a.m. We heard many properties being called. No one called my father's property." Similarly, [her husband] stated in his declaration that "[w]e heard many properties being called. No one called my father in law's property."

Id., at 13. The court reasoned: "NovaStar was the winning bidder at the sale, acquiring title to Rucker's property through conveyance of a trustee's deed. If no trustee's sale in fact took place, then NovaStar never took title to the property[.]" *Id.*, at 11.

Nevertheless, the *Rucker* court found there was no genuine issue of material fact with regard to sale having occurred. It relied on the Notice of Trustee's Sale and sales crier's testimony concerning the date, time, and conduct of the proceedings:

> [The crier] conducted the Sale on June 29, 2007, at 10 a.m. at the main entrance to the Administration Building, 500 4th Avenue, Seattle, WA. … [The crier] did not call a postponement of the Sale; and the property was sold back to the beneficiary for the amount of the opening bid[.] ... [The crier] did not "tell anyone that the sale had been cancelled or postponed. ... Foreclosure sales are literally organized mayhem; there are numerous criers, crying any number of properties at once. Unless an individual knew which caller would be calling a particular property, it would be practically impossible to ascertain which properties were called or postponed."

Id., at 12. Further, the crier's "testimony was supported by additional documentation evidencing the sale." *Id.*

Based on this evidence, the court held: "the fact that [the wife and husband] did not hear Rucker's property being called does not indicate that no sale took place." *Id*. It concluded: "Given the evidence presented,

reasonable minds could conclude only that Rucker's property was sold at the trustee's sale. ... The evidence presented by Rucker and April was not inconsistent with a sale taking place. The trial court did not err by granting summary judgment with regard to this issue." *Id.*

Rucker controls here. In the face of the conclusive evidence of the Trustee's Deed, the Anderson Declaration should not be considered. Even if it is, however, it does not prove the sale did not occur. Instead it proves—at most—that Mr. Anderson did not hear the sale called.[18]

The trial court did not err in applying the waiver doctrine to dismiss the Torrens Petition with prejudice, as a matter of law.

E. <u>The Trial Court Did Not Err in Holding the Torrens Act Claims Were Barred by Res Judicata and Claims-Splitting.</u>

Mr. Schnarrs argues the trial court erred in finding Wilmington proved the relief sought in his Torrens Petition was barred by res judicata, claim preclusion, and/or issue preclusion.[19] The trial court held:

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[18] Mr. Schnarrs also asserts that he "rel[ies] on Anderson's declaration ... that the loan was paid off." [Opening Brief, p. 18.] His citation to the record, "CP 362-2 & 366," is to an unsworn pleading, not a Declaration. [*Id.*] Regardless, this argument fails in the face of the conclusive evidence of the Trustee's Deed. It also fails because delivery of a promissory Note does not constitute "pa[yment] in full for [a] Loan[.]" [CP 43, 154-57.]

[19] Contrary to Mr. Schnarrs' assertion [Opening Brief, p. 36], res judicata includes both claim preclusion and issue preclusion. *See, Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L.Ed.2d 155 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"). Regardless of the title, "[f]iling two separate lawsuits based on the same event—claim splitting—is precluded in Washington." *Landry v. Luscher*, 95 Wn. App.

> I am going to grant the motion for ... the issue of claim preclusion, or res judicata. Given the prior case that was before Judge Murphy, these claims could have been brought because they are dealing with the same subject matter and could have been brought at the same time. As a result, the Torrens petition is barred under res judicata from the disposition of that prior case.

[ROP 12/22/17 p. 4, lns. 7-15.]

The Washington Supreme Court summarized the reasons for and application of preclusion defenses:

> [I]issue preclusion, bars relitigation of an issue in a later proceeding involving the same parties. [It] promotes judicial economy and prevents inconvenience or harassment of parties. Importantly, [it] provides finality in adjudications, shielding parties and courts from expending resources in repetitive litigation. [It] precludes only those issues that were actually litigated and necessary to the final determination in the earlier proceeding. For [it] to apply, the party seeking it must show (1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party, ... to the earlier proceeding, and (4) applying [it] would not be an injustice.

Schibel v. Eymann, 189 Wn.2d 93, 99, 399 P.3d 1129 (2017) (citations omitted).

779, 780, 976 P.2d 1274 (1999) (citing *Sprague v. Adams*, 139 Wn. 510, 515, 247 P. 960, 47 A.L.R. 529 (1926)).

Mr. Schnarrs asserts Wilmington did not prove "the subject matter of [the First State Court Case] and this Torrens application ... are the same [n]or does the [prior dismissal] Order demonstrate that these two cases involved the same causes of action, persons and same quality of persons ... as those who would be involved in judicially resolving Schnarrs' Torrens application."[20] [Opening Brief, p. 37.] Mr. Schnarrs misrepresents the record.[21]

It is obvious that the Schnarrses as plaintiffs and Wilmington as defendant in the First State Court Case are the identical parties to the Schnarrses as plaintiffs and Wilmington as defendant in the present case. [*Compare*, CP 160 (caption) with CP 346 (caption).] It is equally apparent that the subject matter—title to the Property—is identical. [*Compare*, CP 163 ("[t]he estate, interest or claim of Applicants is that of Owner of real property free and clear") (original capitalization), and CP 164, ¶9(a) ("this house was illegally foreclosed on"), with CP 347, ¶3 ("Plaintiff's *(sic)* ... motion to Authenticate the evidence *Quiet Title* Motion, *set aside sale*")

[20] The fact that Mr. Schnarrs apparently chose not to agree to the form of the previous dismissal Order entered in the First State Court Case [Opening Brief, p. 36; CP 348] does not affect its validity.

[21] Mr. Schnarrs also misrepresents the record by asserting the "Thurston County judges ignored [the first default] motion and the other motions for a default judgment Schnarrs filed[.]" [Opening Brief, pp. 38-39.] The record is clear that appropriate rulings were entered on each such motion which was correctly filed and noted. *See*, pp. ___, *supra*.

(emphasis supplied).] And there is no dispute that the First State Court Case ended with a final judgment on the merits. [CP 346-48.]

At no time did Mr. Schnarrs dispute Wilmington's representations of the claims, defenses, evidence, and dispositive ruling entered in the First State Court Case. [CP 306.] They also choose to ignore the trial court's specific statements concerning its personal knowledge of proceedings in that case, which was before Judge Murphy:

> THE COURT: Has Judge Murphy [hired a title examiner] for the same property or is it a different property?
>
> MR. SCHNARRS: Different property, same bank.
>
> THE COURT: *That's what I thought* ...
>
> THE COURT: *I will be monitoring the other case with Judge Murphy,* and depending on what happens there, that could influence things here as well. ...
>
> THE COURT: So *I will be following this closely, staying abreast of things,* just in terms of efficiency in addressing issues and *making sure that things don't happen inconsistently.* ...

[ROP 10/27/17, p. 9, ln. 16 – p. 10, ln. 18 (emphasis supplied).]

Moreover, it is not required that the causes of action be identical in both cases for the res judicata bar to apply—rather, the later claim is barred if it *could* have been pleaded and was already decided in the parties' earlier litigation. *See, New Hampshire* v. *Maine*, 532 U.S. 742,

748-49, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (holding preclusion bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim); *Schibel v. Eymann*, 189 Wn.2d 93, 99, 399 P.3d 1129 (2017) ("Collateral estoppel, also known as issue preclusion, bars relitigation of an issue in a later proceeding involving the same parties."). As a foreclosure defense and effort to quiet title in the Schnarrses, the Torrens Act registration claim clearly could have been brought in the First State Court Case.

Mr. Schnarrs attempts to overcome this hurdle by asserting he could not have actually obtained Torrens registration in Thurston County because it did not appoint a title examiner until April 2018 [10/30/18 Order], which "eviscerates [Wilmington's] preclusion defenses." [Opening Brief, p. 38.] This argument is unavailing.

The Schnarrses "*could have*" sought the identical Torrens registration relief in the First State Court Case (*Landry, supra*, 95 Wash. App. at 782) as they sought in the trial court below—they simply chose not do so. The fact that the requested relief *would not* have been granted is a completely different issue than whether it *could have* been sought.

The opinions cited in Mr. Schnarrs' Opening Brief support the application of res judicata under the present facts, rather than his own

position. The court in *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 866-67, 726 P.2d 1 (1986), stated:

> The application of the *logical relationship test* leads to the conclusion the counterclaim was compulsory and should have been brought in the interpleader action. Whether [the counterclaimant] was *culpable* is not the important factor, it is whether *the rules fostering judicial economy required her to have brought the action*. The *issue[s] ... are integrally and logically related*. ... Further, *all the necessary facts for a ... claim ... were known* to [the counterclaimant] at the time of the interpleader action yet she did not raise this claim. ... She is barred from bringing the ... claim ... because the asserted claim was compulsory.

Id., (emphasis supplied).

Similarly, whether a party is entitled to Torrens registration of property is "logically related" to whether he defaulted on his mortgage, the Trustee's sale of that same property should be overturned, and title to the property quieted in him. "Judicial economy" required the Schnarrses bring their Torrens claims in the First State Court Case because "all necessary facts were known to" them and the claims were "integrally and logically related" to their other foreclosure defenses.

The Schnarrses had already ostensibly "paid" their mortgage by tendering promissory notes two years earlier. Nevertheless, they allowed the non-judicial foreclosure to be completed and Wilmington to take title

without contest, before finally filing their First State Court Case—regardless of Thurston County's "culpability" in "delay[ing the] Schnarrs Torrens proceeding[.]" [Opening Brief, p. 39.]

In another opinion cited by Mr. Schnarrs, *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 454, 951 P.2d 782 (1998), the court also emphasized judicial economy and the claimants' knowledge at the time they participated in the first action: "Reninger and Cohen were entitled to one bite of the apple, and they took that bite. That should have been the end of it. The normal rules of collateral estoppel apply here to prevent successive and vexatious litigation." *Id.*

The Schnarrses, too, already had their bite of the apple. The litigation below is not only duplicative, but vexatious. The trial court signaled as much in its explanation to Mr. Schnarrs concerning denial of Wilmington's fee request. [ROP 12/22/17, p. 5, ln. 21 – p. 6, ln. 1 ("[I]f these issues came up again – and I trust that they won't – the Court might take a different position.").]

Because the Schnarrses' multiple foreclosure defenses were fully and fairly decided in their prior lawsuit against Wilmington by way of final judgment—and all issues raised by their Torrens Petition were necessarily decided in that litigation—the trial court correctly applied res judicata to dismiss the Schnarrses' Amended Petition with prejudice.

F. Mr. Schnarrs' Assignment of Error Based on a Due Process Violation Must Be Rejected.

Mr. Schnarrs advances a rather convoluted due process challenge to the trial court's dismissal order. He claims he was denied due process because Thurston County did not have an examiner appointed to perform title searches and because he thinks the entire County's judiciary is biased. Neither argument withstands scrutiny.

This Court already denied Mr. Schnarrs' Request for Judicial Notice of most of the material he contends supports his claim that Thurston County failed to follow the law and appoint a title examiner.[22] The one exhibit of which the Court did grant judicial notice merely says that a particular attorney was appointed as an examiner on March 30, 2018. [10/30/18 Order, RJN, Ex. 1.] It does not say and cannot logically be read to support Mr. Schnarrs' conclusion that no other examiner existed before that date or that Thurston County failed to abide by any requirements prior to that date.

The only other support for Mr. Schnarrs' claim that no such person existed was the trial court's statement—again, made before any valid pleading had been signed by Mr. Schnarrs himself—that an "examiner of

[22] As noted above, this Request for Judicial Notice was improperly filed after Mr. Schnarrs' death. His former counsel had no authority to file the motion at all, and no part of it should have been granted. *See*, RAP 3.2(d).

titles has not been appointed under RCW 65.12.110 (Torrens Act) which may be mandatory even in a default situation." [Opening Brief, p. 14.] This appears to be a statement that no examiner was appointed in response to the procedural posture of the Petition, *i.e.*, a purported "default situation." It is not an admission that the County did not have one at all.

Regardless, as noted above, whether or not the County had an examiner is not material here.[23] Even if the County did not have an examiner, Mr. Schnarrs was not prejudiced as a result because he had no right to a title examination under the Torrens Act. Neither he nor Mrs. Schnarrs were owners and their claims of ownership had already been fully and finally decided against them. Moreover, whether or not the County had appointed such a person was not directly raised or litigated before the trial court. Thus, Mr. Schnarrs cannot raise it now.

Similarly, Mr. Schnarrs failed to raise any claim of judicial bias before the trial court. It is well established that "even constitutional rights can be waived by failing to utilize the machinery available for asserting them." *Henriksen v. Lyons*, 33 Wn. App. 123, 128, 652 P.2d 18 (1982), *rev. den'd.*, 99 Wn.2d 1011 (1983). Additionally, pro se litigants are expected to comply with procedural rules. *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P.3d 300 (2002). Because Mr.

[23] Indeed, it appears to be related entirely to Mr. Schnarrs' separate Petition for Writ of Mandamus.

Schnarrs failed to raise these issues below and did not utilize the available procedures by seeking the Superior Court judge's recusal, he has waived the issue. *Henriksen, supra*, 33 Wn. App. at 128.

Moreover, there is no factual justification for Mr. Schnarrs' claim of bias. A "trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice." *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). A party alleging judicial bias must present evidence of actual or potential bias. *In re Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). Without evidence of actual or potential bias, a claim of judicial bias is without merit. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

No due process violations affecting Mr. Schnarrs' rights occurred.

G. <u>Wilmington is Entitled to an Appellate Fee and Cost Award.</u>

Wilmington's entitlement to an appellate fee and cost award is established by RAP 18.1. The Torrens Petition attempts to defeat Wilmington's status as beneficiary of the Deed of Trust and purchaser at the Trustee's sale. Wilmington was forced to defend its Property interests both in the trial court and on appeal.

Paragraph 26 of the Deed of Trust provides: "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term 'attorneys' fees,' ... shall include without limitation attorneys' fees incurred ... on appeal." [CP 339, ¶26.]

Similarly, the Schnarrses' Note provides: "[T]he Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note ... includ[ing], for example, reasonable attorneys' fees." [CP 322, ¶6(E).]

Because the law permits recovery when defending its right to enforce the Note and Deed of Trust, and because this appeal relates directly to Wilmington's enforcement of its rights, it respectfully requests that the Court award its reasonable attorney's fees and costs incurred on appeal as provided by the Note, Deed of Trust, and RAP 18.1, pursuant to a Cost Bill to be submitted after Wilmington's entitlement to such an award is determined.

IV. CONCLUSION[24]

The Schnarrses' Torrens Act Petition and Mr. Schnarrs' appeal were and are procedurally improper. There is currently no Appellant and

[24] Because the Schnarrs' remaining arguments are addressed to non-parties, Thurston County, its "officers," and its Superior Court Judges—and they do not affect the disposition of this appeal in any event—Wilmington does not address them.

no legitimate effort has been made to substitute one. The Petition itself was nothing more than an impermissible and ill-conceived effort to challenge a completed non-judicial foreclosure of the Property the Schnarrses formerly owned. Mr. Schnarrs attempted to use this action to collaterally attack a prior judgment dismissing the couple's challenges to the foreclosure.

The trial court's judgment awarding Wilmington dismissal with prejudice of the Schnarrses' Torrens Act claims was proper and should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury of the laws of the State of Washington and the United States of America that on this 21st day of December, 2018, I caused to be delivered a copy of the foregoing to be served on the following in the manner indicated below:

Scott E. Stafne Stafne Law Advocacy & Consulting 239 N. Olympic Avenue Arlington, WA 98223 *Attorney for Appellant/Plaintiff*	[ ] By United States Mail [ ] By Legal Messenger [ ] By Email scott@stafnelaw.com [X] By ECF/E-Service

SIGNED in Seattle, Washington, this 21st day of December, 2018.

/s/ Karrie L. Blevins
Karrie L. Blevins, Legal Assistant

AFRCT LLP

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