94252-8

Court Of Appeals No. 339386-III

IN THE SUPREME COURT OF THE

STATE OF WASHINGTON

SAMUEL SALMON and ROXY SALMON,
Appellant,
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Respondent,

Notice of Discretionary review by Washington State Supreme Court

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PETITION FOR REVIEW

Samuel Salmon and Roxy Salmon
Pro Se
Appellant

Samuel Salmon
Roxy Salmon
917C Philpott Rd.
Colville, WA 99114

(1) Cover

(2) Table of Contents

a. TABLE OF AUTHORITIES

b. TABLE OF LAWS

(3) IDENTITY OF PETITIONER:

We, Samuel Salmon, and Roxy Salmon do hereby file this petition for review on behalf of us and for the relative public interest.

(4) CITATION TO COURT OF APPEALS DECISION:

Washington Court Appeals Division III, Opinion No. 33938-6-11, filed on February 9, 2017.

(5) ISSUES PRESENTED FOR REVIEW:

1. The decision of the Court of Appeals is in conflict with a [1]decision of the Supreme Court pursuant RAP 13.4 (b)(1). The Washington Supreme Court decision authorizes the petitioner to litigate this action. Also the petitioner recognizes that because of the Washington Supreme Court decision the quality of MERS person has been exposed for the purpose of the public litigating injuries inflicted by MERS, so to receive protection due under the Consumer Protection Act (CPA).
2. MERS person in its association and its actions present a significant question of law under the Constitution of the State of Washington, and of the United States, this petition involves issues of substantial

[1] *Bain V. Metro. Mortg. Grp., Inc.,175 Wn.2d 83 "depending on whether the homeowner can produce evidence on each element required to prove a CPA claim".*

public interest that should be determined by the Supreme Court, pursuant RAP 13.4 (b)(3)(4).

MERS deceptive and unfair acts have injured the public, and their co-partnership with national banks and GSEs are evidencing the legal appearance of a monopoly, pursuant RCW 19.86.030, and its footnote reference to *State Constitution Art. 12 § 22.*

3. Res judicata was improperly used to dismiss this case. MERS alleges RCW 61.24, et seq, is fundamentally the same cause as RCW 19.86 CPA. Salmons concede to some similarities, but assert the fundamentals between the cases are vastly different in depth, scope, and law.
4. The Salmons' State and US Constitutional rights in amendments 7, and 14, were not protected in the lower court decisions.

(6) STATEMENT OF THE CASE

a. PARTIES

MERS provided electronic tracking service of mortgage records for several national banks including Federal National Mortgage Association (FNMA), and Government National Mortgage Association (GNMA). FNMA, and GNMA (GSE) produced uniform instruments, or Multistate Fixed Rate Notes Form 3200 (Note[s]). MERS listed itself on the Notes'

security instrument as "beneficiary". By MERS listing their name on the Notes' security instruments as the beneficiary, MERS not only tracked the records, but also controlled the beneficial assignments of their co-partners' private mortgage records. MERS was never a lender, financer, servicer, owner or holder of the Note[s], or its security instrument.

Samuel Salmon Signed a GSE Form 3200 Note for $417,000.00. GSEs are chartered, and funded primarily by the United States Treasury Dept., or the US tax payers. The lender listed on the Salmons' Note is Countrywide Bank FSB. The beneficiary listed on the deed of trust is MERS. Bank of America collected on the Note from 2007 to 2010. MERS assigned the Note, and deed of trust to Bank of America, et al, on Sept 17, 2010, see CP at 125. On Nov 17, 2010 the Salmons filed a RCW 61.24, et seq, deed of trust act lawsuit (DOTA) against Bank of America, and MERS, et al. The Salmons' DOTA case was dismissed from the Eastern Washington Federal Court in 2011 Case No. 2 :10-CV-00446-RMP. The Salmons filed this RCW 19.86 consumer protection act, case in June 2013 in Stevens County Superior Court (trial court) Case Number: 13-2-00281-5.

b. VALID PROCESS OF SERVICE

MERS as foreign corporation was served via Washington secretary of state (SOS). The SOS returned proper service of process, see CP at 1-3.

MERS became inactive in 2009; the SOS serves inactive corporations in as a rule. MERS did not respond to the summons on time.

c. COURT RECORD ERASED

The Salmons motioned for an order of default, and filed orders with the court. Being instructed by the county clerk's office the Salmons paid the ex-parte fee to have the orders reviewed by the judge; see CP at 41-45. These orders were later removed from the court record. Salmons when noticing the orders were removed from the record upon appeal motioned to supplement the record with copies of the orders and receipt retained in the Salmons personal records. The Washington State Appeal Court Division III (appeal court) granted the motion to supplement the record, with the orders, and receipt, and were re-entered into the record, see CP at 40-45. The appeal court did not address the erased orders, their opinion stated "This claim is outside the scope of the record on review and will not be addressed".

d. DEFAULT ORDER GRANTED

The Salmons filed another Motion for Default in Jan 2015. On February 17, 2015; Judge Patrick Monasmith granted the second Order of Default.

e. DEFAULT ORDER VACATED

i. IMPROPER JURISDICTION MISAPPLIED

June 19, 2015 MERS filed a motion to vacate order of default alleging improper service of process. MERS alleged the registered agent; Robert Jacobsen was not their registered agent, and cited a Northern California Case No. C 09-3600 SBA, which Judge Sandra Armstrong dismissed Robert Jacobsen from the case indicating some undisclosed agreement between the parties, see CP 256-260. Also a [2]permanent injunction order was later executed **solely** against MERS a "**California corporation**", not MERS the **Delaware Corporation**. see CP at 167 lines 18-20. The jurisdiction and venue of the case against only the California Corporation was misapplied to annul Washington SOS service of process on MERS.

ii. STATE AGENCY RECORDS IGNORED

MERS is a Delaware corporation with its principal place of business in Reston, Virginia. The Delaware MERS registered with Washington department of revenue (DOR), MERS' DOR records show the same entity was served by Washington SOS, because they have the same UBI number at each agency, see CP at 173-180.

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[2] "Having considered the Stipulated Permanent Injunction and Judgment, the Court finds no just reason for delay in entering a permanent injunction and judgment against defendant Mortgage Electronic Registration Systems, Inc., **a California corporation**."

iii. RES JUDICATA MISAPPLIED TO VACATE DEFAULT

In the hearing to vacate Judge Neilson inappropriately cited Salmons previous cases, or res judicata, as added reason to vacate the default, see RP at 6-7. July 21, 2015 the order of default was vacated.

August 19, 2015 MERS moved to dismiss, and Salmons moved to compel discovery on Sept 1, 2015. On Sept 30, 2015 at the hearing, MERS motion to dismiss was granted, and the Salmons discovery motion was denied, see CP at 24-25. The Salmons motioned to compel discovery in reference to [3]MERS Washington agency records and license required, as to reason why the trial court should have granted Salmons' motion to compel discovery to resolve the conflict between MERS claim of improper service that arose from their use of an extra jurisdictional California case, verses Washington's agencies records pursuant RCW 31.04.035. Service was valid on MERS, because *[3] An affidavit of service that is regular in form and substance creates a presumption that the service was correct. The party challenging the service has the burden of showing by clear and convincing evidence that the service was improper. Lee v. Western Processing, Co, 35 Wn. App. 466, 469, 667 P.2d 638 (1983)*

[3] Washington agency records should be sufficient evidence of proper service. MERS DOTA CPA violations require MERS to have a business license, a requisite pursuant RCW 31.04.035 License required—when violation occurs.

f. RECUSAL DENIED

Salmons moved Judge Nielson to recuse himself because (1) in 2013 MERS didn't appear, defend, nor was there evidence of improper service of process, when Judge Nielson denied the original orders of default on Sept 26, 2013, see CP 41-45, his motive was also questionable because the orders were wrongfully removed from the record pursuant, RCW 40.16.020 Injury to and misappropriation of record asserting invalidity; also see [4]Lee v. Western Processing, Co, 35 Wn. App. 466, 469, 667 P.2d 638 (1983); (2) Judge Neilson misapplied [5]res judicata to vacate the order of default, see R P at 6-7; (3) Judge Nielson showed personal bias against Robert Jacobsen when calling him a "fly-by-night scam artist" on the record see RP at 26 lines 24, 25. Judge Nielson is required to be impartial, or recuse himself, see RP at 22 paragraph 2.

g. RECONSIDERATION DENIED

The Salmons motioned for reconsideration which was also denied at CP 37. The Salmons appealed to Appeal Court Division III in Spokane on December 8, 2015. On February 9, 2017 the appeal court dismissed the case.

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[4] [3] Process – Service – Validity – Affidavit of Service – Burden and Degree of Proof. An affidavit of service that is regular in form and substance creates a presumption that the service was correct. The party challenging the service has the burden of showing by clear and convincing evidence that the service was improper.

[5] Res judicata is irrelevant in vacating an order of default.

(7) ARGUMENT

a. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court pursuant RAP 13.4 (b) (1).

Salmons pursue MERS CPA violations, and as authorized by the CPA and the 2012 Supreme Court decision showing actionable injury as required in *Bain V. Metro. Mortg. Grp., Inc.,175 Wn.2d 83,* CONCLUSION "...a CPA action may be maintainable, but the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury."

It is up to the Salmons to show the Supreme Court evidence of MERS CPA violations. To prevail on a CPA action, the plaintiff must show "[1] Consumer Protection - Action for Damages - Elements. To recover damages under the Consumer Protection Act (RCW 19.86), a private party must prove that the defendant's act or practice (1) is unfair or deceptive, (2) occurs in the conduct of any trade or commerce, (3) affects the public interest, and (4) causes (5) an injury to the plaintiff in his business or property. " *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986), and [2] Consumer Protection - Action for Damages - Unfair or Deceptive Conduct - What Constitutes. The unfair or deceptive act or practice element of a private cause of action under the Consumer Protection Act is satisfied if the conduct complained of has the capacity to deceive a substantial portion of the public, regardless of the defendant's intent to deceive.

b. The (1) unfair or deceptive act or practice; (2) occurring in trade or commerce, is covered in this segment.

The first two elements of CPA violations are met when: MERS claims to be a beneficiary, when under a plain reading of the statute was not met, presumptively meets the deception element of a CPA action. This in itself is not an actionable CPA cause, but when MERS assigned the Salmons Note and mortgage, it causes actionable injury to the county records by clouding the title, because MERS was not at any time the beneficiary. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA cause, see *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d, 298, 305-09, 553 P.2d 423 (1976).

MERS assignment of the Note was, also improper because it was signed by G. Hernandez, who was an employee of the trustee, Recontrust, and not MERS, see CP at 124. This further demonstrates the deception of MERS, see *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011-12 (9th Cir. 1997) (noting that Microsoft's agreement with certain workers that they were not employees was not binding)., see also Bradburn v. ReconTrust, et al. No. 11-2-08345-2, (2014). "G. Hernandez" was not an employee of MERS but rather was employed by ReconTrust."

To insure there was no chicanery harming land title records the Salmons have requested a detailed list of MERS records before filing this 2013 CPA suit which MERS did not answer. MERS also ignored the motion for discovery in the initial CPA complaint also; see CP at 50, and 130-147. Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA, [6]AG Br. at 11 (citing 15 U.S.C. § 1635(f); Miguel v. Country Funding Corp., 309 F.3d 1161, 1162-65 (9th Cir. 2002)). See also [7]*State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d, 298, 305-09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

c. A significant question of law under the State and US Constitution Amendments 7, and 14

The petition involves an issue of substantial public interest that should be determined by the Supreme Court, pursuant RAP 13.4 (b)(3)(4)

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[6] "MERS' concealment of loan transfers also could also deprive homeowners of other rights," such as the ability to take advantage of the protections of the Truth in Lending Act and other actions that require the homeowner to sue or negotiate with the actual holder of the promissory note. AG Br. at 11 (citing 15 U.S.C. § 1635(f); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162-65 (9th Cir. 2002)).

[7] [5] Consumer Protection - Unfair Competition - Restitution - Examination of Assets - Jurisdiction. A proceeding to examine the defendant in a consumer protection action for purposes of determining his assets in connection with a restitution order is part of the consumer action itself and not a supplemental proceeding.

The (2) public interest impact; (4) injury to plaintiff in his or her business or property, are covered in this segment.

MERS was controlling the mortgage industry in a uniform manner by assigning the Note, in wholesale for approximately 65 million loans registered in its database in the US at their peak. MERS was created in 1995 to add another level of separation between the Note and its true Beneficiary[s] (tax payers).

County land records are of public domain by law, however MERS internal recording system of land records is proprietary and important details of the loans transfers are largely unavailable to the public, which is unfair, and deceptive causing injury to the public interest, and a violation of RCW 42.56.030 "The people insist on remaining informed so that they may maintain control over the instruments that they have created."

MERS records are not available to the public, so the public has no way to validate the debt, or insuring they are not the victim of predatory servicing or lending practices. There are no laws subjecting the public to MERS proprietary way of handling public records yet MERS uses their system to modify the public mortgage records at each county recorder's office. Because MERS control of the GSEs' Note and its security instrument via their arcane recording system, is unfair causing injury to the Salmons, and public by requiring undue effort to discover the true parties in interest. To

prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public." *Hangman Ridge v. Safeco Title*, *105 Wn.2d 775(1986),*.

There is evidence here that MERS is involved with millions of mortgages in the country (and our state), perhaps as many as half nationwide, see footnote 5, and John R. Hooge & Laurie Williams, Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS' Authority to Act, NORTON BANKR. L. ADVISORY No. 8, at 21 (Aug. 2010). "If in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met."

The national bank association, FNMA, and other GSEs in using MERS recording system are giving their status, or right of beneficiary over to MERS, a separate entity, to control, assign, or convey the interest in each Note and deed of trust. The act of so easily relinquishing beneficial rights to MERS, gives the appearance of chicanery or deception, because no true beneficiary would be so haphazard with their own investment.

The fact that the notes were not funded by the national banks but by the GSE, explains why some very low priced buyouts were executed among the major mortgage players. For instance, Countrywide, et al, sold 9

million loans worth about 1.5 Trillion dollars for about 4 billion dollars, which translates to about 1:375 of Countrywide's portfolio value, see [8] . Countrywide was the lender for the Salmons' servicing agreement worth 417.000.00 dollars. When Countrywide sold their portfolio for 1:375 of its value, the Salmons' servicing agreement was purchased by Bank of America for about $1.112.00, or one thousand, one hundred, and twelve dollars. MERS co-partnership with these parties, in conjunction with their private records for such transactions, the price of each loan could be bargained and set without public knowledge, this is violates RCW 19.86.020, 19.86.030, 19.86.040, 19.86.060, 15 U.S. Code § 1, and unjust enrichment because the Salmons paid over $70,000.00, or seventy thousand dollars on the mortgage which pertains to an RCW 19.86.090 and RCW 19.108.030 remedy.

Countrywide, Bank of America and FNMA were in an association, or co-partnership with MERS. The act of selling the loans, or commodities at a fixed price, is also unconstitutional pursuant, State Constitution Art. 12 §

[8] CHARLOTTE, N.C., Jan. 11 /PRNewswire/ -- Bank of America Corporation today announced a definitive agreement to purchase Countrywide Financial Corp. in an all-stock transaction worth approximately $4 billion. Bank of America would gain greater scale in originating and servicing mortgages in the U.S. Countrywide had $408 billion in mortgage originations in 2007 and has a servicing portfolio of about $1.5 trillion with 9 million loans. The purchase also includes Countrywide's Lender Placed insurance and other businesses, http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle_print&ID=1095252

22; 14 Amendment of the US Constitution, and in accordance with RCW 19.86.010--Definitions.

These kinds of transactions make evident why the national banks using MERS services, so readily relinquished their beneficial rights to a non-beneficiary. MERS inserted into the mortgage chain of title did not clarify the parties of interest, but served to further cloud the chain of title from the primary lender US Treasury Dept. (tax payers) to the borrowers (public).

MERS being created as, incorporated company, co-partnership, or association with their national banking partners, and FNMA, et al, could set or fix a price of a commodity (Note, and its security). This association would also be unfair to the traditional mortgage lenders, using their own private portfolio of resources to finance loans.

d. RES JUDICATA IMPROPER TO VACATE, DISMISS

Res judicata may not be a satisfactory ruling by the appeal court because all the elements were not met, see appeal court opinion page 5.

The previous case MERS references, to claim res judicata has a different cause of action, focused on the deed of trust records, applicable to an inappropriate foreclosure action. The CPA cause is not the same cause dismissed in the Salmons' previous RCW 61.24 deed of trust action, case number 10-2-00596-8, because it does not address MERS actions causing

disenfranchisement of the Salmons, and public by MERS restricting records of their associates which is unsafe to the public, and unfair for validating debt, pricing, trading, selling, transferring, assigning, endorsing, collecting, interest, fees, ownership, servicing contracts of the Note and its security which the public could not knowingly address, respond to, or benefit from as a party in interest pursuant RCW 19.86.020, 19.86.040, 19.86.050, or 19.86.060, RCW 19.86.090, and specifically RCW 19.86.030 footnote referring to Washington *State Const. Art. 12 § 22* in regard to MERS the monopoly.

MERS, was created by conspirators to control loans and securities (commodities) allowing unfair pricing, which is by definition a monopoly, who by producing assignments of the note, and its security, causes a break in the chain of title, have thereby caused injury to the Salmons, and public records and the value thereof. The duty is upon MERS to insure that they were in alignment with all of the laws governing their actions. Even if the Salmons' two cases here are slightly related as to a specific violation regarding the DOT, this CPA case addresses many foundationally different elements which cover a broad spectrum of the Salmons'

[9]inalienable rights and legal protections not addressed, or covered under the DOT laws enacted in the Salmons' previous 2010 case.

The previous federal case, dismissed the injurious and illegal actions of the defendant Bank of America, et al, which deprived the Salmons of, liberty, and property, without due process of law; within its jurisdiction, or providing equal protection of the laws pursuant, the U.S. Const. am. 14 sect, 1.

The Salmons believe their constitutional rights have also been violated by applying the res judicata doctrine to dismiss the case, without having equal protection under the law, or a trial by jury, on the elements of the previous case pursuant [10]U.S. Const. am. 7. This CPA is a 14th Amendment Constitutional case at its core and in conjunction with our Wash. Const. Art 12 § 22.

e. CAUSATION

Except for the actions of MERS privatizing their mortgage records, and of their associates records, the parties would not be the victim of unfair, and

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[9] US Constitution Amendment 14 (1) "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[10] U.S. Const. am. 7"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

invalid debts, pricing, trading, selling, transferring, assigning, endorsing, collecting, interest, fees, ownership, servicing contracts, and the harm would not have occurred to the Salmons, or the public causing MERS victims to spend, time consuming, and expensive fruitless efforts to search, find, and discover the records necessary to validate a debt, insure there are no misrepresentations, or predatory servicing or lending practices evidenced in the record.

Because of, MERS action of adding their name to the county's property title records as an owner of the Note, deed of trust, and purporting to be a party in interest, the public has been made unsafe in sustaining injury to the records which are breaking the chain of title, and giving MERS unfair authority to further cause injury to public records by adding to the title deficiencies through their assignments, because MERS is not the "beneficiary" by law and Supreme Court En Banc ruling No. 86206-1.

Except for the actions of MERS in assigning the Note, and its security to other servicers, harm would not have occurred to the Salmons, or the public from invalidated debt collecting, issuing invalid notices, of intent to accelerate, defaults, or selling of real property without proper disclosure, validation of debt, or proper chain of title. For causing the Salmons to

spend, time consuming, and expensive efforts to defend against MERS, their associates, and assigns' violations.

In this manner MERS, and, or its successors, has, is, and will continue to injure the public if the government does not provide a remedy for damages caused by MERS injurious acts.

MERS negligence is a substantial factor in the Salmons injuries. MERS records are filed in the county recorder's office which is presumed correct, until proven incorrect by law and by the preponderance of the evidence, "Even accurate information may be deceptive "'if there is a representation, omission or practice that is likely to mislead.'" *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986)). MERS this uniform manner to assign the Note, in wholesale to approximately 65 million loans registered in its database in the US at their peak. MERS was created in 1995 to add another level of separation between the Note and its Beneficiary, the public.

(8) CONCLUSION

The petitioner seeks the following relief:

Salmons request that if the court deems further fact finding is necessary to grant injunctive relief, that both of the Salmons' motions to compel

discovery be granted. If the court is satisfied with the facts to remedy this matter, the Salmons hereby request their original motion for injunctive relief be granted, and judgment granted for relief and other further and general legal and equitable relief set forth herein, and the complaint, see CP at 58-59.

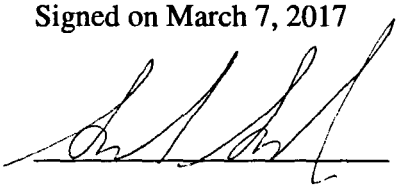
That MERS be ordered to pay the Salmons' for time, fees, collections and all costs, from injuries incurred as a result of MERS deceptive, fraudulent assignments, and damage caused by the unlawful parties who inappropriately received any authority from MERS assignments, et seq, and to the degree treble damages may apply pursuant RCW 19.86.090.

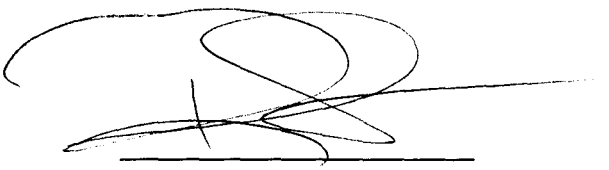
Salmons' hereby, strenuously seek injunctive protection, and relief pursuant RCW 19.86 et seq, and other related law which might be construed as a remedy for the above stated injuries.

(9) Appendix

Attached is a copy of the Washington Court Appeals Division III, Opinion No. 33938-6-11, filed on February 9, 2017.

Signed on March 7, 2017





Samuel Salmon

Roxy Salmon

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February 9, 2017

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CASE # 339386
Samuel Salmon, et al v. Mortgage Electronic Registration Systems, Inc.
STEVENS COUNTY SUPERIOR COURT No. 132002815

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable Allen Nielson

FILED
FEBRUARY 9, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SAMUEL SALMON and ROXY SALMON, Appellants, v. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Respondent.	)	No. 33938-6-III UNPUBLISHED OPINION

PENNELL, J. — Samuel and Roxy Salmon appeal the dismissal of their lawsuit against Mortgage Electronic Registration Systems, Inc. (MERS) for violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. The superior court determined res judicata barred the Salmons' CPA action. The Salmons contend the court erred in (1) vacating the order of default entered against MERS, (2) determining res judicata barred their claim, (3) denying their motion for discovery, (4) denying their motion to recuse, and (5) denying their motion to reconsider. We affirm.

FACTS

In June 2013, the Salmons filed a complaint in Stevens County Superior Court against MERS, a Delaware corporation. In September 2013, after serving an inactive Washington domestic corporation named MERS via the secretary of state, the Salmons attempted to obtain a default judgment against MERS for its alleged failure to appear in

this action. The superior court denied their request in a letter, indicating it was unclear if additional service was required. The Salmons again sought a default judgment in early 2015. This time they obtained an order of default against MERS.[1] When MERS learned of the order of default, it filed a motion to vacate based on the Salmons' improper service of the summons and complaint.

In its motion, MERS maintained the Salmons served a bogus MERS entity. The MERS sued in this lawsuit is a Delaware corporation with its principal place of business in Virginia. MERS does not have a registered agent in Washington. The bogus MERS served by the Salmons used MERS' UBI[2] number but was incorporated in Washington on June 3, 2009, by Robert Jacobson. MERS submitted documents and affidavits in support of its contention that Mr. Jacobson established this bogus MERS in order to trick people into thinking he was a proper registered agent who could accept service on MERS' behalf. Mr. Jacobson would then solicit payment from MERS to obtain the legal notices and documents he received. In February 2010, MERS obtained a permanent injunction against Mr. Jacobson in United States District Court for the Northern District of

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[1] Although the order is entitled "Order of Default Judgment," the contents of the order and the minutes from the court hearing make it clear it is an order of default. *See* Clerk's Papers (CP) at 17-18.

[2] The Unified Business Identifier (UBI) number is a nine-digit number used to identify persons engaging in business activities in Washington.

California enjoining him from using MERS' name. The bogus MERS' Washington registration with the secretary of state expired in June 2010.

Based on this evidence, the superior court determined good cause existed to vacate the order of default. MERS then filed a CR 12(b)(6) motion to dismiss the Salmons' complaint based on res judicata and collateral estoppel. MERS' motion was based on the Salmons' prior attempts to litigate the foreclosure of their home.

In November 2010, the Salmons filed a lawsuit in Stevens County Superior Court against several defendants, including MERS, in an attempt to stop the foreclosure of their home.[3] Essentially, the Salmons claimed MERS was not a lawful beneficiary of the deed of trust and thus could not assign its interest in the deed of trust to the third party who eventually foreclosed on the deed of trust. After the lawsuit was removed to federal district court, that court dismissed it with prejudice as to all defendants.

Three months after the 2010 lawsuit was dismissed, the Salmons filed a second lawsuit in Stevens County Superior Court to stop the foreclosure of their home. The Salmons challenged the bank's authority to foreclose based on MERS' assignment of its beneficial interest to the bank. MERS was not a party to the 2010 lawsuit. Because of

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[3] The facts of this case, as summarized here, are discussed in more detail in the United States District Court for the Eastern District of Washington's order dismissing the case. *See* CP 215-35.

the preclusive effect of it, that lawsuit was also dismissed with prejudice.

In 2013, the Salmons filed this third lawsuit. Their complaint, entitled "Consumer Protection Act Complaint and Injunction Pursuant [to] Supreme Court Decision: 86206-1 [*Bain*[4]]," asserted MERS' assignment of the deed of trust was unlawful because MERS was not a beneficiary. Clerk's Papers (CP) at 50. The Salmons further requested relief from MERS' "unfair or deceptive acts or practices." CP at 58.

The superior court heard argument on MERS' motion to dismiss and the Salmons' motion for discovery, which sought documents relating to the issues discussed in MERS' motion to vacate the order of default. The court granted MERS' motion to dismiss, finding the Salmons' claim could have and should have been raised previously.

Following entry of these orders, the Salmons unsuccessfully moved for reconsideration. The Salmons also moved to recuse the superior court judge from the case. The court also denied the recusal motion. The Salmons appeal.

ANALYSIS

Vacation of order of default

The superior court has discretion when deciding whether to vacate an order of default. *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). As such, this

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[4] *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

court reviews the superior court's decision for abuse of discretion.[5] *Id.* Abuse of discretion means the trial court exercised its discretion on untenable grounds or for untenable reasons or acted in a manifestly unreasonable way. *Stevens*, 94 Wn. App. at 29.

The superior court's decision to vacate its order of default was based on a reasoned analysis of numerous unique facts. There was no abuse of discretion.

Res judicata

The superior court granted MERS' CR 12(b)(6) motion to dismiss on the ground of res judicata. A court's decision to grant a CR 12(b)(6) motion to dismiss is a question of law this court reviews de novo. *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). Res judicata prohibits relitigation of previously decided matters. *Ensley v. Pitcher*, 152 Wn. App. 891, 898-99, 222 P.3d 99 (2009). Res judicata requires a concurrence of identity in four respects: (1) persons or parties, (2) quality of the person for or against whom the claim is made, (3) cause of action, and (4) subject matter. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 858, 726 P.2d 1 (1986). Res judicata

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[5] The Salmons argue MERS must prove by clear and convincing proof that service was improper in order to vacate the order of default. But the Salmons are confusing an *order* of default with a default *judgment*. The cases they cite deal with the latter. *See Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918) (after default judgment the burden is on the party attacking service to show, by clear and convincing proof, the service was irregular); *see also McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).

also requires a final judgment on the merits. *Id.* at 860.

All four elements of res judicata are satisfied. MERS was a party to the Salmons' 2010 suit and the quality of its participation, as the reputed beneficiary of a deed of trust, is the same in both actions. In addition, the subject matter and cause of action are the same. Both complaints are premised on the claim that MERS could not appoint a successor trustee to initiate nonjudicial foreclosure of the Salmons' property because MERS was not the original beneficiary of the deed of trust and never held the applicable promissory note. The Salmons lost this argument in 2010. Since that time, our supreme court issued a decision favoring the Salmons' legal theory in *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012). However, res judicata prohibits the Salmons from reopening their litigation based on *Bain*. The Salmons could have appealed their 2010 judgment, relying on arguments ultimately deemed successful in *Bain*. Because they did not, they are barred from relitigating the issue of whether MERS acted unlawfully in assigning the deed of trust to the Salmons' property, regardless of how their claims are captioned.

Motion for discovery

The Salmons next contend the superior court erred in denying their motion for discovery. They assert discovery was needed to rebut MERS' claims of ineffective

service. The superior court has discretion in deciding whether to deny a motion to compel discovery. *Clarke v. Office of the Attorney Gen.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006). This court will not disrupt that ruling absent an abuse of discretion. *Id.* Because no discovery was necessary to resolve the superior court's decision to vacate its order of default, there was no abuse of discretion.

Motion to recuse

This court reviews a trial court's decision to recuse for an abuse of discretion. *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). Washington has long recognized judges must recuse themselves when the facts suggest they are actually or potentially biased. *Id.* at 93. While the facts here demonstrate the trial judge disagreed with the Salmons' legal argument, there was no indication of bias. Denial of the motion to recuse was proper.[6]

Motion for reconsideration

This court reviews a superior court's denial of a motion for reconsideration for

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[6] The Salmons contend the superior court committed a felony when it "erased" their proposed orders of default. Br. of Appellant at 13, 18. This claim is outside the scope of the record on review and will not be addressed. The record that exists shows no evidence of bias.

abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). Because the trial court did not commit any error in addressing the Salmons' legal claims, it was not an abuse of discretion to deny reconsideration.

CONCLUSION

The orders of the superior court are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.