

Court of Appeals No. 68878 2 I  
King County Superior Court No. 11 2 32517 2 SEA

---

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

---

REPUBLIC CREDIT ONE, LP

*Plaintiff/Appellant/Petitioner,*

v.

QUEEN ANNE BUILDERS, LLC, et al.

*Defendants/Respondents,*

---

**BRIEF OF RESPONDENTS/CROSS APPELLANTS**

---

TACEY GOSS P.S.  
C. Chip Goss, WSBA #22112  
330 112<sup>th</sup> Avenue NE, Suite 301  
Bellevue, WA 98004  
Tel. (425-489-2878)  
Fax. (425-489-2872)

Attorney for Respondents/Cross-Appellants Crown Development Inc.,  
Greg and Jill Blunt, and Cory and Geneanne Burke

2017 NOV 19 PM 3:26  
CLERK OF COURT  
STATE OF WASHINGTON  
60

**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ISSUES RAISED BY APPELLANT..... 2

C. ISSUE FOR REVIEW ON CROSS-APPEAL ..... 3

D. STATEMENT OF THE CASE..... 3

E. STANDARD OF REVIEW..... 9

F. AUTHORITY ..... 9

    1. The Lower Court Applied The Correct Summary Judgment Standard. .... 10

    2. The Lower Court Correctly Found that Separate Paperwork Alone Did Not Avoid Res Judicata Claim Preclusion of a Second Lawsuit on the Same Transaction, Executed at the Same Time, Under the Same Conditions, and Between the Same Parties..... 11

    3. The Lower Court Correctly Applied Landry To Preclude A Second Lawsuit On The Same Transaction..... 17

    4. The “One Action Rule” of RCW 61.24.030(4) Does Not Entitle Shoreline Bank to Split Its Claims Arising From a Single Development Loan In Two Parts Secured By One Deed Of Trust18

    5. Republic’s Recitation of Personal Guaranties, Liability of Marital Communities, Loan Applications and Parol Evidence Cannot Avoid Res Judicata Claim Preclusion..... 19

    6. Under CR 54(b), the Summary Judgment Order is Not a Judgment Triggering The CR54(d)(2) Time To Request Fees ..... 20

G. THE BURKES ARE ENTITLED TO ATTORNEY FEES AND COSTS ..... 24

H. CONCLUSION..... 24

## TABLE OF AUTHORITIES

### CASES

<u>Black v. Evergreen Land Developers, Inc.</u> , 75 Wn.2d 241, 450 P.2d 470 (1969) .....	20
<u>Bohr v. Johnson</u> , 122 Wn.2d 829, 864 P.2d 380 (1993).....	22
<u>City of Kirkland v. Ellis</u> , 82 Wn. App. 819, 920 P.2d 206 (1996) .....	22
<u>Cook v. Vennigerholz</u> , 44 Wn.2d 612, 269 P.2d 824 (1954) .....	20
<u>Corey v. Pierce County</u> , 154 Wn. App. 752, 225 P.3d 367, 379 (2010)...	21
<u>Costantini v. Trans World Airlines</u> , 681 F.2d 1199, 1202 (9 <sup>th</sup> Cir. 1982)	12
<u>Doerflinger v. New York Life Ins. Co.</u> , 88 Wn.2d 878, 567 P.2d 230 (1977) .....	22
<u>Ensley v. Pitcher</u> , 152 Wn. App. 891, 222 P.3d 99, 103 (2009)9, 11, 13, 14	
<u>Hayes v. City of Seattle</u> , 131 Wash.2d 706, 934 P.2d 1179, 943 P.2d 265 (1997) .....	13
<u>Karlberg v. Otten</u> , 167 Wn. App. 522, 280 P.3d 1123 (2012).....	14
<u>Kelly-Hansen v. Kelly-Hansen</u> , 87 Wn. App. 320, 941 P.2d 1108 (1997).....	11, 12
<u>Kuhlman v. Thomas</u> , 78 Wn. App. 115, 897 P.2d 365 (1995) .....	13
<u>Landry v. Luscher</u> , 95 Wn. App. 779, 976 P.2d 1274 (1999) i, 3, 12, 13, 17	
<u>Loveridge v. Fred Meyer, Inc.</u> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	11
<u>Marshall v. Thurston County</u> , 165 Wn. App. 346, 267 P.3d 491 (2011)..	14
<u>Pepper v. King County</u> , 61 Wn. App. 339, 810 P.2d 527 (1991).....	22

<u>Rosenthal v. Fowler</u> , 12 F.R.D. 388, (S.D.N.Y. 1952).....	12
<u>Russell v. Maas</u> , 166 Wn. App. 885, 889, 272 P.3d 273, 275 (2012). .....	9
<u>Schoeman v. N.Y. Life Ins. Co.</u> , 106 Wn.2d 855, 726 P.2d 1 (1986) .....	12
<u>Seattle First National Bank v. Kawachi</u> , 91 Wn.2d 223, 588 P.2d 725 (1978) .....	15
<u>State v. Raper</u> , 47 Wn. App. 530, 736 P.2d 680 (1987) .....	22
<u>Western Sys., Inc. v. Ulloa</u> , 958 F.2d 864 (9 <sup>th</sup> Cir. 1992) .....	12

**STATUTES**

RCW 61.24.030(4).....	3, 18, 19
RCW 61.24.100(2)(a) .....	19
RCW 4.84.330 .....	24

**OTHER AUTHORITIES**

Restatement (Second) of Judgments § 24(1) (1982).....	12
---	----

**RULES**

CR 54(a)(1) ..... 23

CR 54(b)..... 3, 9, 10, 20, 21, 22, 23, 25

CR 54(d)(2)..... 3, 9, 10, 21, 23, 25

RAP 10.1(b) ..... 24

RAP 18.1.....24

COME NOW, Crown Development Inc., Greg and Jill Blunt, and Cory and Geneanne Burke, Respondents/Cross-Appellants,<sup>1</sup> and pursuant to RAP 10.1(b) submit the following brief of authority opposing Appellant's appeal to reverse the Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke,<sup>2</sup> and supporting reversal and remand of the Order Denying Defendants' Crown Development, Blunt & Burke's Motion for Entry of Judgment with Award of Attorneys' Fees and Costs.<sup>3</sup>

#### **A. INTRODUCTION**

This appeal arises from a second lawsuit to collect against a borrower and guarantors of a single development loan split into two parts by the lender in order to avoid violating FDIC guidelines. When Queen Anne Builders, LLC<sup>4</sup> defaulted on both parts of its loan with Shoreline Bank, the bank sued on one part of the loan while also foreclosing on the Deed of Trust securing both parts of the loan.

After the Trustee's Sale and during the lawsuit, the FDIC placed Shoreline Bank into receivership. GBC International Bank then substituted as plaintiff into the lawsuit pursuant to an assumption and

---

<sup>1</sup> Collectively, hereinafter referenced as "the Burkes."

<sup>2</sup> Hereinafter the "Summary Judgment Order."

<sup>3</sup> Hereinafter the "Order Denying Judgment & Fees."

<sup>4</sup> Hereinafter "QAB."

purchase agreement with the FDIC. Seven weeks before trial in the first action, and on the eve of the statute of limitations, Appellant Republic Credit One, LP commenced this second lawsuit to collect an alleged deficiency following the Trustee's Sale.

GBC prosecuted its lawsuit to judgment against the same Defendants.<sup>5</sup> The Burkes and other guarantors, John and Teresa Bargreen, then moved for summary judgment against Republic for improper claim splitting. The Honorable Barbara Linde granted the Burkes' motion and entered the Summary Judgment Order at issue. Republic appealed.

Several weeks later, the Burkes moved for entry of judgment with an award of attorney fees and costs. Judge Linde denied the Burkes' motion as untimely. The Burkes timely cross-appealed.

### **B. ISSUES RAISED BY APPELLANT**

Appellant identifies three issues for review and also includes several unrelated arguments in its brief.

1. Under claim preclusion, separate paperwork alone does not make the 4190 Loan a sufficiently separate transaction and occurrence to permit a second duplicate trial with the same evidence and the same witnesses after the 2545 Loan was litigated to judgment.

---

<sup>5</sup> The Burkes appealed that judgment and the matter currently is pending before this court in cause No.

eight townhomes on two properties in Queen Anne.<sup>6</sup> QAB granted Shoreline Bank a Deed of Trust for the property securing "all obligations, debts and liabilities" between it and Shoreline Bank.<sup>7</sup>

When the loan approached its maturity in 2008, QAB and Ryssel had no method for repayment but to construct the townhomes with the promised construction loan.<sup>8</sup> However, Shoreline Bank faced two problems: first, property values had fallen such that the loan exceeded the FDIC's 75% loan to value (LTV) guidelines<sup>9</sup> and, second, Mr. Ryssel lacked the personal wealth to back the loan.<sup>10</sup> So, Shoreline Bank gave Ryssel a 60 extension and sent him out to find additional guarantors to support the conversion to the construction loan that Shoreline Bank had promised all along.<sup>11</sup> Ryssel found Defendants Burke, who met with

---

<sup>6</sup> Declaration of Andy Ryssel Opposing Summary Judgment (Ryssel Declaration) at ¶¶ 2 and 3, Exhibit J to Goss Declaration Supporting Summary Judgment (Goss Declaration), CP at p. 285.

<sup>7</sup> Deed of Trust, at "CROSS-COLLATERALIZATION" p. 2, CP at p. 367.

<sup>8</sup> Ryssel Declaration at ¶¶ 2 and 3, CP at p. 285.

<sup>9</sup> Excerpt of Dale Anderson Deposition Testimony (Anderson Testimony) at 55:24-56:5, Exhibit L to Goss Declaration, CP at pp. 305-306, and Credit Authorization, Exhibit M to Goss Declaration, CP at p. 309.

<sup>10</sup> Ryssel Declaration at ¶¶ 6 and 7, CP at p. 286.

<sup>11</sup> Ryssel Declaration at ¶ 7, CP at 286. See also Business Credit Application – Short Form and Change In Terms Agreement, Exhibit N to Goss Declaration, CP at 311.

Shoreline Bank and negotiated the construction loan.<sup>12</sup> The Burkes agreed to provide personal guaranties on the construction loan.<sup>13</sup>

In the meantime, the extension of the QAB loan matured and, without any payments, became "nonconforming."<sup>14</sup> Shoreline Bank now disclosed to Ryssel that it could not convert the "nonconforming" loan to the promised construction loan until it was "conforming."<sup>15</sup> To return the loan to "conforming," Shoreline Bank split the original \$1.515 Million loan into two bridge loans: a \$1.1 Million loan and a second \$500,000 loan to pay the first loan.<sup>16</sup> Shoreline Bank needed the loan split because it had to pay down the principal on the first loan and create separate interest reserves to comply with FDIC LTV guidelines.<sup>17</sup>

Shoreline Bank authorized the two bridge loans to convert to the construction loan on December 12<sup>th</sup>, 2008.<sup>18</sup> When Greg Blunt picked up the loan paperwork on behalf of the Burkes, he was surprised by the bridge loans and rejected them.<sup>19</sup> The Burkes only relented after Shoreline

---

<sup>12</sup> Ryssel Declaration at ¶9, CP at 286; Declaration of Greg Blunt Opposing Summary Judgment (Blunt Declaration) at ¶ 3, Exhibit O to Goss Declaration, CP at pp. 313-314; Anderson Testimony 51:16-24.

<sup>13</sup> Ryssel Declaration at ¶¶ 8 and 9, CP at p. 286; Blunt Declaration at ¶¶ 3 and 4, CP at pp. 313-314.

<sup>14</sup> Ryssel Declaration at ¶ 10, CP at pp. 286-287..

<sup>15</sup> Ibid.

<sup>16</sup> Anderson Testimony at 54:6-11, CP at p. 304.

<sup>17</sup> Credit Authorization, Exhibit M to Goss Declaration, CP at p. 309.

<sup>18</sup> Ibid.

<sup>19</sup> Blunt Declaration at ¶ 4, CP at p. 314.

Bank's Chief Credit Officer Dale Anderson and Andy Ryssel assured them that the bridge loans simply returned the original QAB loan to "conforming" before it would be converted into the construction loan that they had agreed to guaranty.<sup>20</sup>

Ryssel brought the paperwork to the Burkes who executed the loan guaranties for both loans in a single package notarized December 26, 2008.<sup>21</sup> Notwithstanding, Shoreline Bank back-dated the \$1.1 Million bridge loan to November 8, 2008 and the \$500,000 bridge loan to December 19, 2008.<sup>22</sup> The proceeds of the \$500,000 loan never left Shoreline Bank, but were applied entirely to the \$1.1 Million loan.<sup>23</sup>

Unbeknownst to QAB and the Burkes, Shoreline Bank had been audited by the FDIC and Washington DFI in July 2008, and throughout the time it was negotiating the construction loan with QAB and the Burkes its \$3 Million legal loan limit was falling with its declining capital.<sup>24</sup> When Shoreline Bank finally disclosed that it could not provide the

---

<sup>20</sup> Blunt Declaration at ¶ 5, CP at p. 314; Ryssel Declaration at ¶ 12, CP at p. 287

<sup>21</sup> See Commercial Guaranties, Exhibit P to Goss Declaration, CP at pp. 318-341.

<sup>22</sup> See Business Loan Agreements, Exhibit Q to Goss Declaration, CP at pp. 344-353.

<sup>23</sup> Trial Testimony of Shoreline Bank President Jeffrey Lewis at 239:3 to 240:24, Exhibit R to Goss Declaration, CP at pp. 356-357; Notice of Final Agreement, Exhibit S to Goss Declaration, CP at p. 360.

<sup>24</sup> Anderson Testimony at 47:1 - 48:3, CP at pp. 299-300.

promised construction loan,<sup>25</sup> QAB had no other option to pay the loan and predictably defaulted.<sup>26</sup>

On April 28, 2010, Shoreline Bank commenced suit alleging breach of both bridge loans by QAB and naming all guarantors as additional defendants: Seattle Signature Homes, Inc., Andy and Rene Ryssel, Crown Development, Inc., Greg and Jill Blunt, Cory and Geneanne Burke, and John and Teresa Bargreen.<sup>27</sup> Shoreline Bank thereafter amended its complaint to remove allegations of breach of the 4190 loan<sup>28</sup> and also initiated nonjudicial foreclosure proceedings on the Deed of Trust, which explicitly secured the \$1,515,000.00 QAB promissory note and interest, and both of the bridge loans.<sup>29</sup> Just ten days before the foreclosure sale, Shoreline Bank obtained an appraisal valuing the property at \$1,100,000.<sup>30</sup> Nevertheless, the trustee<sup>31</sup> conveyed the

---

<sup>25</sup> Anderson Testimony at 46:20-24, CP at p. 298.

<sup>26</sup> Blunt Declaration at ¶ 8, CP at p. 315; Burke Declaration at ¶ 5, Exhibit T to Goss Declaration, CP at p. 363.

<sup>27</sup> Complaint for Breach of Contract, Breach of Guaranties, For Monies Due and For Attorneys' Fees and Costs, Exhibit P to Declaration of Thomas W. Stone In Support of Bargreen Defendants' Motion for Summary Judgment (Stone Declaration) at Exhibit P, CP at pp. 224-230; See particularly "First Cause of Action – Breach of Contract," at ¶ 3.2, CP at p. 229.

<sup>28</sup> Compare ¶ 3.2 of the original Complaint, CP at P. 229, with ¶ 3.2 of the First Amended Complaint, Exhibit Q to Stone Declaration, CP at 236-237.

<sup>29</sup> Deed of Trust, at "CROSS-COLLATERALIZATION" p. 2, Exhibit U to Goss Declaration., CP at p. 367.

<sup>30</sup> Property Valuation Report of September 16, 2010, Exhibit V to Goss Declaration, CP at p. 379.

<sup>31</sup> Mr. Willig, current attorney for Republic Credit One LP, prior attorney for Shoreline Bank, and attorney for Shoreline's successor in the prior lawsuit, GBC International Bank, also served as Trustee.

property by foreclosure sale on September 24, 2010 to Shoreline Bank for \$900,000.<sup>32</sup>

Six days after the Trustee's Sale, the FDIC closed Shoreline Bank October 1, 2010. GBC International Bank thereafter substituted into the lawsuit as successor to Shoreline Bank through a Purchase and Assumption Agreement of Shoreline Bank's assets from the FDIC, and prosecuted QAB's default against the same Defendants to judgment.<sup>33</sup> Forty-five (45) days before GBC's trial, Republic Credit One LP commenced this second lawsuit September 23, 2011.<sup>34</sup>

Defendants John and Teresa Bargreen moved for summary judgment on res judicata grounds, and the Burkes joined in the motion.<sup>35</sup> Following oral argument, the Honorable Judge Barbara Linde granted the Burke's motion and thereafter the parties submitted competing orders for signature. Judge Linde signed the Summary Judgment Order submitted by Republic on June 5, 2012.<sup>36</sup> The Summary Judgment Order does not

---

<sup>32</sup> Trustee's Deed, Exhibit W to Goss Declaration, CP at pp. 382-384.

<sup>33</sup> Goss Declaration at ¶ 1, CP at p. 280.

<sup>34</sup> See Complaint, CP at pp. 1-70.

<sup>35</sup> Defendants John and Teresa Bargreen's Motion for Summary Judgment, CP at pp. 113-135; Defendants' Crown, Blunt & Burke Motion Joining in Bargreen Motion for Summary Judgment, CP at pp. 271-279.

<sup>36</sup> Summary Judgment Order, CP at pp. 847-849.

include findings and a directive to enter judgment as required by CR 54(b) in a multi-party case.<sup>37</sup> Republic timely appealed.

On August 13<sup>th</sup>, 2012, the Burkes moved for entry of judgment with award of attorney fees and costs.<sup>38</sup> The court denied the motion as untimely under CR 54(d)(2).<sup>39</sup> The Burkes timely cross-appealed.<sup>40</sup>

### **E. STANDARD OF REVIEW**

Whether res judicata bars an action is a question of law that the Court of Appeals reviews de novo. Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99, 103 (2009). Likewise, the application of court rules is a question of law that the Court of Appeals also reviews de novo. Russell v. Maas, 166 Wn. App. 885, 889, 272 P.3d 273, 275 (2012).

### **F. AUTHORITY**

The lower court's Summary Judgment Order should be affirmed and Republic's appeal dismissed with award of attorney fees and costs to the Burkes where res judicata properly precludes a second lawsuit arising from a single development loan between the same parties split into two interdependent parts. However, the lower court did err when it denied as

---

<sup>37</sup> Summary Judgment Order, CP at pp. 847-849.

<sup>38</sup> CP at pp. 885-888.

<sup>39</sup> Order Denying Judgment & Fees, CP at 924-925.

<sup>40</sup> CP at pp 959-971.

untimely the Burke's motion for entry of judgment with fees and costs because the Summary Judgment Order was not a judgment under CR 54(b) that triggers the time limit of CR 54(d)(2). The lower court's Order Denying Judgment & Fees should be reversed and the matter remanded for determination of an award of reasonable attorney fees and costs to the Burkes.

**1. The Lower Court Applied The Correct Summary Judgment Standard.**

The lower court correctly found the facts establishing that the 4190 and 2545 loans were two parts of the same development loan were undisputed. It cannot reasonably be disputed that the parties are the same and the documents speak for themselves. Although Republic begins its argument with the assertion that the lower court failed to draw all inferences in Republics' favor,<sup>41</sup> it identifies no such inferences that would lead to any contrary result. The lower court did not err in viewing the evidence and granting summary judgment to the Burkes.

---

<sup>41</sup> Appellant's Brief at p. 13.

**2. The Lower Court Correctly Found that Separate Paperwork Alone Did Not Avoid Res Judicata Claim Preclusion of a Second Lawsuit on the Same Transaction, Executed at the Same Time, Under the Same Conditions, and Between the Same Parties.**

The Lower Court correctly determined that 4190 and 2545 Loans were inextricable parts of the same development loan and properly applied Washington law that prohibits splitting claims into two lawsuits based on the same event. Ensley v. Pitcher, 152 Wn. App. 891, 898–99, 222 P.3d 99 (2009). Re-litigating claims that were, or should have been litigated in a previous lawsuit is barred by the doctrine of res judicata. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). "A matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding." Kelly–Hansen v. Kelly–Hansen, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). The Lower Court properly found that Republic's second lawsuit on the same loan extension was barred by res judicata where it involved the same persons and parties, the same causes of action, and the same subject matter transaction as the prior lawsuit and judgment. Loveridge, 125 Wn.2d at 763.

The most important criteria for claim preclusion is whether the two suits arise out of the same nucleus of facts. Costantini v. Trans World

Airlines, 681 F.2d 1199, 1202 (9<sup>th</sup> Cir. 1982). To determine whether claims arise from the same transaction and occurrence, Washington applies the "logical relationship" test. "[C]ourts should give the phrase 'transaction and occurrence that is the subject matter' of the suit a broad and realistic interpretation in the interest of avoiding a multiplicity of suits . . . ." Schoeman v. N.Y. Life Ins. Co., 106 Wn.2d 855, 865-66, 726 P.2d 1 (1986); *quoting* Rosenthal v. Fowler, 12 F.R.D. 388, 391 (S.D.N.Y. 1952).

Two lawsuits arise out of the same transaction when they arise out of the same facts, involve substantially the same evidence, and where the rights and interests established in the first proceeding would be destroyed or impaired by completing the second proceeding. Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 330, 941 P.2d 110 (1997). Two lawsuits are part of the same transaction when they are related to the same facts and could conveniently be tried together. Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9<sup>th</sup> Cir. 1992); *citing* Restatement (Second) of Judgments § 24(1) (1982).

A second action is barred by res judicata where it is identical to the first action in four respects: "(1) persons or parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999); *citing* Hayes v. City of Seattle, 131 Wash.2d 706, 711-12,

934 P.2d 1179, 943 P.2d 265 (1997); Kuhlman v. Thomas, 78 Wn. App. 115, 120, 897 P.2d 365 (1995). The second lawsuit by Republic to collect on QAB's development loan meets each of these criteria.

Republic and the prior plaintiff, GBC International Bank, share identity because both are successors to Shoreline Bank in privity. In Landry, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999), the court held that res judicata barred a second lawsuit for a wife's personal injuries suffered in a car accident after a prior claim by the husband and wife for property damage from the same accident had already been litigated. The husband and wife were identical parties for res judicata purposes because each was part of the same marital community that shared the claims. Landry, 95 Wn. App. at 783-84. Similarly, in Ensley v. Pitcher, 152 Wn. App. 891, 222 P.2d 99 (2009), an employer and its bartender were identical parties to prohibit claims against the bartender after claims against the bar had been litigated. Ensley, 152 Wn. App. at 902-903.

Republic's assertion that res judicata does not apply because it is not Shoreline Bank or GBC International Bank is disingenuous. QAB and its guarantors (including the Burkes) entered no obligations to Republic (or to GBC), and Republic's claims (as well as GBC's claims) only exist as successor to Shoreline Bank in privity. Like the marital community in Landry, or the bartender and bar in Ensley, Republic and GBC

International Bank are both successors to the same party, Shoreline Bank., and have a common identity for res judicata purposes.

Republic's cause of action also is identical to the prior suit. Two suits share identical causes of action where (1) the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) substantially the same evidence is presented in the two actions; (3) the suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Ensley v. Pitcher, 152 Wn. App. at 903.

In Karlberg v. Otten, 167 Wn. App. 522, 280 P.3d 1123 (2012), the court held that res judicata precluded a landowner from bringing a second quiet title action against the same neighbor after successfully quieting title in another portion of the same property. The court upheld the principal that “[a] party cannot in one action sue for a part of that which he is entitled to recover, and in a subsequent action sue for the remainder when the right of recovery rests upon the same state of facts.” Karlberg, 167 Wn. App. at 537. Likewise, Republic cannot bring a second action to recover another part of QAB's default on its development loan.

In Marshall v. Thurston County, 165 Wn. App. 346, 267 P.3d 491 (2011), the court found that landowners who asserted prior negligence, trespass and inverse condemnation claims for the county's storm water

diversion were barred from making a subsequent claim for flooding arising from the same nucleus of facts. Marshall, 165 Wn. App. at 355. Just as the flooding is an additional part of the same storm water diversion, so too is Republic's collection action an additional part of the same development loan between QAB and Shoreline Bank.

In contrast, transactions between the same parties seven years apart were not sufficiently identical for res judicata purposes in Seattle First National Bank v. Kawachi, 91 Wn.2d 223, 227-228, 588 P.2d 725 (1978). There, transactions in 1961 and 1962 were introduced at trial on a 1967 transaction, but the court found the transactions were "entirely separate and apart" from each other and a second action was not barred. It should be noted that the critical distinction of the court was that the earlier transactions "formed no part of the claim with respect to the 1967 transactions" and "bore no relationship to that transaction." Kawachi, 91 Wn.2d at 229. The court did not find that separate documents established separate transactions.

Here, the undisputed record facts establish that the two causes of action are two parts of the same development loan. Republic incorrectly states that the 4190 and 2545 loans "were signed at different times."<sup>42</sup> While it is true that the loan documents are dated differently, there is no

---

<sup>42</sup> Appellant's Brief at p. 4.

dispute that both the 4190 and 2545 Loan guaranties were notarized the day after Christmas.<sup>43</sup> Both loans are secured by the same Deed of Trust.<sup>44</sup> Both suits seek to enforce identical rights and obligations arising from identical guaranties by identical parties.<sup>45</sup> The circumstances of both loans and the claims and defenses arising therefrom are inextricably intertwined and were litigated in the prior lawsuit.

Republic also misleadingly asserts that the 2545 Loan was a line of credit "to be used for purposes agreed upon by the Defendants."<sup>46</sup> However, the record establishes that the 2545 Loan funds were held entirely by Shoreline Bank in its own controlled account for the bank's purposes: to serve the 4190 Loan debt.<sup>47</sup>

Because Republic's lawsuit arises from the same facts and would require presentation of the same evidence as the prior lawsuit, the causes of action have a concurrence of identity and the elements of res judicata are satisfied. Both the previous lawsuit and Republic's action assert breach of commercial guaranties and collection of QAB's debt. That debt was a single development loan for \$1.515 Million later extended by

---

<sup>43</sup> Blunt Declaration at ¶ 6, CP at p. 314; Commercial Guaranties, CP at pp. 318-341.

<sup>44</sup> Deed of Trust, CP at p. 366-375.

<sup>45</sup> Commercial Guaranties, CP at pp. 318-341.

<sup>46</sup> Appellant's Brief at p. 10.

<sup>47</sup> Theresa Robinson testimony at 289:5-20, Exhibit F to Stone Declaration, CP at p. 168; Dale Anderson testimony at 252:5-16, Exhibit H to Stone Declaration, CP at p. 179;

splitting the loan into two interdependent loans, executed at the same time, between the same parties, and under the same circumstances. The evidence regarding the negotiation, execution and default of QAB's debt is the same for both lawsuits.<sup>48</sup> The factual basis for Republic's claim existed at the time Shoreline Bank started the first lawsuit and Shoreline Bank had the opportunity to litigate Republic's claim in the initial action. Indeed, Shoreline Bank's initial complaint April 28, 2010 details the 4190 Loan that Republic now pursues. The loans are not separate, but inextricable. The obligations secured are not separate, but joined by the Deed of Trust. Without the 4190 Loan there would be no 2545 Loan. The lower court properly applied res judicata to preclude Republic's second lawsuit arising from the same development loan between the same parties.

**3. The Lower Court Correctly Applied Landry To Preclude A Second Lawsuit On The Same Transaction**

Republic's attempt to distinguish the case of Landry v. Luscher, 95 Wn. App. 779, 976 P.2d 1274 (1999) fails and the lower court correctly relied upon it to bar Republic's claims. Republic erroneously asserts that in Landry "the relief requested was identical." However, the first claim in Landry was for property damage while the second, and barred, claim was

---

<sup>48</sup> See Joint Statement of Evidence in prior lawsuit, Exhibit X to Goss Declaration, CP at pp. 711-718.

for personal injuries. Nevertheless, the court held that for res judicata purposes a claim for personal injuries was not separate from a claim for property damage arising from the same car accident. So to here, where claims for breach of two inextricable loans arising from the same transaction are not separate for res judicata purposes.

**4. The “One Action Rule” of RCW 61.24.030(4) Does Not Entitle Shoreline Bank to Split Its Claims Arising From a Single Development Loan In Two Parts Secured By One Deed Of Trust**

Republic misreads RCW 61.24.030(4) for the proposition that the statute entitles Republic to split its claims. During foreclosure, the "One Action Rule" does not prevent other "actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed[.]" RCW 61.24.030(4). The error of Republic's reasoning is that the prior lawsuit did not enforce another lien or security interest (like a mechanic's lien or a second Deed of Trust) for QAB's obligations secured by the single Deed of Trust. Rather, it was an action to collect on the second part of QAB's development loan, the 2545 Loan.

Republic also incorrectly asserts that the present claim against the Burkes could not have been raised in the "First King County Lawsuit"

because the Trustee's Sale had not yet occurred. Although RCW 61.24.030(4) precludes a Trustee's Sale when a lawsuit is pending on an obligation secured by the Deed of Trust, Republic's predecessor, Shoreline Bank, could have brought the First King County Lawsuit instead of the Trustee's Sale. RCW 61.24.100(2)(a) and the Commercial Guaranties exacted by Shoreline Bank from the Burkes do not require the bank to pursue a Trustee's Sale before bringing suit upon the guaranties. Shoreline Bank created its own mess and violated RCW 61.24.030(4) by simultaneously pursuing the Trustee's Sale and the "First King County Lawsuit" when the Deed of Trust explicitly secured "all obligations, debts and liabilities" between QAB and Shoreline Bank,<sup>49</sup> or both the 4190 and 2545 Loans. Shoreline Bank's two wrongs do not make a right.

**5. Republic's Recitation of Personal Guaranties, Liability of Marital Communities, Loan Applications and Parol Evidence Cannot Avoid Res Judicata Claim Preclusion.**

---

<sup>49</sup> The Deed of Trust reads:

CROSS-COLLATERALIZATION. In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any or more of them, as well as all claims by Lender against Grantor, or any one or more of them, whether now existing or hereafter arising . . . CP at p. 367.

Republic's brief raises additional arguments that have no bearing on the application of res judicata by the lower court to grant the Summary Judgment Order. Republic's recitation of the Burkes' commercial guaranties underscores that the documents and obligations to pay both parts of the QAB loan are identical. The spousal consents also demonstrate the loans were executed together. That the Burkes' submitted their financial information in pursuit of the construction loan also does not uncouple the two bridge loans. And, finally, Republic may not invoke the parole evidence rule to exclude facts establishing that both loans were negotiated and executed together. "A party to a contract is not bound by a false recital of fact, and parole evidence is admissible to show the true state of affairs." Black v. Evergreen Land Developers, Inc., 75 Wn.2d 241, 250, 450 P.2d 470 (1969); quoting Cook v. Vennigerholz, 44 Wn.2d 612, 616-617, 269 P.2d 824 (1954). Here, the back-dating of the loan documents is clearly revealed by the Burke's notarized signatures. Parole evidence is not required to establish that both loans are two parts of the same transaction and occurrence.

**6. Under CR 54(b), the Summary Judgment Order is Not a Judgment Triggering The CR54(d)(2) Time To Request Fees**

The lower court erred when it ignored the requirements of CR 54(b) to deny the Burkes' request for attorney fees and costs as untimely under CR 54(d)(2). The lower court's ruling that the Summary Judgment Order "effectively dismiss[ed] all claims against defendants"<sup>50</sup> does not make it a judgment triggering CR 54(d)(2). "The timeliness requirement of CR 54(d) applies only after the underlying claim is reduced to judgment in court." Corey v. Pierce County, 154 Wn. App. 752, 779, 225 P.3d 367, 379 (2010). Where, as here, multiple defendants are involved, CR 54(b) requires that an order must include certain findings or it cannot be a judgment.

CR 54(b) states:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, **the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment.** The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. **In the absence of such findings, determination and direction, any order or**

---

<sup>50</sup> Order Denying Defendants' Crown, Blunt & Burke's Motion for Entry of Judgment with Award of Attorney Fees and Costs, CP at pp. 925.

**other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**  
(Emphasis Added)

CR 54(b) makes clear that when there are other defendants remaining in the case, no order is a judgment unless the trial court makes an express determination, supported by findings, that there is no just reason to delay entering judgment. Doerflinger v. New York Life Ins. Co., 88 Wn.2d 878, 881, 567 P.2d 230 (1977); Pepper v. King County, 61 Wn. App. 339, 344-345, 810 P.2d 527 (1991).

The lower court may not disregard the requirements of CR 54(b). Court rules must be given their plain meaning and, when the language is clear, a court is not free to construe the rules contrary to their plain language. City of Kirkland v. Ellis, 82 Wn. App. 819, 826, 920 P.2d 206 (1996). Court rules must be interpreted so that “no word, clause or sentence is superfluous, void or insignificant.” State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680 (1987). The provisions of the rules are read together to give each effect and to harmonize with each other. Bohr v. Johnson, 122 Wn.2d 829, 835, 864 P.2d 380 (1993).

A judgment is defined by CR 54(a)(1). It reads:

A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.

The conflict here is that the Summary Judgment Order is not a final determination of the rights of the parties in the action, but only a determination of the rights of some of the parties and, further, subject to revision. There has been no judgment entered against other Defendants Queen Anne Builders, LLC, Seattle Signature Homes, Inc. and Andy and Renee Ryssel. The Summary Judgment Order signed by the court was drafted by Republic with none of the requisite CR 54(b) findings to be a judgment. Without the requisite findings, the Summary Judgment Order "**shall not terminate the action as to any of the claims or parties**" and, therefore, cannot be a judgment under CR 54(a)(1) and cannot trigger the ten (10) day rule in CR 54(d)(2).

The lower court erred when it disregarded CR 54(b) and denied the Burkes' motion for judgment with attorney fees and costs as untimely. The Order Denying Attorneys Fees should be reversed and the matter remanded for the lower court to determine an award of reasonable attorney fees and costs to the Burkes.

**G. THE BURKES ARE ENTITLED TO ATTORNEY FEES AND COSTS**

Under the loan documents, RCW 4.84.330 and RAP 18.1, the Burkes should be awarded attorney fees and costs. All the loan documents provide that QAB will pay attorney fees and legal expenses "incurred in connection with the enforcement" of the document, or if QAB does not pay.<sup>51</sup> The Deed of Trust also states that in an action to enforce any of its terms, "Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorneys' fees at trial and upon any appeal."

By statute, the right to attorney fees must be mutual. RCW 4.84.330 requires that in any contract providing for attorney's fees, "the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

**H. CONCLUSION**

The lower court properly found that Res Judicata claim preclusion barred Republic Credit One, LP's claim on the 4190 Loan arising from the

---

<sup>51</sup> Promissory Note, CP 282-283; Commercial Guaranties, CP 318-341.

same transaction, executed at the same time, under the same conditions, and between the same parties as the 2545 Loan previously litigated. Judicial economy and the integrity of judgments is not served by a second lawsuit with the same evidence and witnesses that may lead to a contradictory outcome. The Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke should be affirmed, with an award of attorney fees and costs to Burke for this appeal.

The lower court did err, however, when it held that the Order Granting Summary Judgment in Favor of Defendants Crown Development, Blunt & Burke was a judgment for purposes of the time to seek attorney fees and costs under CR 54(d)(2) even though the Order did not include findings and a directive to enter judgment required by CR 54(b) in a multi-party action. The Order Denying Defendants' Crown Development, Blunt & Burke's Motion for Entry of Judgment with Award of Attorneys' Fees and Costs should be reversed, and the matter remanded for a determination by the lower court of an award to the Burkes of reasonable attorney fees and costs.

Respectfully submitted this 14<sup>th</sup> day of November, 2012.

TACEY GOSS P.S.

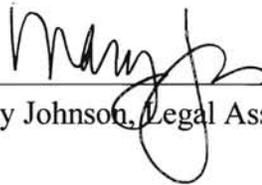


C. Chip Goss                      WSBA #22112  
330 112<sup>th</sup> Avenue NE, Suite 301  
Bellevue, WA 98004  
Tel. (425-489-2878)  
Fax. (425-489-2872)  
Attorney for Defendants/Respondents/Cross  
Appellants

CERTIFICATE OF SERVICE

I, Mary Johnson, certify under penalty of perjury of the laws of the State of Washington, that a true and correct copy of this Respondent's Answer was provided by agreement via electronic mail to counsel of record for Appellant, Republic Credit One, LP.

SIGNED in Bellevue, WA this 14<sup>th</sup> day of November, 2012.



Mary Johnson, Legal Assistant

2012 NOV 14 PM 3:26  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON