

No. 68962-2-1

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

KULEANA, L.L.C., a Washington limited liability company; and
HAROLD E. JOHNSON, a single person,

Appellants,

v.

DIVERSIFIED WOOD RECYCLING, INC., a Washington corporation,

Respondent.

**BRIEF OF RESPONDENT
DIVERSIFIED WOOD RECYCLING, INC.**



MARIS BALTINS
LAW OFFICES OF MARIS BALTINS, P.S.
Attorneys for Respondent
7 S. Howard St., Suite 220
Spokane, WA 99201
Telephone: (509) 444-3336

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I. INTRODUCTION

The instant appeal arises from the summary judgment dismissal of a Complaint pursuant to CR 56. The Complaint, in turn, represents nothing less than the latest manifestation of appellants' continuing refusal to accept the Judgment entered by the trial court in *Diversified Wood Recycling, Inc., v. Johnson*, Cause No. 07-2-02149-8 which was subsequently affirmed by the Court of Appeals, Division I, in the linked appeals of *Diversified Wood Recycling, Inc. v. Johnson, et al.*, 161 Wn.App. 859, 251 P.3d 293 (2011) and *Diversified Wood Recycling, Inc. v. Kuleana, LLC, et al.*, 161 Wn.App. 891, 251 P.3d 908 (2011).

Characterizing the Opinion of the Court of Appeals in *Diversified II* as "incoherent," "non sequitur," "grammatically questionable" and "disingenuous," appellants sought review in the Washington Supreme Court. Clerks Papers ("CP") at 65, 109, 111, 118, 119. However, the Supreme Court did not share appellants' view and denied appellants' Petition on November 2, 2011. CP at 167. This should have terminated the litigation.

It was from this legal posture that appellants Harold E. Johnson and Kuleana, LLC elected on January 10, 2012 to file a new Complaint in Spokane County Superior Court, *Kuleana, LLC, et al., v. Diversified Wood Recycling, Inc.*, No. 12-2-00098-5. CP at 3-37.

To bolster the ostensible grounds for the new Complaint, Harold E. Johnson and Kuleana, LLC deliberately misrepresented the Opinion issued by the Court of Appeals. In their Complaint, appellants contend that the Court of Appeals did not rule that foreclosure was limited solely to junior interests in the Property. CP at 5. This is false.

What the Court of Appeals ruled, in its own words, was the following:

... the sine qua non for keeping the lien alive and obtaining a valid judgment of foreclosure is making service on the owner.

Evidence at trial indicated that the record owner of the lien property was either Harold Johnson or Kuleana. Harold Johnson was Kuleana's registered agent. Given the evidence and the state of the public record, we concluded in Junior's appeal that Diversified could not reasonably be expected to distinguish between the two Harold Johnsons for purposes of service under *RCW 60.04.141*. Whether the owner was Harold Johnson or Kuleana, **Diversified made service upon both of them by serving a Harold Johnson.** Therefore, if appellants Harold Johnson and Kuleana perceived they had ownership interests in the property subjected to the lien, they had an opportunity to be heard.

* * *

If an owner who has been served but not joined does nothing, the property will be sold at auction to satisfy the lien. Thus, a timely motion to intervene is advisable. An owner who does not intervene before judgment and does not present a good reason for being allowed to intervene postjudgment will generally be left to devise a collateral attack upon the judgment. That is what happened here.

The judgment entered by the trial court properly reflects the law discussed above. The judgment decrees "that after the execution and delivery of the Sheriff's deed after foreclosure, **defendant and all persons claiming under the defendant, and all persons claiming interest in the real property junior to that of the Claim of Lien foreclosed on in this Judgment**" shall be forever barred from asserting interests in the real property. There is no language precisely delineating, by person, the interests in the lien property that are foreclosed by the judgment.

The judgment stands on solid ground regardless of whether appellants were owners.

See Diversified Wood Recycling, Inc. v. Kuleana, LLC, et al., at 902-904 (emphasis added) (footnotes omitted).

Simply put, the Court of Appeals held that Harold E. Johnson and Kuleana, LLC, having been properly served with the Complaint for Foreclosure, were under an affirmative duty to assert their ownership interests in the lien property, which they chose not to do. As such, the lien being forecloseable, the property could be sold.

There are no new or separate issues presented in appellants' latest Complaint. Rather, Harold E. Johnson and Kuleana, LLC seek nothing less than relitigation of claims and issues which have been laid to rest by both Federal and State Courts.

Accordingly, as will be demonstrated below, the trial court correctly concluded, after hearing the Motion to Dismiss or in the Alternative for Summary Judgment filed by Diversified Wood Recycling,

Inc. (“Diversified”), that summary judgment was warranted based on the doctrines of collateral estoppel and res judicata. Under the undisputed facts of this case, the trial court’s Order Granting Motion to Dismiss or in the Alternative for Summary Judgment should be affirmed by the Court of Appeals.

II. COUNTER-STATEMENT OF THE ISSUES

It is submitted that the sole issues to be reviewed in this appeal are:

1. Whether the trial court correctly concluded that there was no genuine issue as to any material fact precluding application of the doctrine of collateral estoppel warranting dismissal of appellants’ Complaint.
2. Whether the trial court correctly concluded that there was no genuine issue as to any material fact precluding application of the doctrine of res judicata warranting dismissal of appellants’ Complaint.

III. COUNTER-STATEMENT OF THE CASE

A. The Lien Foreclosure Action - *Diversified Wood Recycling, Inc., v. Johnson*, Spokane County Superior Court No. 07-2-02149-8

This matter began in October of 2006 when Harold E. Johnson, the son of appellant Harold E. Johnson, entered into a contract with Diversified. Pursuant to that contract, Diversified provided slash removal

services in connection with a planned development project on certain real property (the “Property”) which Harold E. Johnson represented that he owned.¹ After providing the necessary labor and equipment for the job, Diversified sent two invoices totaling \$10,680 which Johnson, Jr., refused to pay. CP at 64.

As a result, Diversified filed a Claim of Lien against the Property and subsequently filed a Complaint for Judgment and Foreclosure of Lien pursuant to RCW Chapter 60.04 in Spokane County Superior Court, *Diversified Wood Recycling, Inc., v. Johnson*, Cause No. 07-2-02149-8 (“lien foreclosure action”). CP at 63, 64.

The lien foreclosure action was tried on April 14 and April 15, 2008, before the Honorable Robert D. Austin. At trial, Johnson, Jr. asserted that the Property was owned by Johnson, Sr. and Kuleana, LLC. Johnson Sr. was deposed prior to trial and testified as a witness during trial. CP at 64.

During trial, Johnson Sr. and Johnson Jr. attempted to capitalize on the similarity between their names and shared addresses to support the proposition that Diversified had failed to serve and join the proper parties

¹ To avoid confusion, because both father and son share the same name including middle initials, Harold E. Johnson, the son, will be referred to as “Johnson, Jr.” and appellant Harold E. Johnson, as “Johnson, Sr.”

in the lien foreclosure action. On April 15, 2008, Judge Austin, in his oral ruling, commented on this defense, stating:

I have two law students observing this case. And if I were to write a bar exam question that said that the owner's name was Harold Johnson, and the contractor's name was his son, Harold Johnson, I think people would laugh at me and say this is such a disingenuous question it would never happen in real life. But that is exactly what we have. We have two Harold Johnsons. Counsel referred to them as Senior and Junior throughout the argument. Apparently they had never ever themselves, used senior and junior. The difference is one says well I'm Harold and my son goes by Hal, the nickname. But the nickname Hal, could apply to either one. Then you say, well no, if you'd have just asked, we'd have told you.

Well, you have Hal and Hal, or Harold and Harold sitting in a pickup truck when you hand them a contract. And "we don't want to sign it right now, we'll hand it back to you." And they sign, hand back a signed contract.

I think, logic for a four-year-old dictates that Harold Johnson signed the contract either as the contractor or the owner, not as the guy who is the mechanic for the Ford pickup.

* * *

Well, I don't know if we could have a more intimate owner-contractor relationship than Harold and Harold Johnson. They are father and son and share the exact name. And apparently even share the ... exact same address for business purposes. Which happens to be the address of the general contracting business in Puyallup. But you see, the true owner, Harold, lives in a townhouse nearby, but "I don't know the address." So, it's the son's address.

Fact: We don't have the property owner in this suit.

Fact: At the time the suit was filed, the owner was

Harold Johnson.

Fact: At the time the trial commences, the owner is Kuleana, LLC.

Fact: There are two Harold Johnsons. One is a father, one is a son. They are not designated as senior and junior. And no one would know which is which.

Fact: They both use the same address.

Fact: Harold Johnson at the 133 address in Puyallup is the registered agent for Kuleana, LLC.

Fact: Harold Johnson is validly served with process of service.

Fact: The work was performed according to the contract signed by Harold Johnson.

Fact: The lien is forecloseable.

CP at 64, 72-74.

On June 13, 2008, Judge Austin entered written Findings of Fact and Conclusions of Law, and a Judgment and Decree Foreclosing Claim of Lien. An Amended Judgment and Decree Foreclosing Claim of Lien was subsequently entered on March 13, 2009. CP at 64, 77-79. On June 23, 2008, Johnson Jr. filed a Motion for Reconsideration. On August 29, 2008, Judge Austin denied the motion. CP at 65.

On July 7, 2008, Johnson, Sr. and Kuleana, LLC filed two motions; a Motion to Intervene and a Motion to Vacate Judgment. On September 5, 2008, Judge Austin denied the Motion to Intervene,

rendering the Motion to Vacate Judgment moot. In his ruling, Judge Austin again commented on Johnson Sr.'s and Johnson Jr.'s *modus operandi* which he characterized as a "dual persona":

THE COURT: Thank you. These are highly unusual facts.

One of my impressions at trial was that Harold Johnson and Harold Johnson have used that **dual persona** quite to their advantage, probably more than just this time.

Harold senior had indicated that he lived nearby the office of the son in Puyallup, but didn't know his address. He got his mail at that business. He goes along with his son, and the general contractor, as it is now discovered, both sat in the car. Neither of them indicated who was going to sign, or what the signing was, "but we will give it to you when we want to give it to you." **And I believe it was very much intentional. Very much intentional. That's why I think I was as short as I was. I found it preposterous, what their explanations were. Preposterous.**

Motion to Intervene is denied.

CP at 65, 82-83 (emphasis added).

B. The Appeal by Johnson Sr. and Kuleana, LLC - Diversified Wood Recycling, Inc. v. Kuleana, LLC, et al., 161 Wn.App. 891, 251 P.3d 908 (2011)

On September 22, 2008, Johnson Sr. and Kuleana, LLC appealed Judge Austin's denial of their Motion to Intervene. This matter was heard by the Court of Appeals, Division I in Case No. 652630. Oral arguments were heard on November 2, 2010. On May 16, 2011, the Court of

Appeals issued its unanimous opinion affirming the trial court in Diversified Wood Recycling, Inc. v. Kuleana, LLC, et al., 161 Wn.App. 891, 251 P.3d 908 (2011) (“Diversified II”). On June 2, 2011, Johnson Sr. and Kuleana, LLC filed a Motion for Reconsideration which was denied by the Court of Appeals on June 22, 2011. On July 21, 2011, Johnson Sr. and Kuleana, LLC filed a Petition for Review by the Washington Supreme Court. On August 22, 2011, Diversified filed its Answer to Petition for Review. On November 2, 2011, the Petition for Review was denied. CP at 65, 86-94, 96-140, 142-165, 167.

**C. Federal Litigation by Johnson Sr. and Kuleana, LLC -
Kuleana, LLC, et al. v. Diversified Wood Recycling, Inc.,
No. CV-09-114-EFS**

On April 13, 2009, during the pendency of their appeal, Johnson Sr. and Kuleana, LLC collaterally attacked the Judgment by filing a Complaint in the United States District Court for the Eastern District of Washington, *Kuleana, LLC, et al. v. Diversified Wood Recycling, Inc.*, No. CV-09-114-EFS. In this action, Johnson Sr. and Kuleana, LLC claimed that the Judgment entered in the lien foreclosure action violated their civil rights under 42 U.S.C. § 1983. On June 22, 2009, Diversified filed a Motion to Dismiss Complaint Pursuant to Fed R. Civ. P. 12(b)(6). Although scheduled for hearing on August 11, 2009 the Court, on August 10, 2009 granted Diversified’s Motion to Dismiss. On September 9, 2009,

Johnson Sr. and Kuleana, LLC appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. Diversified thereafter briefed the appeal and on June 10, 2010, the Ninth Circuit, in an unpublished Opinion, affirmed the District Court's dismissal. CP at 66, 169-179, 1818-183.

D. The Appeal by Johnson Jr. - Diversified Wood Recycling, Inc. v. Johnson, et al., 161 Wn.App. 859, 251 P.3d 293 (2011)

Like his father, on October 3, 2008, Johnson Jr. appealed Judge Austin's Findings of Fact and Conclusions of Law and Judgment. This matter was heard by the Court of Appeals, Division I in Case No. 652648. Oral arguments were heard on November 2, 2010. On May 16, 2011, the Court of Appeals issued its opinion affirming the trial court in Diversified Wood Recycling, Inc. v. Johnson, et al., 161 Wn.App. 859, 251 P.3d 293 (2011) ("Diversified I"). On June 3, 2011, Johnson Jr. filed a Motion for Reconsideration which was denied by the Court of Appeals on June 22, 2011. On July 22, 2011, Johnson Jr. filed a Petition for Review by the Washington Supreme Court. On November 2, 2011, the Petition for Review was denied. CP at 66-67, 185-202, 204.

E. Cash Supersedeas Posted in the Lien Foreclosure Action

In order to stay enforcement of the Judgment pending their appeals, Johnson Jr., Johnson Sr. and Kuleana LLC had posted cash supersedeas with the Superior Court Registry totaling \$120,000. CP at 67.

F. The “New” Complaint - *Kuleana, LLC, et al. v. Diversified Wood Recycling, Inc.*, Spokane County Superior Court No. 12-2-00098-5

On January 10, 2012, Johnson Sr. and Kuleana, LLC filed their new Complaint, *Kuleana, LLC, et al. v. Diversified Wood Recycling, Inc.*, Spokane County Superior Court No. 12-2-00098-5. CP at 3-37. The Facts set forth as the basis for the new Complaint involved the same foreclosure which was litigated in the lien foreclosure action, *Diversified Wood Recycling, Inc., v. Johnson*, Cause No. 07-2-02149-8. CP at 4-7.

Diversified, upon learning of the new lawsuit, contacted counsel for Johnson, Sr. and Kuleana, LLC and advised him that the Complaint was frivolous and requested Johnson, Sr. and Kuleana, LLC to voluntarily dismiss their Complaint. CP at 67, 206-209.

On February 21, 2012, Diversified filed its Motion to Dismiss or in the Alternative for Summary Judgment. CP at 60-62. The Motion came on for hearing before the Honorable Jerome J. Leveque on March 23, 2012. After hearing arguments of counsel, Judge Leveque granted

Diversified's Motion to Dismiss or in the Alternative for Summary Judgment. CP 394-396.

On April 2, 2012, appellants filed their Notice of Appeal. CP at 397-402.

IV. ARGUMENT

A. The Brief of Appellants Provides No Grounds to Support Reversal of the Trial Court.

At the outset, Diversified is constrained to point out that the arguments advanced in the Brief of Appellants do not directly address the issue of whether the trial court correctly concluded that there were no genuine issues of material fact precluding application of the doctrines of collateral estoppel and res judicata so as to warrant dismissal of the Complaint under CR 56.

Rather, a two-part argument is advanced by Johnson, Sr. and Kuleana, LLC. The first part centers on interests of Johnson, Sr. and Kuleana, LLC within the context of the lien foreclosure action and holding in *Diversified II*. This appears to be nothing more than a request for reconsideration of issues decided in *Diversified II* or else irrelevant to this appeal.

The second part is a one paragraph declaration that the Complaint is not subject to dismissal based upon the doctrines of collateral estoppel

or res judicata because “Harold Johnson Sr. and Kuleana seek to enforce the Court’s decisions in Diversified I and II ...” as opposed to relitigating them. This is pure spin. Aside from the fact that Johnson, Sr. and Kuleana, LLC provide absolutely no authority in support of this proposition, as demonstrated below, this assertion is patently false and without merit.

B. The Legal Standard for Dismissal Under CR 56.

Summary judgment under CR 56 shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinback, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. Id. Summary judgment is proper only if, from all the evidence, reasonable

persons could reach but one conclusion. Id.; Wilson, at 437; CPL, LLC v. Conley, 110 Wn.App. 786, 790-701, 40 P.3d 679 (2002). “[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 292, 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986); *see also* Balint v. Carson City, Nev., 180 F.3d 1047, 1054 (9th Cir. 1999); Ingram v. Martin Marietta Long Term Disability Income Plan, 244 F.3d 1109, 1114 (9th Cir. 2001).

Summary judgment orders are reviewed de novo on appeal. Van Noy v. State Farm, 142 Wn.2d 784, 790, 16 P.3d 574 (2001); Hayden v. Mut. Of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).

C. The Doctrine of Collateral Estoppel.

Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” State v. Williams, 132 Wn.2d 248, 253-254, 937 P.2d 1052 (1997).

Collateral estoppel has four requirements: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is

asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice. Id. at 254. The party asserting collateral estoppel bears the burden of proving all four requirements. Id. Additionally, “the issue to be precluded must have been actually litigated and necessarily determined in the prior action.” Shoemaker v. City of Bremerton, 109 Wn.2d 504, 508, 745 P.2d 858 (1987); Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 228, 588 P.2d 725 (1978). “The question is always whether the party to be estopped had a full and fair opportunity to litigate the issue.” State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wash.App.299, 304, 57 P.3d 300 (2002).

D. The Doctrine of Res Judicata.

The doctrine of res judicata is similar to collateral estoppel, applying to claims instead of issues. The party asserting res judicata “bears the burden of proving, by competent evidence consistent with the record in the former cause, that such issue was involved and actually determined” Bradley v. State, 73 Wn.2d 914, 917, 442 P.2d 1009 (1968). To prove res judicata, the proponent must show “a concurrence of identity between two actions in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.” US Bank v. Hursey, 116 Wn.2d 522,

529, 806 P.2d 245 (1991); Seattle-First Nat. Bank, Id., at 225. Res judicata should not be applied when it would work an injustice. Henderson v. Berdahl Int'l Corp., 72 Wn.2d 109, 119, 431 P.2d 961 (1967).

The doctrine of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966 (1894).

E. The Trial Court Correctly Concluded that Doctrines of Collateral Estoppel and Res Judicata Require Dismissal of the Complaint.

1. Analysis of the Complaint.

In order to determine whether the trial court correctly concluded that the causes of action set forth in the Complaint filed by Johnson, Sr. and Kuleana, LLC were barred by the doctrines of collateral estoppel and res judicata, Diversified suggests it would be worthwhile to begin with an analysis of the Complaint itself.

First, it is noted that the majority of facts recited in support of the causes of action and relief sought are the same facts involved in the lien foreclosure action, beginning with the filing of the lien foreclosure action

and ending with the opinion of the Court of Appeals in Diversified II. CP at 5-7.

Second, all but one of the six exhibits attached to the Complaint were either exhibits introduced at trial in the lien foreclosure action (exhibits 1, 2 and 3)² or else rulings of the court in the lien foreclosure action (exhibits 5 and 6).³ CP at 10-21, 24-37.

Third, Johnson, Sr. and Kuleana, LLC seek relief which would revise or overturn the results obtained in Diversified I and Diversified II. Specifically, the requested relief includes:

1. [A declaratory judgment that] [t]heir interest in the property are not foreclosed or otherwise affected by the lien foreclosure action because they were not joined as parties
....
2. [A declaratory judgment that] Diversified has no claim against the cash supersedeas they deposited in the lien foreclosure action.
3. [Quiet title in the Property] [b]ecause Diversified did not join Harold Johnson Sr. and Kuleana in the lien foreclosure action, and because it successfully resisted their attempt to intervene, their interests are unaffected, and there is no subordinate interest for the lien to attach to. Title should therefore be quieted in Harold Johnson Sr. and Kuleana.

² Exhibits 1, 2 and 3 even bear the Clerks Papers designation in the appeal taken in the lien foreclosure action.

³ Exhibit 5 is the Findings of Fact, Conclusion and Conclusions of Law entered June 13, 2008 in the lien foreclosure action while exhibit 6 is the Amended Judgment and Decree Foreclosing Claim of Lien entered March 13, 2009.

4. Stay of enforcement of judgment in [the lien foreclosure action] ...pending a decision in this matter, pursuant to RCW 7.24.190 and other applicable law.

CP at 7-8.

In light of the foregoing, there can be no doubt that the Complaint is nothing but an attempt to relitigate the unfavorable result obtained in Diversified II. The Complaint filed by Johnson Sr. and Kuleana, LLC is a feeble attempt to cast the relief sought in terms of issues *supposedly* not addressed by the Court of Appeals, in hopes of staying foreclosure on the Property and avoiding dismissal under the doctrines of collateral estoppel and res judicata.

In fact, an examination of the substance of the Complaint against the Opinion of the Court of Appeals in Diversified II indicates that nothing remains to be litigated.

First, Johnson, Sr. and Kuleana, LLC attempt to raise a “straw man” issue of the Property subject to the Claim of Lien as follows:

10. The legal description of the Diversified lien (Exhibit 3) is the same as the legal description on the McGarvey-to-Johnson deed (Exhibit 1), with two exceptions.

11. The first exception is that the Diversified lien (Exhibit 3) covers portions of Highway 2 and Crescent Road that are not included in the McGarvey-to-Johnson deed (Exhibit 1). In this sense, the lien encompasses *more* property than the deed.

12. The second exception is that the Diversified lien (Exhibit 3) excludes a portion of the property on the northern boundary of the McGarvey-to-Johnson deed (Exhibit 1). In this sense the claim of lien encompasses less property than the deed.

13. The property described in the Johnson-to-Kuleana deed (Exhibit 2) is wholly contained within the property described in both the original McGarvey-to-Johnson deed (Exhibit 1) and the Diversified lien (Exhibit 3).

14. A surveyor's map outlining the legal description of the McGarvey-to-Johnson deed (Exhibit 1) in *red*, the legal description of the Johnson-to-Kuleana deed (Exhibit 2) in *blue*, and the legal description of the Diversified lien (Exhibit 3) in green is attached to this Complaint as Exhibit 4 and incorporated by reference.

CP at 4-5.

However, this alleged disparity was raised by Johnson Sr. and Kuleana, LLC in Diversified II. In rejecting the argument, the Court of Appeals, in Diversified II, stated:

His [Johnson Sr. and Kuleana, LLC] appellate brief repeats the bare assertion that the property described by the claim of lien was not only the planned unit development property owned by Kuleana but also adjacent property owned by Senior. **Senior's motion is unaccompanied by a map or expert testimony illuminating the various legal descriptions.**

Had Senior's contention been raised and documented at the foreclosure trial, perhaps the lien could have been amended and confined to a smaller portion of the property. See RCW 60.04.091(2). We say "perhaps" because, even now, appellants do not elaborate upon the alleged problem with the legal descriptions. It is

not clear exactly how much property they each claim to own or where such property is located in relationship to the property that was described in the claim of lien and that was foreclosed on by the judgment. Still, the motion to intervene might have been granted based on Senior's bare assertion if appellants had not waited until after judgment to make it. They do not make a strong showing to justify being permitted to intervene postjudgment.

* * *

Senior's declaration does not explain why he waited until after judgment was entered to claim ownership or why he did not analyze the various legal descriptions until after the trial was over. **He declared before trial that he had conveyed to Kuleana the entire acreage subject to the lien. After judgment, he declared he had conveyed only a portion of it.** He fails to explain why he did not come forward with the second declaration until after the judgment.

Diversified II, at 898-900 (emphasis added) (footnote omitted).

From the foregoing, it is clear that Johnson Sr. and Kuleana, LLC are simply attempting to do now what the Court of Appeals suggested should have been done in order to protect their interests in the lien foreclosure action. The ownership issue was accordingly litigated in the lien foreclosure action and on appeal and if nothing else, Johnson, Sr. and Kuleana, LCC were given the opportunity to litigate this issue. As such this Complaint is nothing more than Johnson Sr. and Kuleana, LLC seeking a proverbial “second bite at the apple” on the same issue.

Perhaps even more disturbing, the following averments appear in paragraphs 25 through 28 of the Complaint:

25. The superior court specifically found that Diversified never served Harold Johnson Sr. in the foreclosure action (see Exhibit 5).

26. In fact, Diversified never served Harold Johnson Sr. in the foreclosure action.

27. The superior court omitted any finding that Diversified served Kuleana in the foreclosure action (see Exhibit 5).

28. In fact, Diversified never served Kuleana in the foreclosure action.

CP at 5-6.

These four paragraphs form the ostensible predicate for the declaratory relief sought in the Complaint. However, paragraphs 26 and 27 are outright falsehoods, directly contradicted by the holding of the Court of Appeals in Diversified II, which stated:

Whether the owner was Harold Johnson or Kuleana, Diversified made service upon both of them by serving a Harold Johnson. Therefore, if appellants Harold Johnson and Kuleana perceived they had ownership interests in the property subjected to the lien, they had an opportunity to be heard.

Diversified II, at 903.

Additionally, paragraphs 25 and 27, referencing findings made by Judge Austin after trial, confirm that this Complaint is nothing more than an attempt to relitigate the Findings of Fact and Conclusions of Law entered by Judge Austin in the lien foreclosure action. At this point, with

the termination of appellate proceedings in Diversified I and Diversified II, Judge Austin's Findings of Fact and Conclusions of Law simply cannot be used as the basis to prosecute a new Complaint challenging the appellate outcome as Johnson, Sr. and Kuleana, LLC are trying to do.

Appellants further demonstrate their propensity for mendacity by seeking to challenge the award of attorney fees and costs entered by Judge Austin and the Court of Appeals, by falsely stating, in paragraph 33 of the Complaint:

33. The only issue that remains in the direct appeal is the *in rem* (as opposed to *in personam*) nature of an award of attorney fees and costs under the lien foreclosure statute, RCW 60.04.181.

CP at 7.

In truth, Johnson Sr. and Kuleana, LLC made this precise argument before the Court of Appeals in Diversified II. The Court of Appeals, in rejecting the argument, stated:

Appellants [Johnson Sr. and Kuleana, LLC] contend fees cannot be awarded against them under this statute [RCW 60.04.181] unless they are recognized as party intervenors in the underlying lien foreclosure action. We disagree. Appellants attempted to intervene in the action for the purpose of vacating the judgment. By defeating their motion, Diversified has prevailed in the action. The appellants have added significantly to the time and expense Diversified has had to incur to maintain its lien. An award to Diversified for fees incurred on appeal is appropriate.

Diversified II, at 906-907.

In light of the foregoing and the specific provisions of RCW 60.04.181, there can be no good faith contention by Johnson Sr. and Kuleana, LLC that any issue exists as to the award of attorney fees and costs entered against them.

Parlaying on the deliberate misstatements set forth above, Johnson Sr. and Kuleana, LLC conclude with yet another falsehood in paragraph 36 of the Complaint:

36. The Court of Appeals specifically recognized that, under RCW 60.04.171, the interest of an owner who is not joined in a lien foreclosure action cannot be foreclosed or otherwise affected, and that foreclosure under these circumstances is limited solely to junior interests in the property.

CP at 7.

In fact, the Court of Appeals ruled as follows:

The judgment entered by the trial court properly reflects the law discussed above. The judgment decrees "that after the execution and delivery of the Sheriff's deed after foreclosure, **defendant and all persons claiming under the defendant, and all persons claiming interest in the real property junior to that of the Claim of Lien foreclosed on in this Judgment**" shall be forever barred from asserting interests in the real property. There is no language precisely delineating, by person, the interests in the lien property that are foreclosed by the judgment.

The judgment stands on solid ground regardless of whether appellants were owners.

Diversified II, at 904 (emphasis added); CP at 64, 77-79.

It is significant to note that Judge Leveque, in granting Diversified's Motion to Dismiss or in the Alternative Summary Judgment, correctly focused on and identified the similarity of issues between those raised in Complaint the Opinion of the Court of Appeals in Diversified II, reasoning as follows:

... I have made a deliberate, focused interest in the case in an effort to get to what I think is the nut for my purposes to make my decision and I think I'm there. If I wasn't, I'd take it under advisement but in my questioning you can kind of probably see where I'm going.

When I talk about my thought of the Court of Appeals comment about they weren't going to make reference or holdings or decisions on certain issues and the reasoning why or why not. They're the only ones that know but there can be many reasons for it. My assumption, but it's only that, is that the reason they didn't address matters that weren't directly in front of them is they didn't need to and they probably felt by doing so couldn't make their order on finding on this issue any more valid but could potentially impact it. So they left it alone. We're going to do what we've got in front of us. **What they had in front of them I see is analogous to the things that are now being talked about, at least analogous in my opinion. If it isn't exactly the same, it's so very similar.**

When I asked the question of Mr. Baltins on the comment on Page 2 in the quoted area and bolded area: "Diversified made service upon both of them by serving a Harold Johnson." **The rationale and the facts that they used to base that on I believe were and would support that same comment by saying the party they had before them in these matters was the party that was Harold Johnson. The owner and that party was the party and whether another party now coming with almost the same identity and the same opportunity to have**

clarified it and to have developed interest in it and didn't was a significant fact to them and I think it's every bit as significant in the joinder concept or I mean a party concept, join the party.

I believe those issues have been decided by the Court of Appeals. I believe they're identical to the things that would be decided at this level, therefore I'm finding that the matter has been resolved by the Court of Appeals on this and that by either or both res judicata and collateral estoppel resolved the matters.

Motion granted.

Record of Proceedings ("RP") at 34:19-36:5 (emphasis added).

It is submitted that, based upon the prior litigation which occurred in this case, the trial court was absolutely correct.

2. The Trial Court Correctly Concluded that the Complaint was Barred by the Doctrine of Collateral Estoppel.

Under the circumstances, all four elements necessary for the application of collateral estoppel exist in this matter. First, the Complaint involves the same issue as that litigated in the lien foreclosure action; that is, whether Diversified can foreclose on the Property subject to its Claim of Lien. Both the trial court in the lien foreclosure action and the Court of Appeals in Diversified I answered this in the affirmative. CP at 64, 74; Diversified I, at 864.

Second, there is no doubt that the prior adjudication ended in a final judgment on the merits. CP at 65, 66, 86-94, 167, 185-202, 204.

Third, Johnson Sr. was in privity with Johnson Jr., a party in the lien foreclosure action. As Judge Austin observed:

... I don't know if we could have a more intimate owner-contractor relationship than Harold and Harold Johnson. They are father and son and share the exact name. And apparently even share the ... exact same address for business purposes.

CP at 64, 73. This observation was confirmed by the Court of Appeals in Diversified II, specifically finding that Johnson Sr. was in privity with Johnson Jr. in the lien foreclosure action:

The interests asserted by appellants [Johnson Sr. and Kuleana, LLC] were adequately represented by Junior. Junior, Senior, and Kuleana all desired to have the lien foreclosure action dismissed with prejudice. Senior and Kuleana argue that the owner was not served as required by RCW 60.04.141 and was not joined as required by RCW 60.04.171 and, as a result, the court lacked both subject matter jurisdiction and statutory authority to proceed with the action. Junior made the same argument, without success.

Appellants do not show how they, by relitigating these issues, could drive the foreclosure action to a different outcome.

Diversified II, at 912 (emphasis added).

Lastly, application of the doctrine of collateral estoppel would not work any form of injustice where Johnson Sr. and Kuleana, LLC were afforded a fair opportunity to litigate. As the Court of Appeals observed:

If an owner who has been served but not joined does nothing, the property will be sold at auction to satisfy

the lien. Thus, a timely motion to intervene is advisable. An owner who does not intervene before judgment and does not present a good reason for being allowed to intervene postjudgment will generally be left to devise a collateral attack upon the judgment. That is what happened here.

Diversified II, at 896.

Based upon the foregoing, the trial court correctly concluded that no genuine issue of material facts existed to prevent application of the doctrine of collateral estoppel and summary judgment was appropriate.

Accordingly, the trial court's dismissal of the Complaint pursuant to CR 56 should be affirmed.

3. The Trial Court Correctly Concluded that the Complaint was Barred by the Doctrine of Res Judicata.

A review of the undisputed facts of this case compels the further conclusion that the trial court correctly concluded that the Complaint is also barred by the doctrine of res judicata. Again, all four elements necessary to establish res judicata exist in this matter.

First, the subject matter of the Complaint involving foreclosure on the Property is identical to that in the lien foreclosure action.

Second, the cause of action is identical between the instant Complaint and the lien foreclosure action. Johnson, Sr. and Kuleana, LLC are simply attempting to do in this litigation what they failed to achieve in

the lien foreclosure action; to-wit, defeat the foreclosure of Diversified's Claim of Lien.

Third, Johnson Sr. and Kuleana, LLC were afforded the opportunity to become parties in this matter but elected to have Johnson Jr. represent their interests. The Court of Appeals found that their interests were, in fact, adequately represented by Johnson Jr. Diversified II, at 896. That Johnson, Sr. and Kuleana, LLC may now have a severe case of "buyer's remorse" for their decision does not in the slightest detract from the legal implications.

Lastly, there is no doubt that the parties, Diversified on the one hand and Johnson Sr. and Kuleana, LLC on the other, are the exact same parties involved in the lien foreclosure action.

It is significant to note that even if the claims advanced in the Complaint were not specifically made in the lien foreclosure action, they would nevertheless be barred by res judicata, as these points properly belonged to the subject of the lien foreclosure action which Johnson Sr. and Kuleana, LLC might have brought forward at the time, instead of attempting to mislead the trial court by "intentionally manipulating their identities." Diversified I, at 882.

Based upon the foregoing, the trial court correctly concluded that there was no genuine issue of material facts to preclude application of the doctrine of res judicata warranting dismissal of the Complaint.

Accordingly, the trial court's dismissal of the Complaint based upon the doctrine of res judicata should be affirmed as well.

F. Appellants Have No Claim to the Cash Supersedeas.

The fact that the lien foreclosure action has now been terminated by the Washington Supreme Court would ordinarily mean that Diversified, after five years, can now receive payment for services it rendered to Johnson Jr., Johnson Sr. and Kuleana, LLC. At this point, there is \$120,000 supersedeas cash posted with the Superior Court Registry in the lien foreclosure action. CP at 67. However, in their Complaint, Johnson, Sr. and Kuleana, LLC seek, *inter alia*, the following relief:

[A declaratory judgment that] Diversified has no claim against the cash supersedeas they deposited in the lien foreclosure action.

CP at 8.

Diversified suggests that this is the true motive underlying the Complaint. The cash supersedeas in this case was posted pursuant to RAP 8.1(b)(1). Rule 8.1 of the Rules of Appellate Procedure (RAP) "... provides a means of delaying enforcement of a trial court decision in a civil case ..." RAP 8.1(a). "The primary purpose of a supersedeas bond

is ... to delay the execution of judgment against property of the debtor and to guarantee that the debtor's ability to satisfy the judgment cannot be altered pending outcome of the appeal." Seventh Elect Church in Israel v. Rogers, 34 Wn.App. 105, 120, 660 P.2d 280 (1983). The purpose of the cash supersedeas is to secure the judgment. See Brooke v. Robinson, 125 Wn.App. 253, 258, 104 P.3d 674 (2005). There is no doubt that, with the termination of the appellate proceedings in favor of Diversified, release of the cash supersedeas to Diversified is imminent.

It is not difficult to discern that, with the outcomes obtained in the linked appeals of Diversified I and Diversified II, Johnson, Sr. and Kuleana, LLC will do anything, including filing a Complaint which is nothing more than an improper collateral attack to forestall release of the security to Diversified. Under the law, there is absolutely no merit to support appellants' request that Diversified be denied access to the cash supersedeas. The Court of Appeals has already noted that the actions of Johnson Sr. and Kuleana, LLC have prejudiced Diversified by delaying Diversified "getting paid for its work." Diversified II, at 900. This instant litigation has only served to escalate that prejudice.

G. Diversified is Entitled to an Award of its Reasonable Attorney Fees and Costs Incurred on Appeal.

Pursuant to RAP 18.1, Diversified requests an award to recover its

attorney fees and expenses incurred in this appeal as provided for in RCW 60.04.181. It is significant to note that in Diversified II, Johnson Sr. and Kuleana, LLC contended that no award of attorney fees could be made against them. The Court of Appeals rejected this argument, stating:

Appellants [Johnson Sr. and Kuleana, LLC] contend fees cannot be awarded against them under this statute unless they are recognized as party intervenors in the underlying lien foreclosure action. We disagree. Appellants attempted to intervene in the action for the purpose of vacating the judgment. By defeating their motion, Diversified has prevailed in the action. The appellants have added significantly to the time and expense Diversified has had to incur to maintain its lien. An award to Diversified for fees incurred on appeal is appropriate.

Diversified II, at 906-907.

RCW 60.04.181(3) provides:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

RCW 60.04.181(3).

By filing its Complaint, Johnson, Sr. and Kuleana, LLC continue their misguided efforts, needlessly adding “significantly to the time and expense Diversified has had to incur to maintain its lien.” *See* Diversified

II, at 907. At this point, the Complaint is simply vexatious and cannot be regarded as anything but a device to delay conclusion of Diversified's lien foreclosure action, improperly used as a means to harass Diversified in enforcing its legal rights, and finally, unjustifiably increasing the cost of litigation. See Miller v. Badgley, 51 Wn.App. 285, 300, 753 P.2d 530 (1988); Rhinehart v. Seattle Times, 59 Wn.App. 332, 341, 798 P.2d 1155 (1990).

It is worth noting that, on January 13, 2012 Diversified, upon accepting service of the Complaint through counsel, prepared and sent a letter to the appellants' attorney, George M. Ahrend, outlining the Complaint's lack of merit and demanding that the appellants voluntarily dismiss their Complaint. CP at 67, 206-209.

The trial court, in dismissing the Complaint as barred by the doctrines of collateral estoppel and res judicata, implicitly found that the Complaint was essentially the same as the lien foreclosure action and pursuant to Diversified II, Diversified submits that an award is authorized under RCW 60.04.181, for its reasonable attorney fees and costs incurred in having to defend its lien in this matter on appeal.

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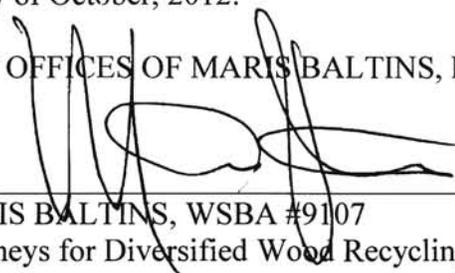
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V. CONCLUSION

Accordingly, based upon the foregoing, Diversified respectfully requests the trial court's Order Granting Motion to Dismiss or in the Alternative Summary Judgment be affirmed in all respects and that Diversified be awarded its attorney fees and costs incurred on appeal.

DATED this 20th day of October, 2012.

LAW OFFICES OF MARIS BALTINS, P.S.

A handwritten signature in black ink, appearing to read 'Maris Baltins', is written over a horizontal line. The signature is stylized and overlaps the text below it.

MARIS BALTINS, WSBA #9107
Attorneys for Diversified Wood Recycling, Inc.

CERTIFICATE OF SERVICE

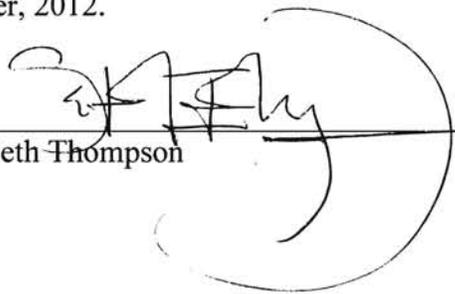
Seth Thompson hereby declares under penalties of perjury of the laws of the State of Washington that:

1. I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years and not a party to this action.

2. On the 20th day of October, 2012, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, upon the following party:

George M. Ahrend	<input type="checkbox"/>	First Class Mail, Postage Prepaid
Ahrend Albrecht PLLC	<input type="checkbox"/>	Federal Express
16 Basin Street S.W.	<input checked="" type="checkbox"/>	Hand Delivery
Ephrata, WA 98823	<input checked="" type="checkbox"/>	Facsimile Transmission: 509-464-6290
	<input checked="" type="checkbox"/>	E-mail: gahrend@ahrendalbrecht.com

DATED this 20th day of October, 2012.


Seth Thompson

10/20/12 11:12:31
10/20/12 11:12:31