3-23-2018

Monitor Finance, L.C. v. Wildlife Ridge Estates, LLC Appellant's Brief Dckt. 45517

IN THE SUPREME COURT OF THE STATE OF IDAHO

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Plaintiffs/Respondents,

v.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company, Defendant/Appellant; M&S DEVELOPMENT, LLC, an Idaho limited liability company,

Defendant.

WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company,

Counter-Claimant/Appellant;

v.

MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company,

Counter-defendants/Respondents.

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District for Bannock County.
Honorable Robert C. Naftz, District Judge presiding.

A. Bruce Larson and Richard A. Hearn
Residing at 155 S. 2nd Avenue, Pocatello, Idaho 83204, for Appellant

Ron Kerl
Residing at 151 North Third Avenue, 2nd Floor, Pocatello, Idaho 83205, for Respondents

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NATURE OF THE CASE

This case is based upon the foreclosure of a Deed of Trust encumbering real property owned by the Appellant, Wildlife Ridge Estates, LLC, ("Wildlife Ridge"). The underlying obligation secured by the Deed of Trust is a Promissory Note. The note is not an obligation of Wildlife Ridge. A prior action was brought by Wildlife Ridge seeking to quiet title to the real property challenging the amounts claimed to be owed on the note and seeking to remove the encumbrance of the Deed of Trust. That action was dismissed with prejudice upon the stipulation of Wildlife Ridge and the Respondents, Monitor Finance, L.C., ("Monitor") and First Capital Funding, L.C., ("First Capital") based upon Monitor and First Capital's payment of $4,000 to Wildlife Ridge by Monitor and First Capital. After the dismissal, Monitor and First Capital commenced the foreclosure action. Monitor and First Capital claim that Wildlife Ridge's defense of the foreclosure action is barred by the doctrine of *res judicata* while maintaining that its action is not barred by either the statute of limitation, fraud or the doctrine of *res judicata*.

PROCEEDINGS IN THE DISTRICT COURT

This case was initiated by a Complaint to Judicially Foreclose Deed of Trust filed by Monitor and First Capital. Wildlife Ridge, the fee owner of the real property encumbered by the Deed of Trust ("Property"), filed an answer and also brought a counterclaim against Monitor and First Capital and another defendant in M&S Development Company, LLC. The counterclaim was for fraud and also sought declaratory and injunctive relief. Monitor and First Capital filed a Motion for Partial Summary Judgment based exclusively upon the doctrine of *res judicata* seeking dismissal of the affirmative defenses raised by Wildlife Ridge in its Answer, as well as dismissal of the Counterclaim for fraud. Monitor and First Capital claimed that an earlier action brought by Wildlife Ridge seeking to quiet title to the Property created a bar to the claims of Wildlife Ridge.

The District Court took judicial notice of the filings and outcome of the Quiet Title action.[1] That action was dismissed with prejudice based upon a stipulation between the parties that included the payment of $4,000 by Monitor and First Capital to Wildlife Ridge.[2] The District Court issued a Memorandum Decision and Order granting Monitor and First Capital's Motion for Summary Judgment and entered a Memorandum Decision and Order determining that Wildlife Ridge's affirmative defenses and fraud claim was barred by the doctrine of *res judicata*. All of Wildlife Ridge's affirmative defenses, as well as their Counterclaim for fraud were stricken and dismissed.[3] The District Court did not address the request for declaratory and injunctive relief.

Monitor and First Capital then filed another Motion for Summary Judgment seeking a Judgment and Decree against Wildlife Ridge based upon the prior ruling of the District Court and also requested a determination of the amounts owed on the obligation secured by the Deed of Trust. Wildlife Ridge responded and sought reconsideration of the District Court's previous rulings. The District Court granted the Motion for Summary Judgment, and made a determination of the amount owed on the obligation and then dismissed the case with prejudice.[4] Subsequent to the order of dismissal, the District Court entered a Judgment and Decree of Foreclosure and Order of Sale.[5] The property was then sold a final Judgment entered.[6] The District Court then issued an I.R.C.P. 54(b) Certificate.[7]

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[1] Memorandum Decision and Order, R Vol. I, p. 274 (footnote 4)
[2] Appellant's Motion to Augment pp. Aug. p. 16-21.
[3] Memorandum Decision and Order, R Vol. I, p. 283, L. 18-19
[4] Memorandum Decision and Order, R Vol. I, p. 306, L. 15 and R Vol. I, p. 307, L. 1-3 and 11-12
[5] Judgment, Decree of Foreclosure and Order of Sale, R Vol. I, pp. 310-13
[6] Judgment, R Vol. I, pp. 316-18
[7] Rule 54(b) Certificate, R Vol. I, pp. 321-22

STATEMENT OF THE FACTS

Wildlife Ridge prior to foreclosure was the owner in fee of real property encumbered by the Deed of Trust appended to Monitor and First Capital's amended complaint. The Deed of Trust Note ("Note") is also attached to the complaint, Wildlife Ridge was not a party to either the Deed of Trust or the Deed of Trust Note. Wildlife Ridge filed a Quiet Title action on December 3, 2013, the complaint was later amended asking for a declaration by the court that the Note had been satisfied. In both Wildlife Ridge's initial and amended complaint, Wildlife Ridge sought a decree quieting title to property described in Monitor and First Capital's Deed of Trust "free and clear of their interest" because "the applicable promissory note has been satisfied by previously [sic] payments made to Respondents [Monitor and First Capital]." Monitor and First Capital filed their Answer to the Amended Complaint in the Quiet Tile Action denying that the applicable promissory note had been satisfied on March 26, 2015. The Quiet Title Action was dismissed on June 14, 2016.

The entity that appeared in the Quiet Title Action as Monitor Financial L.C. was not a real party in interest to the transactions that were the subject matter of that action or the present action. The Monitor Financial L.C. that is named as a party to the Note and Deed of Trust expired on September 17, 2012 and has never been renewed.[8] A new entity bearing the same name Monitor Financial L.C. was established on January 23, 2015 nearly two months after the Quiet Title Action was filed on December 3, 2014.

Monitor and First Capital defended the prior action claiming that the obligation secured by the Note had not been paid and specific amounts were owing. The quiet title action was dismissed based upon a stipulation of Wildlife Ridge and Monitor and First Capital which provided that

[8] Appellant's Motion to Augment the Record p. Aug. p. 41

Monitor and First Capital would pay Wildlife Ridge $4,000 and that the action would be dismissed with prejudice. [9]

Although M&S and Millward were referenced in paragraphs 7 and 8 of Wildlife Ridge's Amended Complaint and in paragraphs 2 and 3 of Monitor and First Capital's Answer,[10] neither M&S nor Millward were named parties in the Quiet Title Action. Not only were M&S and/or Millward not named parties in the Quiet Title Action, there were no allegations made by any party in the Quiet Title Action that either M&S or Millward had done anything wrong.

And then there's the conspicuous absence of any mention of the "Modification of Trust Deed Note" dated March 3, 2008 ("Modification")[11] in the pleadings filed in the prior Quiet Title Action despite it being attached as Exhibit B to the Complaint in the Foreclosure Action. If valid, the March 3, 2008 Modification -- signed by Michael Millward both individually and as manager of M&S -- would have almost doubled the debt owed on the original Trust Deed Note ($244,000).[12] Finally, not only did Millward sign the Modification both individually and as a member of M&S, **Millward signed an "Acknowledgement" of the Modification as a member of Wildlife Ridge Estates, LLC.**[13]

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[9] Stipulation for Dismissal with Prejudice pP. Aug. p. 16-18

[10] Appellant's Motion to Augment the Record, pp. Aug. p. 6-15, Answer in Quiet Title Action, ¶ 2 ("In answer to paragraph 7 of the Amended Complaint, [First Capital and Monitor Finance] that on December 30, 2005, M&S Development, LLC, an Idaho limited liability company executed a Trust Deed Note naming [First Capital and Monitor Finance] as "Holder(s)" and without admitting the characterization of the terms of the Trust Deed Note by [Appellant's] allegations, state that its terms are clearly set forth in the Trust Deed Note and speak for themselves.") and ¶ 2 (" In answer to paragraph 8 of the Amended Complaint, [First Capital and Monitor Finance] that on December 30, 2005, Michael J. Millward, individually, and M&S Development, LLC, an Idaho limited liability company executed a Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing "Deed of Trust") naming [First Capital and Monitor Finance] as "Beneficiary" and without admitting the characterization of the terms of the Deed of Trust by [Appellant's] allegations, state that its terms are clearly set forth in the Deed of Trust and speak for themselves.).

[11] Complaint to Judicially Foreclose Deed of Trust, Exhibit B, Modification of Deed of Trust.

[12] *Id.*

[13] *Id* (*emphasis added*).

Monitor and First Capital then filed this action naming Wildlife Ridge and M&S Development, LLC as defendants. Michael Millward who was also a party to the Note was not named in this action. On September 10, 2012, Millward filed for relief under chapter 7 of the Bankruptcy Code, Case No. 12-41260 in the United States Bankruptcy Court for the District of Idaho. Millward's bankruptcy case was closed on June 23, 2016. M&S did not file for Bankruptcy.

ISSUES ON APPEAL

1. Whether *res judicata* justifies the dismissal of a counterclaim/affirmative defense alleging fraud in a foreclosure action under Idaho law where the party alleging fraud had previously brought a quiet title action against the plaintiff in the foreclosure action without alleging fraud?

2. Whether, for purposes of *res judicata*, the dismissal of a quiet title action serves as a dismissal with prejudice of every possible action that could have been raised to challenge the enforceability of a deed of trust including fraud, under Idaho law, where the gravamen of the original quiet title action was that the debt underlying the deed of trust had been satisfied?

3. Whether *res judicata* justifies the dismissal of a foreclosure action, under Idaho law, where the plaintiff in the foreclosure action had previously settled as the defendant an earlier quiet title action involving the property subject to the foreclosure action?

4.Wildlife Ridge is entitled to an award of attorney fees pursuant to I.A.R. Rule 41, I.C. §§ 12-120(3) and 12-121.

ARGUMENT

1. Standard of Review on Appeal.

This Court reviews "a district court's grant of summary judgment de novo, and apply the same standard used by the district court in ruling on the motion. (citations omitted). Summary

judgment is appropriate when 'the pleadings, depositions, 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 a judgment as a matter of law.' I.R.C.P. 56(c). All reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, and disputed facts are liberally construed in the nonmoving party's favor. (citations omitted).

'[W]hen the district court grants summary judgment and then denies a motion for reconsideration, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment. This means the Court reviews the district court's denial of a motion for reconsideration de novo.' (citations omitted)."[14]

"This Court reviews questions of law de novo. (citations omitted). Whether an action is barred by *res judicata* is a question of law. (citations omitted)"[15]

2. <u>Wildlife Ridge's Affirmative Defense and Counterclaim for Fraud Is Not Barred by *Res Judicata*</u>.

[*R*]*es judicata* includes two legal concepts—issue preclusion or collateral estoppel and claim preclusion. (citations omitted). Collateral estoppel bars re-litigation of an issue previously determined when:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. Id. Claim preclusion "bars a subsequent action between the same parties upon the same claim or upon claims 'relating to the same cause of action.'" (citations omitted). Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought,

[14] Marek v. Hecla, Ltd., 161 Idaho 211, 384 P.3d 975, (2016)
[15] Berkshire Invs., LLC v. Taylor, 153 Idaho 73, 278 P.3d 943, (2012)

> where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (2) the present claim arises out of the same transaction or series of transactions as the original action.[16]

Whether claim preclusion will bar parties from relitigating a claim that either was or should have been litigated between the same parties in a prior litigation is a question of law.[17] "*Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence."[18]

In order for claim preclusion to apply, both proceedings must involve the same parties or their privies. To be privies, a person not a party to the former action must "derive[] his interest from one who was a party to it, that is, . . . he [must be] in privity to a party to that judgment." This Court has held that registered creditors are in privity with a bankruptcy trustee and thus are subject to claim preclusion.

Furthermore, in order for claim preclusion to bar a claim in a subsequent action because the claim allegedly arose out of the same transaction or series as the original action, a court must find that it could not "reach more than one conclusion" about whether the plaintiff in the subsequent action would have "discovered the basis for these claims" if she had exercised "due diligence" when litigating the earlier action. If a court finds that it can reach more than one conclusion about whether a plaintiff exercised "due diligence" when asserting her claims in the prior action, a court must refuse to bar such claims in any subsequent action based upon claim preclusion.

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[16] *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 278 P.3d 943, (2012), *Ticor Title Co. v. Stanion,* 144 Idaho 119, 125-27, 157 P.3d 613, 618-20 (2007)
[17] *Ticor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007) (*citing Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003)).
[18] *Id.*

Wildlife Ridge's affirmative defenses for fraud were not raised -- and therefore never litigated -- in the prior Quiet Title Action. In the Quiet Title Action, Wildlife Ridge made no allegations of wrongdoing against either Millward or M&S. Wildlife Ridge never alleged that the Modification dated March 3, 2008 was fraudulent. The fraud claims arising out of the 2008 Modification contained in the Counterclaim against Monitor and First Capital in the Foreclosure Action, Millward and M&S are not barred by *res judicata* because, at the time of the Quiet Title Action, Millward was in bankruptcy. As Millward and M&S would have been necessary parties to any fraud claim brought against Monitor and First Capital, Wildlife Ridge had no duty to bring its claims for fraud against Monitor and First Capital, Millward and M&S in association with its Quiet Title Action.

Monitor and First Capital allege that the Modification operated to extend the term and maturity date of the obligation created by the Note and by implication the period of limitations allowed to foreclose the Deed of Trust. Monitor and First Capital claim that the Millward Bankruptcy filing stayed any enforcement of the Deed of Trust and by implication tolled the running of the statute of limitations. An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. The same limitation period applies to the foreclosure of a deed of trust.[19] The Deed of Trust being foreclosed is subject to the mandatory maturity date contained in the Trust Deed Note. The note specifically states that "*2. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the "Maturity Date").*"[20] Monitor and First Capital claim the maturity date was extended by the Modification that was signed on March 3, 2008 and the limitation period being

[19] Idaho Code §§ 5-214A and 45-1515
[20] Complaint to Judicially Foreclose Deed of Trust, Exhibit "A," R Vol. I, p. 22, L. 16-17

tolled by the stay that came into effect on the filing of the Millward Bankruptcy Petition on September 10, 2016. The stay and tolling continued until after the Bankruptcy Discharge on June 23, 2016.[21] Monitor and First Capital's position that the statute of limitations had not run until after the discharge and incidentally after the dismissal of the prior action without the claimed modification the statutory 5 year period would have expired long before the filing of the Millward Bankruptcy Petition on September 10, 2016 as such the running of the statute was not stayed by the bankruptcy. Under this theory and set of facts the statute of limitations defense now being raised by Wildlife Ridge could not have been litigated in the prior case.

The statute of limitation claim is related directly to the validity and effect of the claimed Modification. On the date of the claimed Modification, M&S Development LLC had been administratively dissolved.[22] Also on that date, Michael Millward did not have the authority of Wildlife Ridge Estates, LLC, to act as a member to bind the LLC in any way or to encumber the real property of the LLC. Wildlife Ridge Operating agreement is specific on the authority of the managers and members of the LLC it states: "*5 .2 Neither Managing Members shall have the right (without consent of all other Members): .... to mortgage any Company property;"* Michael Williams and Michael Millward were the only members of Wildlife Ridge at the time of the claimed Modification and both were Managers.[23]

The issues surrounding the Modification could not have been litigated without Michael Millward, M&S Development LLC and the correct Monitor Financial L.C. being parties to the action. As such, the statute of limitations defense and any claims involving the Modification

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[21] Complaint to Judicially Foreclose Deed of Trust, paragraph 6, R Vol. I, p. 15, L. 6-7
[22] Appellant's Motion to Augment pp. Aug. p. 25-37, Richard A. Hearn Affidavit Exhibit "A"
[23] Appellant's Motion to Augment pp. Aug. p. 38-39, Richard A. Hearn Affidavit Exhibit "B"

were not claims that could have been brought in the Quiet Title Action and are not barred by *res judicata*.

Unlike a mortgage, a deed of trust involves a conveyance of an interest in the subject real property to a trustee. In essence, the trustee of a deed of trust holds title to the real property with the power of sale. The grantor of the deed of trust holds all other rights in the property "*all other incidents of ownership of such real property shall remain with the grantor*".[24] In this action the grantor of the deed of trust is M&S Development LLC and Pioneer Title Company was the grantee and Trustee of named in the Deed of Trust, neither entity was a party to the Quiet Title Action. The grantor and trustee are necessary and indispensable parties in an action to quiet title. The Idaho Courts have consistently held that a deed of trust differs from a mortgage because title passes to the trustee of the deed of trust.[25]

The effect of the Modification on the priority of the deed of trust was not and could not have been a part of the Quiet Title Action because the beneficiaries of the Deed of Trust were not the proper parties for a determination of the issues surrounding the Modification or the running of the statute of limitations. Neither the Deed of Trust Note nor the Deed of Trust required the holders of the note to make any future advances. The draws referenced in the Modification were not mandatory advances secured by the deed and did not impair the interest of Wildlife Ridge Estates, LLC.

> *"The general rule in the United States is that if a future advance is obligatory, it takes its priority from the original date of the mortgage, and the subsequent creditor is junior to it. However, if the advance is optional, and if the mortgagee has notice when the*

[24] Idaho Code § 45-1502(4)

[25] "Idaho is a title theory state, whereby a deed of trust is a title-passing procedure. This Court extensively discussed this procedure in Long v. Williams, 105 Idaho 585, 587, 671 P.2d 1048, 1050(1983). We noted that a deed of trust is effectively a mortgage with a power of sale, but as security for that mortgage, legal title passes to the trustee. Id. at 587–88, 671 P.2d at 1050–51. When a deed of trust is executed and delivered, the legal title of the property passes to the trustee. Idaho Code § 45-1502(4); Defendant A. v. Idaho State Bar, 132 Idaho 662, 665, 978 P.2d 222, 225 (1999). Sims v. ACI Northwest, Inc., 157 Idaho 906 (2015)

> *advance is made that a subsequent creditor has acquired an interest in the land, then the advance loses its priority to that creditor. (citations omitted) Idaho is in accord with the general rule. 'A senior mortgage for future advances will maintain seniority for advances made after actual notice of a junior lien if, but only if, there was a contractual obligation to make such advances existing prior to the notice of the junior lien. A senior mortgage for future advances will maintain seniority for advances made after actual notice of a junior lien if, but only if, there was a contractual obligation to make such advances existing prior to the notice of the junior lien.'*[26]

The issue of the Modification's effect and priority were not litigated in the Quiet Title Action and could not have been litigated due to the absence of necessary parties.

3. <u>The Dismissal of the Prior Quiet Title Action Did Not Serve as a Dismissal with Prejudice of Every Matter Available to Challenge the Enforceability of the Deed of Trust Note, Modification, and the Deed of Trust Including Fraud.</u>

The District Courts Memorandum Decision holds that "No matter the theory advanced by the Defendant [Wildlife Ridge] in its original quiet title action, the dismissal of the First Action serves as a ***dismissal with prejudice of every matter that was available in the First Action*** to challenge the enforceability of the deed of trust note, Modification, and the Deed of Trust in this case."[27] The Court recognized that the "gravamen of the first quiet title action was that there was no enforceable debt left to be secured…" The question remains whether or not Monitor and First Capital in that action had standing to challenge the debt or to raise any claim against Wildlife Ridge who are the beneficiaries of the Deed of Trust or any other defenses in the first quiet title action. In Idaho, a "mortgagor or his successor in interest cannot quiet title against a mortgagee, while the secured debt remains unpaid, although the statute of limitations has run

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[26] Idaho Code § 45-108, Idaho First Nat. Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979), Biersdorff v. Brumfield, 93 Idaho 569, 573, 468 P.2d 301, 304 (1970)
[27] Memorandum Decision and Order R Vol. I, p.146, L. 19 through p. 147, L. 1-47, L. 19

against the right to foreclose the mortgage" [28] However, the mortgagee) is also barred as a matter of law from commencing an action to foreclose on the deed of trust more than five (5) years after its maturity date. [29] The effect is that Wildlife Ridge could not quiet title simply because the statute of limitations had run on the Deed of Trust. The relief was not available in the first quiet title action and could not have been litigated raising the bar of *res judicata* in this action. However, the statute of limitations bars the commencement of a foreclosure action in this matter. An action for the foreclosure of a mortgage on real property must be commenced within five (5) years from the maturity date of the obligation or indebtedness secured by such mortgage. The same limitation period applies to the foreclosure of a deed of trust.[30] Idaho's Statutes of limitations are statutes of repose. They apply to the remedy, and cut off the right of enforcement, although the lien still exists.[31]

The Deed of Trust being foreclosed is subject to the mandatory maturity date contained in the Trust Deed Note. The note specifically states that "***2. The term of this Trust Deed Note shall be one hundred eighty (180) days. This Trust Deed Note shall fully mature on June 28, 2006 (the "Maturity Date").***"[32] Monitor and First Capital claim the maturity date was extended by the Modification that was signed on March 3, 2008 and the limitation period being tolled by the stay that came in to effect on the filing of the Millward Bankruptcy Petition on September 10, 2016. The stay and tolling continued until after the Bankruptcy Discharge on June 23, 2016.[33] Monitor and First Capital's position that the statute of limitations had not run until after the discharge and incidentally after the dismissal of the prior action without the claimed

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[28] Trusty v. Ray, 73 Idaho 232, 249 P.2d 814 (1952)
[29] Idaho Code § 5-214A
[30] Idaho Code §§ 5-214A and 45-1515
[31] White v. Conf. Claimants Endowment Comm, 81 Idaho 17, 336 p.2d 674, 684-85 (1959)
[32] Complaint to Judicially Foreclose Deed of Trust, Exhibit "A," R Vol. I, p. 22, L. 16-17
[33] Complaint to Judicially Foreclose Deed of Trust, paragraph 6, R Vol. I, p. 15, L. 6-7

modification the statutory five-year period would have expired long before the filing of the Millward Bankruptcy Petition on September 10, 2016 as such the running of the statute was not stayed by the bankruptcy. Under this theory and set of facts, the statute of limitations defense now being raised by Wildlife Ridge could not have been litigated in the prior case.

4. Plaintiffs in this Foreclosure Action Are Barred by *Res Judicata* from Attempting to Relitigate the Debt on the Property Being Foreclosed that Was Resolved in the Now Dismissed Quiet Title Action.

Monitor and First Capital moved for summary judgment to allow the foreclosure of the Deed of Trust and to determine the amount of the debt secured debt secured buy Deed of Trust. As noted above, the amount of the debt was raised and litigated in the first quiet title action the result was a joint stipulation dismissing the action. The controlling language in the decision is "As such, 'in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim ***but also every matter which might and should have been litigated in the first suit.***'"[34] Monitor and First Capital submitted an affidavit in support of the motion for summary judgment purporting to determine the amount of the debt. That amount might and should have been litigated in the first quiet title action and by the law of this case cannot now be relitigated. [35] In fact, the issue of the amount of the debt was the gravamen of that action. Monitor and First Capital, by asking the Court to re-litigate the amount of the debt in this case, are trying to split its cause of action to obtain different relief in this action. "A primary purpose of the *res judicata* doctrine is to prevent just such an occurrence."[36] "Claim preclusion bars a subsequent action

[34] Memorandum Decision and Order, R Vol. I, p. 140, L. 12-15
[35] Motion to Augment the Record, pp. Aug. p. 74-76
[36] Kootenai Elec. Co-op., v. Lamar Corp., 148 Idaho 116, 219 P.3d 440 (2009)

between the same parties upon the same claim or upon claims 'relating to the same cause of action ... which might have been made.'"[37]

ATTORNEY FEES

Wildlife Ridge requests an award of attorney fees on appeal pursuant to I.A.R. Rule 41, I.C. 12-120(3), and I.C. 12-121 as the prevailing party on appeal.

CONCLUSION

The doctrine of *res judicata* does not justify the dismissal of a counterclaim/affirmative defense alleging fraud in a foreclosure action under Idaho law where the party alleging a number of affirmative defenses including the statute of limitations and fraud which had not been previously brought a quiet title action. The dismissal with prejudice in the prior action did not resolve Appellant's challenge of enforceability of a deed of trust including fraud, under Idaho law, because the gravamen of the original quiet title action was that the debt underlying the deed of trust had been satisfied. The Doctrine of *res judicata* justify the dismissal of a foreclosure action, under Idaho law, where the plaintiff in the foreclosure action had previously settled as the defendant an earlier quiet title action involving the property subject to the foreclosure action. For the foregoing reasons the decisions of the District Court should be overturned, the foreclosure should be set aside and appellant should be allowed to proceed on its affirmative defenses and counterclaim.

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[37] Id. 219 P.3d 440, 444

DATED this 23rd day of March, 2018.

HEARN LAW, PLC

RICHARD A. HEARN, Attorney for Appellant,
Wildlife Ridge Estates, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on the 23rd day of March, 2018, caused a true and correct copy of the attached MOTION TO AUGMENT THE RECORD postage prepaid, to the following parties:

Ron Kerl	[X]	U.S. Mail – Postage Prepaid
COOPER & LARSEN, Chartered	[ ]	Hand Delivery
151 North Third Avenue, 2nd Floor	[ ]	Overnight Mail
P.O. Box 4229	[ ]	Facsimile: *208-235-1182*
Pocatello, ID 83205-4229	[ ]	Email: ron@cooper-larsen.com
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RICHARD A. HEARN, Attorney for Appellant, Wildlife Ridge Estates, LLC