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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, vs. WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company, Defendant/Appellant, M&S DEVELOPMENT, LLC, an Idaho limited liability company; and PIONEER TITLE COMPANY OF BANNOCK COUNTY, INC., Defendants. ____________________________ WILDLIFE RIDGE ESTATES, LLC, an Idaho limited liability company, Counter-claimant/Appellant, vs. MONITOR FINANCE, L.C., a Utah limited liability company; and FIRST CAPITAL FUNDING, L.C., a Utah limited liability company, Counter-defendants/Respondents.	SUPREME COURT CASE NO. 45517-2017 BANNOCK COUNTY CASE NO. CV-2016-3588-OC

RESPONDENTS' 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 Ave., Pocatello, Idaho 83204, for Appellant

Ron Kerl
Residing at 151 N. 3rd Ave., Second Floor, Pocatello, Idaho 83205, for Respondents

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,

vs.

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

Defendants.

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

Counter-claimant/Appellant,

vs.

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

Counter-defendants/Respondents.

SUPREME COURT

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STATEMENT OF THE CASE

This law suit was commenced on October 7, 2016, when Monitor Finance, L.C. ("Monitor") and First Capital Funding, L.C. ("First Capital")(collectively "Respondents") filed their Complaint to Judicially Foreclose a Deed of Trust ("Complaint"). The Complaint sought to enforce a Trust Deed Note dated December 30, 2005, in the original principal amount of $244,000.00 ("Trust Deed Note"), as amended by a March 3, 2008 Modification, ("Modification"); and to judicially foreclose a Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing ("Deed of Trust") securing that obligation.

Wildlife Ridge Estates, LLC ("Wildlife Ridge") filed its Answer and Counter-claim seeking damages and a declaration from the trial court that the Trust Deed Note, Modification, and the Deed of Trust were unenforceable and that the Respondents should be enjoined from foreclosing the Deed of Trust ("Answer and Counterclaim"). R. Vol. I, pp. 51 - 69. Wildlife Ridge's Affirmative Defenses included (1) Statute of Limitations – p. 53, ¶10, (2) Laches – p. 53, ¶11, (3) Collateral Estoppel – p.53, ¶12, (4) *Res Judicata*, claim and/or issue preclusion – p. 53, ¶13, (5) Unclean Hands – p. 53, ¶14, and (6) Fraud – p. 60.

This Appeal follows the trial court's grant of summary judgment in favor of Respondents. The trial court concluded that Wildlife Ridge's affirmative defenses and counterclaim for fraud were precluded by the doctrine of *res judicata*. R. Vol. I pp. 135-149, 171-192.

STATEMENT OF FACTS

Wildlife Ridge acquired the property described in the Deed of Trust on June 13, 2006, R. Aug. pp. 46-48. At that time, Respondents had already been granted the beneficial interest in

that land to secure the obligations described in the Deed of Trust, and legal title to that property had been transferred to Pioneer Title Company as trustee of the Deed of Trust. R. Vol. I pp. 27-50, 106-130.

The enforceability of the Deed of Trust, and the alleged satisfaction of the obligations secured by that Deed of Trust were the subject of a *prior* lawsuit brought by Wildlife Ridge against Respondents on December 3, 2014. R. Aug. pp 1-21 (the "First Action"). In the First Action Wildlife Ridge sought a decree quieting title in its name to the property described in the Deed of Trust, free and clear of the Deed of Trust, along with a declaration from the Court that the sums due and owing the Respondents and secured by the Deed of Trust had "been satisfied by previously (sic) payments made to First Capital, L.C. and Monitor Finance, L.C." R. Aug. pp. 4, ¶16. Wildlife Ridge's Amended Complaint, filed in the First Action on March 12, 2015, sought that same relief. R. Aug. p. 9, ¶12.

On March 26, 2015, Respondents filed their Answer to the Amended Complaint and denied Wildlife Ridge's right to any of the relief sought in its Amended Complaint. R. Aug. pp. 11 - 15.

On June 8, 2016, a Stipulation for Dismissal With Prejudice between Wildlife Ridge and Respondents was filed in the First Action, and on June 14, 2016, the First Action was dismissed by the court, with prejudice, with each party bearing their own attorney fees and costs of suit (the "Dismissal of the First Action"). R. Aug. pp. 16 - 21.

On January 6, 2017, the Respondents filed their motion for partial summary judgment in the present case, seeking to strike all defenses raised by Wildlife Ridge in its Answer and

Counter-claim under the applicable doctrines of *res judicata*, collateral estoppel, and claim preclusion. R. Vol. I pp. 4, 136, 172. Respondents argued that the dismissal of the First Action not only defeated the claims of Wildlife Ridge as alleged in the First Action, but also defeated every other defense or claim challenging the enforceability of the Respondents' Trust Deed Note, Modification, and Deed of Trust which might and should have been litigated in the First Action.

On March 27, 2017, the trial court issued its Memorandum Decision and Order granting Respondents' motion for partial summary judgment. R. Vol. I pp. 135 - 149. The trial court concluded that "the Defendant's affirmative defenses and fraud claim are barred by the doctrine of *res judicata*. Therefore, all of the affirmative defenses listed in Defendant's Answer, as well as the Defendant's Counterclaim for fraud are hereby stricken and dismissed." R. Vol. I p. 147.

On April 13, 2017, Respondents filed another motion for summary judgment seeking the entry of a decree of foreclosure and the determination of the actual amount due and owing under the Trust Deed Note and Modification (the "Second Summary Judgment Motion"). R. Vol. I pp. 6, 172. Wildlife Ridge opposed the Second Summary Judgment Motion by filing its Motion for Reconsideration of the Court's March 27, 2017 Memorandum Decision and Order, but it did not submit any opposing affidavits or additional evidence. R. Vol. I p. 172.

On June 13, 2017, the trial court issued its Memorandum Decision and Order granting Respondent's Second Summary Judgment Motion and denying Wildlife Ridge's motion for reconsideration. R. Vol. I pp. 171 - 192.

On June 20, 2017, the trial court entered its Judgment, Decree of Foreclosure and Order of Sale authorizing Respondents to proceed to foreclose the Deed of Trust at a sheriff's

foreclosure sale. R. Vol. I p 198 - 202. The sheriff's foreclosure sale was held on August 30, 2017, and Respondents became the purchasers of the two remaining lots encumbered by the Deed of Trust. *See*, Exhibits "6", "7", and "8" to Affidavit in Support of Motion to Dismiss Appeal for Mootness dated April 4, 2018 (the "Mootness Affidavit").

Respondents also received payment of the net sale proceeds from the prior voluntary sale of six (6) lots burdened by the Respondents' Deed of Trust. *See*, Mootness Affidavit, Exhibits "1," "2," and "3."

When Wildlife Ridge acquired the property encumbered by the Deed of Trust on June 13, 2006, the Deed of Trust stated that it was:

> "given for the purpose of securing the following obligations (collectively the "Obligations" of Trustor [M & S Development]:
>
> 2.1.1 Note. The payment and performance of each and every agreement and obligation under the Note [defined on page 1 of the Deed of Trust as the Trust Deed Note]....
>
> ***
>
> 2.1.5 Other Obligations. The payment and performance of any other note or obligation reciting that it is secured by this Trust Deed. Trustor expressly acknowledges its mutual intent with Beneficiary that the security interest created by this Trust Deed secure any and all present and future debts, obligations, and liabilities of Trustor to Beneficiary without any limitation whatsoever."

R. Vol. I pp. 30 and 109.

The Modification expressly stated that the makers of the Trust Deed Note, Millward and M & S Development, and the Respondents "acknowledge that the same terms and conditions of

the original Note and Trust Deed will apply to the amended amount and terms." R. Vol. I pp. 26, 104.

Wildlife Ridge was aware of the Modification during the pendency of the First Action, as a copy of the Modification was provided to Wildlife Ridge in the Respondents' August 12, 2015 response to Wildlife Ridge's First Set of Discovery. R. Aug pp. 53-54 and 56 - 173. *See*, R. Aug. p. 169. There is no evidence in the record that Wildlife Ridge was not aware of the Modification during the pendency of the First Action.

The makers of the Trust Deed Note, Millward and M & S Development, and the Grantor of the Deed of Trust, M & S Development, were not named as Defendants in the First Action by Wildlife Ridge.

The Answer and Counterclaim admitted that (1) Michael Millward[1] was a debtor in a chapter 7 bankruptcy proceeding filed on September 10, 2012, (2) the Millward bankruptcy was pending during the First Action, (3) Millward was protected by the automatic stay provided by 11 U.S.C. §362, and (4) the Millward bankruptcy was dismissed on June 23, 2016. R. Vol. I p. 53, ¶7.

ADDITIONAL ISSUES PRESENTED ON APPEAL

The Respondents accept Wildlife Ridge's statement of Issues on Appeal, and add the following additional issue:

1. Are the Respondents entitled to an award of attorney fees and costs on appeal pursuant to I.A.R. Rule 41, and Idaho Code § 12-120(3) and Idaho Code § 12-121?

[1] Michael Millward ("Millward") and M & S Development, LLC ("M & S Development") were the makers of the Trust Deed Note and Modification; M & S Development was the grantor of the Deed of Trust. R. Vol. I pp. 22-50.

ARGUMENT

A. Standard of Review.

Respondents agree with Wildlife Ridge's description of the Standard of Review on Appeal. This Court is required to review a trial court's grant of summary judgment *de novo*, applying the same standard used by a trial court when ruling upon a summary judgment motion filed under I.R.C.P. Rule 56.

The trial court recognized and employed the required standard of review when ruling upon the summary judgment motions filed by the Respondents. The trial court acknowledged that the undisputed facts had been established upon a preponderance of the evidence, with all reasonable inferences drawn in favor of Wildlife Ridge, that all disputed facts were construed liberally in favor of the non-moving party, Wildlife Ridge, and that all reasonable inferences that could be drawn from the record were drawn in favor of Wildlife Ridge. R. Vol. I 138, 186.

B. The Dismissal of the First Action, With Prejudice, Required the Dismissal of Wildlife Ridge's Affirmative Defenses and Counterclaim for Fraud in this Action Under the Doctrine of *Res Judicata*.

The trial court dismissed the Respondent's affirmative defenses and fraud counterclaim by employing of the doctrine of *res judicata*. The trial court determined that the First Action between the parties ended in a final judgment on the merits, that the present case involves the same parties as the First Action, and that all of the claims in the present case arise out of the same transaction or series of transactions at issue in the First Action. The gravamen of the First Action was that the Respondents did not have an enforceable obligation secured by the Deed of Trust.

The doctrine of claim preclusion bars not only subsequent re-litigation of a claim previously asserted, but also subsequent re-litigation of any claims relating to the same transaction which might have been asserted. The dismissal of the First Action served as a dismissal with prejudice of every claim that was available to Wildlife Ridge to challenge the existence and enforceability of the Trust Deed Note, the Modification, and the Deed of Trust at issue in the present case.

Under principles of *res judicata*, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. "[R]es judicata is an umbrella term for different but related concepts: claim preclusion and issue preclusion." Steve Wieland, *Don't Let the Tab Decide Your Next Infringement Dispute*, 59 ADVOCATE 38 (2016); *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). "Separate tests are used to determine whether claim preclusion or issue preclusion applies." *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)(internal citation omitted).

A final judgment bars a party from re-litigating that same claim, regardless of whether the subsequent litigation involves new or different issues. *Sturgell*, 553 U.S. at 892, 128 S. Ct. at 2171. This Court has explained claim preclusion as follows:

> Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. 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, 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 (3) the present claim arises out of the same transaction or series of transactions as the original action.

Berkshire Investments, LLC v. Taylor, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted, emphasis added).

The doctrine of claim preclusion bars not only the subsequent re-litigation of a claim previously asserted, but also the subsequent re-litigation of any claims relating to the same causes of action which were actually made, or which might have been made. *Elliot v. Darwin Neibaur Farms*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). 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 as to every matter which might and should have been litigated in the first suit.*" *Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 436–37, 849 P.2d 107, 109–10 (1993)(emphasis added); *see also Joyce v. Murphy Land & Irrigation Co.,* 35 Idaho 549, 553, 208 P. 241, 242-43 (1922). Similarly, "[i]ssue preclusion … bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Sturgell*, 553 U.S at 892, 128 S. Ct. at 2171 (internal citation omitted). When a court finally determines an issue in one case that is essential to that judgment, a litigant is barred from raising the issue again in another lawsuit.

> *Res judicata* serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Hindmarsh,* 138 Idaho at 94, 57 P.3d at 805 (quoting *Aldape v. Akins,* 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct.App.1983)).

Stanion, 144 Idaho at 123, 157 P.3d at 617; *see also*, *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

> Whether claim preclusion or issue preclusion bars relitigation between the same parties of a prior litigation is a question of law upon which this Court exercises free review. *Lohman v. Flynn,* 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). *Res judicata* is an affirmative defense and the party asserting it must prove all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony,* 122 Idaho 883, 890, 841 P.2d 413, 420 (1992).

Id. at 122, 157 P.3d at 616.

Wildlife Ridge should have asserted in the First Action every legal rule and/or equitable principle or remedy available to establish that the Trust Deed Note and Modification were unenforceable. Instead it sought only to quiet title to the property described in the Deed of Trust on the basis that the obligations secured by that Deed of Trust had been satisfied.

The doctrine of *res judicata* prohibits Wildlife Ridge from asserting any new or additional claims for relief in the present action because those claims for relief were available to it at the time of the First Action. When the First Action was dismissed, Wildlife Ridge lost the ability to relitigate any other legal rule or equitable principle designed to prevent the enforcement of the Trust Deed Note, Modification and Deed of Trust.

1. Millward and M & S Development Were Not Indispensable Parties to the First Action and Their Absence as Parties Did Not Prevent Wildlife Ridge from Asserting Alternative Claims for Relief in the First Action.

Wildlife Ridge admits in its brief to this Court that its affirmative defense of fraud was never raised in the First Action.[2] But Wildlife Ridge then argues that it was barred from

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[2]Appellant's Brief, p. 8.

asserting that defense in the First Action because one of the makers of the Trust Deed Note, Millward, was a debtor in bankruptcy during the pendency of the First Action and therefore protected by the automatic stay provided by 11 U.S.C. §362. The other maker of the Trust Deed Note and grantor of the Deed of Trust, M & S Development, was not a party to the First Action, either. Wildlife Ridge argues that due to the absence of Millward and M &S Development as parties in the First Action, the defenses and counter claims raised in the present action could not have been litigated by it in the First Action and therefore could not be precluded by the doctrine of *res judicata* in the present case. Respondents dispute that argument.

All of the factual allegations supporting the affirmative defenses and fraud claim alleged in the Answer and Counterclaim existed during the pendency of the First Action and there is no valid reason why the same factual allegations and claims for legal and equitable relief could not have been asserted against the Respondents in the First Action.

Whether a party is "indispensable" is governed by I.R.C.P. 19(a)(1). Under that rule, a party shall be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>> (i) as a practical matter impair or impede the person's ability to protect the interest; or

> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Idaho R. Civ. P. 19(a).

Complete relief could have been granted to Wildlife Ridge if the court in the First Action had been asked to grant the same relief sought by Wildlife Ridge in its Answer and Counterclaim. Wildlife Ridge could have asserted in the First Action that the Trust Deed Note and Modification were unenforceable because the statute of limitations had run on the obligations secured by the Deed of Trust. Or, that the Modification was the product of fraudulent conduct on the part of Respondents. Wildlife Ridge could have asked the trial court in the First Action to enjoin Respondents from ever taking action to enforce the Trust Deed Note, Modification, and Deed of Trust. Millward and M & S Development were not indispensable parties. "A victim of wrongdoing is not generally required to sue all wrongdoers. Certainly not in a tort case, where the rule of joint and several liability reigns; ..." *Babb v. Mid-Am. Auto Exch.*, Inc., 2006 WL 2714273 at *2 (D. Kan. Sept 22, 2006).

If the Trust Deed Note, Modification and Deed of Trust had been rendered completely unenforceable in the First Action, it would not matter on which grounds Wildlife Ridge would have rendered these instruments unenforceable, or the basis for such a judicial finding. That outcome would not have adversely affected either Millward or M & S Development since the debt they were personally responsible to pay would no longer be enforceable against them by the Respondents.

There was no risk that Millward or M & S Development would be exposed to double, multiple or otherwise inconsistent obligations since Respondents would have been bound by the First Action's ruling that the Trust Deed Note, Modification and Deed of Trust were unenforceable, no matter whether the basis of that decision was that the debt had been satisfied or that the debt was unenforceable based on the statute of limitations or fraud arguments urged by Wildlife Ridge in its Answer and Counterclaim. *See*, *Magic Valley Radiology*, *supra*.

As such, Millward and M & S Development were not indispensable parties with respect to Wildlife Ridge's claims in the First Action and Wildlife Ridge's unsuccessful first attempt to have the Deed of Trust declared unenforceable precludes a second attempt *via* the new claims for relief set out in its Answer and Counterclaim.

2. Wildlife Ridge Could Have Asserted the Statute of Limitations and Other Grounds for Relief in the First Action.

Wildlife Ridge, in part 3. of its Brief, argues that the relief it sought in the First Action was barred by this Court's decision in *Trusty v. Ray*, 73 Idaho 232, 249 P.2d 814 (1952). In *Trusty* this Court determined that 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 against the right to foreclose the mortgage."

Wildlife's reliance on *Trusty* is over broad. This Court's decision in *Trusty* only concluded that the "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 against the right to foreclose the mortgage."

The rule stated in *Trusty* did not prohibit Wildlife Ridge from bringing all other available claims for legal or equitable relief in the First Action. Even if the quiet title relief Wildlife Ridge sought in the First Action was barred by *Trusty*, the *Trusty* decision did not prevent Wildlife Ridge from claiming that the obligations secured by the Deed of Trust were otherwise unenforceable because of the running of the statute of limitations, laches and/or unclean hands on the part of the Respondents, or the Respondents' fraud. Wildlife Ridge could have asked for a permanent injunction prohibiting Respondents from taking any action to enforce the obligations secured by the Deed of Trust, or, as beneficiary, directing the Trustee to pursue non-judicial foreclosure of the Deed of Trust. Wildlife Ridge did not do any of that.

Wildlife Ridge argues that the five-year time frame for commencing an action to foreclose the Deed of Trust had expired based on the Trust Deed Note's stated maturity date of June 28, 2006. Wildlife Ridge offers no acceptable explanation for why this statute of limitations claim was not asserted in the First Action.

Nonetheless, Respondents dispute that the applicable statute of limitations has run. Idaho Code § 5-214A provides a five-year statute of limitations for the commencement of an action for the foreclosure of a mortgage. That statute states:

> 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. If the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness.

Idaho Code § 45-1515 adopts the same five-year statute of limitations for the foreclosure of deeds of trust. That statute states:

> The foreclosure of a trust deed by advertisement and sale shall be made and the foreclosure of a trust deed by judicial procedure shall be commenced within the time limited by the same period and according to the same provisions including extensions as provided by law for the foreclosure of a mortgage on real property.

However, the applicable statute of limitations was restarted by a partial payment made on November 8, 2012, thereby extending the maturity date of the obligations secured by the Deed of Trust, and the right to foreclose that Deed of Trust, until November 8, 2017. R. Aug. p. 075.

Idaho Code § 5-238, addresses the effect of partial payments. That statute provides:

> No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; ***but any payment of principal or interest is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.*** (emphasis added).

Payments of interest or principal serve to restart the statute of limitations on all installments on the note pursuant to Idaho Code § 5-238. *Horkley v. Horkley*, 144 Idaho 879, 881, 173 P.3d 1138, 1140 (2007).

There is no dispute in this case that on November 8, 2012, the Respondents received a payment on the Trust Deed Note and Modification in the amount of $38,472.24 and applied that payment to the principal due on the obligation. R. Aug. p. 075. As such, this partial payment made on the Trust Deed Note and Modification restarted the five-year statute of limitations and extended the maturity date of the obligations secured by the Deed of Trust, including the right to foreclose that Deed of Trust, until November 8, 2017.

The Complaint was filed within the five-year limit. R. Vol. I p. 12. Thus, under the provisions of I.C. § 5-238, the November 8, 2012 partial payment to the Respondents constituted "a new promise in writing", extending the statute of limitations found in I.C. § 5-214A and I.C. §

45-1515 for an additional five years. The Respondent's Complaint to enforce the Trust Deed Note and Modification and to foreclose the Deed of Trust was timely filed. The Respondents were not barred by the statute of limitations from commencing the present action.

3. The Administrative Dissolution of Monitor on November 9, 2012, Did Not Prevent it From Being Sued in the First Action or From Filing the Present Action.

Wildlife Ridge attempts to distance itself from the doctrine of *res judicata* by arguing that since one of the Respondents, Monitor, had been administratively dissolved on November 9, 2012, it could not have been a real party in the First Action. Thus, the doctrine of *res judicata* could not apply to prevent Wildlife Ridge from asserting the Answer and Counterclaim against Monitor in the present action. *See*, Appellant's Brief, p. 9.

The dissolution of Monitor before the commencement of the First Action on December 2, 2014, did not prevent Monitor from appearing in the First Action and defending itself against Wildlife Ridge's claims. *See*, Utah Code Annotated, Sec. 48-3a-703(2)(b)(iii).

> 48-3a-703. Winding up.
>
> (1) A dissolved limited liability company shall wind up its activities and affairs and, except as otherwise provided in Section 48-3a-704, the limited liability company continues after dissolution only for the purpose of winding up.
>
> **(2) In winding up its activities and affairs, a limited liability company: (emphasis added)**
>
> (a) shall discharge the limited liability company's debts, obligations, and other liabilities, settle and close the limited liability company's activities and affairs, and marshal and distribute the assets of the limited liability company; and
>
> **(b) may: (emphasis added)**

(i)deliver to the division for filing a statement of dissolution stating the name of the limited liability company and that the limited liability company is dissolved;

(ii) preserve the limited liability company activities, affairs, and property as a going concern for a reasonable time;

(iii) prosecute and defend actions and proceedings, whether civil, criminal, or administrative; (emphasis added);

(iv) transfer the limited liability company's property;

(v) settle disputes by mediation or arbitration;

(vi) deliver to the division for filing a statement of termination stating the name of the limited liability company and that the limited liability company is terminated; and

(vii) perform other acts necessary or appropriate to the winding up.

Monitor was authorized under Utah law to appear in and defend Wildlife's claims in the First Action. And as part of its winding down, Monitor was authorized to prosecute the present action to enforce its interest in the Trust Deed Note, Modification, and Deed of Trust.

Further, Wildlife Ridge's argument in this regard does not address the other Respondent, First Capital, or challenge First Capital's existence at the time the First Action was dismissed with prejudice. Nor does Wildlife Ridge claim that First Capital is not entitled to the protections afforded litigants under the doctrine of *res judicata*.

As concluded by the trial court, Monitor was a legitimate party in interest and a named defendant in the First Action and entitled to the benefit of the doctrine of *res judicata*. R. Vol. I p. 144.

C. Respondents' Complaint to Judicially Foreclose Deed of Trust Is Not Barred by the Doctrine of *Res Judicata*.

Wildlife Ridge's Third Issue on Appeal argues that Respondents were barred from judicially foreclosing the Deed of Trust in the present action because of the dismissal of the First Action. Wildlife Ridge's argument suggests that Respondents had the legal obligation to pursue judicial foreclosure of the Deed of Trust in the First Action as a compulsory claim, or suffer the consequences of *res judicata* being applied against them in the present action.

As defendants in the First Action, Respondents were charged with defending against Wildlife Ridge's claim that the obligations secured by the Deed of Trust had been satisfied. All Respondents had to prove in order to defeat Wildlife Ridge's claim in the First Action was to show that the obligations secured by the Deed of Trust had not been satisfied.

Wildlife Ridge has acknowledged that on September 10, 2012, Millward filed for relief under chapter 7 of the Bankruptcy Code. Pursuant to 11 U.S.C. § 362, an automatic stay commenced on September 10, 2012 which prohibited the Respondents from taking any action to enforce the Trust Deed Note and Modification against Millward. Respondents were therefore stayed from enforcing the Trust Deed Note and Modification, and from foreclosing the Deed of Trust securing those obligations until Millward's bankruptcy case was closed on June 23, 2016.[2] The dismissal of Millward's bankruptcy proceeding occurred *after* the First Action was dismissed.

[2] Upon the closing of his bankruptcy case Millward's discharge under 11 U.S.C 3727 became final and Respondents were prohibited from pursuing him in the present action.

The automatic stay created by Millward's bankruptcy filing also prohibited Respondents from pursuing M & S Development because that limited liability company was wholly owned by Millward and his wife, Stephanie, and therefore property of the Millward Bankruptcy Estate. R. Vol. I p. 157 (Schedule B - Personal Property).

11 U.S.C. § 362 provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301 [a voluntary case under any chapter of the Bankruptcy Code, including Chapter 7], 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, *operates as a stay, applicable to all entities, of—*
>
> (1) *the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or *to recover a claim against the debtor that arose before the commencement of the case under this title*; (emphasis added)
>
> ***
>
> (4) any act to create, perfect, or enforce any lien against property of the estate.
>
> ***

11 U.S.C. § 362 prevented Respondents from asking, and the trial court from issuing its process or summons against Millward and M & S Development. Respondents were also stayed from pursuing any act against Millward's property, M & S Development such as pursuing a judgment lien against it for any deficiency after the foreclosure of the Deed of Trust.

As a result, the trial court was prevented from obtaining jurisdiction over Millward and M & S Development during the pendency of the First Action. Respondents, therefore, could not pursue enforcement of the Trust Deed Note, Modification, and Deed of Trust in the First Action.

Idaho Rule of Civil Procedure Rule 13(a) provides:

> ***Compulsory Counterclaim.***
>
> (1) In General. A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim:
>
> (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> (B) *does not require adding another party over whom the court cannot acquire jurisdiction.* (Emphasis added).

Millward and M & S Development, as makers of the Trust Deed Note and Modification, were indispensable parties in any action Respondents could prosecute in order to enforce the Trust Deed Note and Modification, and also judicially foreclose the Deed of Trust securing those obligations. *Galvanizer's Co. v. State Highway Commission*, 8 Wn.App. 804, 807, 509 P2d. 73 (Wash. App. 1973).

Under I.R.C.P. 19(a)(1), Millward and M & S Development needed to be brought into the First Action before Respondents could be afforded complete relief. Millward and M & S Development had a right to independently challenge the enforcement of the Trust Deed Note, Modification and Deed of Trust in the First Action had the Respondents attempted to enforce their rights under those instruments.

Unlike Wildlife Ridge's right to assert any and all claims against the Respondents to render unenforceable the Trust Deed Note and Modification and to prevent any future foreclosure of the Deed of Trust by the Respondents, the Respondents were prohibited from joining Millward and M & S Development in the First Action and litigating their claims under the Trust Deed Note, Modification, and Deed of Trust due to the applicable bankruptcy stay. *A*

fortiori, Respondents did not actually litigate their claims under the Trust Deed Note, Modification or Deed of Trust in the First Action, nor could they. Respondents are not prohibited from pursuing their claims in the present action under this doctrine of *res judicata*.

ATTORNEY FEES ON APPEAL

Respondents have complied with I.A.R. 41 by asserting that they are entitled to an attorney fee award in their statement of issues on appeal.

Idaho Code § 12–120 (3) allows a prevailing party in a civil action to recover attorney fees "on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction." Respondents contend that the underlying Trust Deed Note, Modification and Deed of Trust give rise to an award of fees under this section both because Respondents were seeking recovery under a note or negotiable instrument (the Trust Deed Note) and because its loan to Millward and M & S Development arose out of a commercial transaction whereby the Respondents provided financing to Millward and M & S Development to improve the real property described in the Deed of Trust and develop the Wildlife Ridge residential subdivision.

Further, Wildlife Ridge's prosecution of this appeal notwithstanding the clear applicability of *res judicata* to the claims and defenses asserted in its Answer and Counterclaim, leads to a reasonable conclusion that Wildlife Ridge's appeal has been brought and pursued frivolously, unreasonably, and without foundation. *Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co.*, 115 Idaho 373, 380, 766 P.2d 1254, 1261 (Ct.App.1988)

For these reasons, this Court should award attorney fees in favor of the Respondents.

CONCLUSION

The doctrine of *res judicata* was applied correctly by the trial court. Wildlife Ridge was obligated to assert in the First Action all of the claims and defenses it asserted in its Answer and Counterclaim because all of those defenses and claims existed before and during the pendency of the First Action. The dismissal of the First Action, with prejudice, constituted a decision on the merits which precludes the re-litigation of those claims and all related claims in this case.

Respondents were not required to pursue judicial foreclosure of the Deed of Trust in the First Action because Millward and M & S Development were indispensable parties to such an action and they could not be joined as parties in the First Action by reason of Millward's pending bankruptcy case and the applicable bankruptcy stay. Therefore, Respondents were not precluded from pursuing its claims in the present action and recovering the foreclosure decree and deficiency judgment entered by the trial court.

The decisions below should be affirmed. Respondents should be awarded their costs including their reasonable attorney fees on appeal.

DATED this 17th day of May, 2018.

COOPER & LARSEN, CHTD.
Attorneys for Monitor Finance, L.C. and First Capital Funding, L.C.

Ron Kerl, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on the 17th day of May, 2018 I served two (2) true and correct copies of the foregoing Respondents' Brief as follows:

Richard A. Hearn A. Bruce Larson Hearn Law, PLC 155 S. 2nd Ave. Pocatello, ID 83201	[x] U.S. Mail, postage prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile - 208-932-1083 [ ] Email to:

COOPER & LARSEN, CHTD

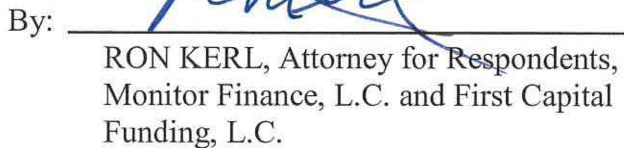
By: ______________________
Ron Kerl, of the firm

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following address:

Richard A. Hearn, counsel for the Appellant Wildlife Ridge Estates, LLC, at hearn@hearnlawyers.com and A. Bruce Larson at larson@hearnlawyers.com.

Dated and certified this 17th day of May, 2018.



By: ______________________
RON KERL, Attorney for Respondents, Monitor Finance, L.C. and First Capital Funding, L.C.