IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 180979

GLORIA B. LANE

Appellant

v.

BAYVIEW LOAN SERVICING, LLC; EQUITY TRUSTEES, LLC, AS SUBSTITUTE TRUSTEE; and ERIC CHARLES VON ALLMAN

Appellees

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Mecklenburg County (the "trial court") erred (1) in entering its April 26, 2018 Order in this case (the "Second Action") granting the Plea of *Res Judicata* filed by appellee, defendant below, Bayview Loan Servicing, LLC ("Bayview"), dismissing with prejudice the Amended Complaint filed by the appellant, Gloria B. Lane ("Mrs. Lane") as to Bayview, and (2) in entering its May 14, 2018 Order in this case dismissing with prejudice the Amended Complaint filed by Mrs. Lane as to appellees, defendants below, Equity Trustees, LLC, as Substitute Trustee ("Equity Trustees") and Eric Charles Von Allman ("Mr. Von Allman"), because neither *res judicata* (claim preclusion) nor collateral estoppel (issue preclusion) applied to bar Mrs. Lane's Amended Complaint against Bayview, and, therefore, preclude the relief sought by Mrs. Lane against Equity Trustees and Mr. Von Allman. [Issue preserved at JA 223-40, 246, 278-92, 303-05, 318-21, 322-24].

2. The trial court erred in its ruling from the bench on February 12, 2018 granting the Plea of *Res Judicata* filed by Bayview because neither *res judicata* (claim preclusion) nor collateral estoppel (issue preclusion) applied to bar Mrs. Lane's Amended Complaint against Bayview. [Issue preserved at JA 223-40, 246, 278-92, 303-05, 318-21, 322-24].

NATURE OF THE CASE

Mrs. Lane maintains this appeal from (1) the trial court's Order entered on April 26, 2018 (the "April 26 Order") granting Bayview's Plea of *Res Judicata* and dismissing her Amended Complaint against Bayview, with prejudice, and (2) the trial court's Order entered on May 14, 2018 (the "May 14 Order") dismissing the Amended Complaint against Equity Trustees and Mr. Von Allman, with prejudice. (JA 318-24). Mrs. Lane's brought the Second Action because Bayview failed to send her a proper 30-day cure notice as required by the operative note and deed of trust prior to foreclosure on a residence

owned by Mrs. Lane (the "residence") and foreclosed on the residence based on an invalid appointment of substitute trustee. (JA 1-23). On that basis, as to all appellees, Mrs. Lane sought reversal of the foreclosure, trustee's deed to Bayview, and subsequent deed to Mr. Von Allman and/or, as to Bayview only, compensatory damages. (JA 1-23). Mrs. Lane asks this Court to reverse the Orders entered below and to remand the Second Action to the trial court for trial.

MATERIAL PROCEEDINGS BELOW

On September 15, 2017, Mrs. Lane filed her Complaint against Bayview, Equity Trustees, and Mr. Von Allman, seeking (1) rescission of a foreclosure sale, trustee's deed, and subsequent deed to Mr. Von Allman as to all appellees and (2) compensatory damages against Bayview only. Compl. *passim*. On November 7, 2017, Mrs. Lane filed a Motion for Leave to File Amended Complaint (the "Motion for Leave"), and on November 20, 2017, the trial court entered an Order granting the Motion for Leave, deeming the Amended Complaint filed as of entry of the Order. (JA 1-23). The factual allegations in the Amended Complaint differed from some of the factual allegations in the Complaint, but the Amended Complaint sought the same relief as the Complaint. (JA 1-23). On December 11, 2017, Bayview filed a Demurrer and Plea of *Res Judicata* to the Amended Complaint. (JA 58-222).

Bayview obtained a hearing date from the trial court for oral argument on Demurrer and Plea of *Res Judicata*. (JA 318). On February 5, 2018, Mrs. Lane filed her Memorandum in Opposition to Demurrer and Plea of *Res Judicata*. (JA 223-47). On February 12, 2018, the Court heard argument on Bayview's Plea of *Res Judicata*. (JA 318). Counsel for Bayview and Mrs. Lane appeared and argued their grounds for and against the Plea of *Res Judicata*. (JA 248-308). At the end of that hearing, the trial court found that *res judicata* barred Mrs. Lane's claims in the Amended Complaint against Bayview and concluded that other issues before the Court were mooted by its ruling on the Plea of *Res Judicata*. (JA 306). On April 26, 2018, the trial court entered an Order granting the Plea of *Res Judicata* for the reasons stated on the record on February 12, 2018 and dismissing the Amended Complaint, with prejudice, as to Bayview. (JA 318-21). On May 14, 2018, the trial court entered an Order (1) finding that the granting of the Plea of *Res Judicata* precluded Mrs. Lane from obtaining the relief sought in the Amended Complaint as to Equity Trustees and Mr. Von Allman and (2) dismissing the Amended Complaint, with prejudice, as to Equity Trustees and Mr. Von Allman. (JA 322-24). On May 11, 2018, Mrs. Lane timely filed her Notice of Appeal to the April 26 Order and the May 14 Order. (JA 325-27). On May 25, 2018, Mrs. Lane timely filed an Amended Notice of Appeal

to the April 26 Order and May 14 Order to cure any potential concerns regarding service of the Notice of Appeal on counsel for Equity Trustees. (JA 328-34). On May 25, 2018, Mrs. Lane timely filed the transcript of the February 12, 2018 hearing on the Plea of *Res Judicata*. On June 1, 2018, Mrs. Lane timely filed and served her Notice of Filing of Transcript, pursuant to Rule 5:11(c) of the Rules of the Supreme Court of Virginia.

STATEMENT OF FACTS

The dispute in this case arises out a wrongful foreclosure of the residence on January 4, 2017. (JA 1-23). Bayview failed to send Mrs. Lane a proper 30-day cure notice as required by the operative note and deed of trust prior to foreclosure and foreclosed on the residence based on an invalid appointment of substitute trustee. (JA 2-3, 4-11, 14-17). Mrs. Lane, *pro se*, unsuccessfully sought temporary injunctive relief to stop the foreclosure sale. (JA 10, 68-209). Based on Mrs. Lane's unsuccessful petition for a temporary injunction, the trial court found all of her claims in the Amended Complaint to be barred by *res judicata*. (JA 318-24).

Mrs. Lane and her husband, Randolph Lane, Sr., fell into arrears on a note secured by a deed of trust constituting a lien on the residence. (JA 6). Bayview sent a purported pre-acceleration notice to Mrs. Lane that overstated the amount of the default by almost one-hundred percent (100%).

(JA 7).[1] Based on its defective pre-acceleration notice, Bayview accelerated the note and proceeded to institute foreclosure action as to the residence. (JA 9-10). Bayview, although it was not the holder of the note or the party secured by the deed of trust, executed a document (the "purported appointment") purporting to appoint Equity Trustees as substitute trustee on the deed of trust. (JA 3-4, 16-17). The purported appointment was invalid because Virginia law and the deed of trust require execution of an instrument appointing a substitute trustee by "the party secured by the deed of trust, or the holders of greater than fifty percent of the monetary obligations secured thereby." (Va. Code § 55-59(9); JA 14-17). Bayview instructed Equity Trustees to foreclose on the residence, and in response to that instruction, Equity Trustees advertised the residence for foreclosure on January 4, 2017. (JA 10).

On December 29, 2016, Mrs. Lane, *pro se*, filed a "Petition for Injunction" (the "Petition") against BWW Law Group, LLC[2] ("BWW Law Group") in the trial court, styled as *Gloria B. Lane, Petitioner, et als. v. Substitute Trustee BWW Law Group, LLC* – Case Number the First Action

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[1] Bayview sent a prior purported pre-acceleration notice to Mrs. Lane, but the Amended Complaint alleges that such notice was not sent by Certified mail, as required by the deed of trust and Mrs. Lane cured the default set forth in that pre-acceleration notice prior to acceleration of the note. (JA 6).
[2] BWW Law Group, LLC acts as attorney for Equity Trustees.

(the “First Action”), seeking an injunction to halt the foreclosure scheduled for January 4, 2017 at 10:30 a.m. (JA 10, 45-49, 68-72). On January 3, 2017, the trial court conducted a hearing on the Petition and, on January 10, 2017, entered an Order denying the Petition (the “Injunction Order”). (JA 10, 50-51, 78, 183-84). Mrs. Lane did not appeal the Order denying the Petition. (JA 68-209).

On September 15, 2017, Mrs. Lane filed her Complaint against Bayview, Equity Trustees, and Mr. Von Allman, seeking (1) rescission of a foreclosure sale, trustee’s deed, and subsequent deed to Mr. Von Allman as to all appellees and (2) compensatory damages against Bayview only. Compl. *passim.* Mrs. Lane sought and obtained leave to file her Amended Complaint, which was deemed filed as of November 20, 2017. (JA 1-57). On December 11, 2017, Bayview filed a Demurrer and Plea of *Res Judicata* to the Amended Complaint, asserting, *inter alia*, that *res judicata* barred all of Mrs. Lane’s claims in the Amended Complaint. (JA 58-209). The Plea of *Res Judicata* included as its **Exhibit A** a complete copy of the court file for the First Action. (JA 68-209).

On February 12, 2018, the trial court heard oral argument on the Plea of *Res Judicata*, and at the conclusion of such argument, ruled that *res judicata* barred the Second Action as to Bayview. (JA 306, 318-21).

STANDARD OF REVIEW

The standard of review for each assignment of error in this appeal is *de novo* because the trial court granted Bayview's Plea of *Res Judicata*. *Caperton v. A.T. Massey Coal Co.*, 285 Va. 537, 548, 740 S.E.2d 1, 7 (2013) ("[w]hether Plaintiffs' Second Virginia Action is precluded by res judicata is a question of law that we review de novo."). The party "asserting the defense of res judicata-bar…must show by a preponderance of the evidence that the claim or issue should be precluded by the prior judgment." *Bates v. Devers*, 214 Va. 667, 671, 202 S.E.2d 917, 921 (1974).

AUTHORITIES AND ARGUMENT

Summary of Argument

The trial court improperly concluded that the Injunction Order precluded the relief sought in the Amended Complaint, necessarily finding that the First Action and the Amended Complaint arose from the same conduct, transaction, or occurrence and that the First Action resulted in a decision on the merits by a final judgment. Neither of the findings undergirding the trial court's decision that *res judicata* barred Mrs. Lane's Amended Complaint was correct. Because the Petition sought a temporary injunction, the denial of the Petition, as a matter of law, cannot establish claim preclusion to bar the relief sought in the Amended Complaint. *See* 2

Friend's Virginia Pleading and Practice § 33.02 (2018). Even if this Court found that the trial court concluded the First Action with a Final Order following a full hearing on the merits, there is no claim preclusion because the Amended Complaint arises from separate and distinct conduct on the part of Bayview, readily divisible from conduct by BWW Law Group. The trial court also erred in its apparent finding that issue preclusion barred the relief sought in Count One of the Amended Complaint[3] because (1) the parties in the First Action and this case are not the same, and Bayview is not in privity with BWW Law Group; (2) the issues of fact in this case were not actually litigated in the First Action; (3) the issues of fact relating to pre-acceleration notice were not essential to the trial court's Injunction Order; and (4) there was no valid, final judgment entered against Mrs. Lane in the First Action.

1. There Is No Claim Preclusion Because the First Action Merely Sought a Temporary Injunction, the Denial of Which Cannot Preclude the Relief Sought in the Second Action (Assignments of Error 1 and 2)

The Amended Complaint sought damages and equitable relief arising out of *the completed foreclosure* by Bayview. In contrast, the Petition sought a temporary injunction to stop *a prospective foreclosure* and improperly named BWW Law Group as the respondent. Under Virginia law, "[t]emporary

[3] Bayview's Plea in Bar only sought the application of issue preclusion to Count One of the Amended Complaint.

injunctions remain in force only until a preliminary evaluation of the rights of the parties and the need for the injunction can be determined…They do not conclude the rights of the parties." 2 Friend's Virginia Pleading and Practice § 33.02 (2018). Because the Petition sought a temporary injunction, the Injunction Order cannot form the basis for a finding of claim preclusion to bar the relief sought by Mrs. Lane in the Second Action.

The Petition contains indicia of a request for temporary injunctive relief because it (1) sought to stop the foreclosure sale scheduled for January 4, 2017, not a permanent bar against foreclosure; and (2) focused on preserving the current state of affairs, not obtaining permanent relief against collection action. 1 Virginia Civil Procedure § 3.3 (2018); 1 Virginia Remedies § 51-5 (2018). In classifying the Petition as seeking temporary relief as opposed to final relief, the proof is in the pudding, i.e. an Order granting the Petition would not have permanently "altere[d] the legal relations of [Mrs. Lane and BWW Law Group]," rather would have maintained their existing status as owner of the residence and law firm seeking to enforce its client's claimed security interest, respectively. 1 Virginia Remedies § 51-5 (2018).

Likewise, the conduct of the proceedings in the First Action indicates that the trial court treated the Petition as seeking a temporary injunction:

1. The trial court conducted its hearing *on the second day after the filing of the Petition that was not a Saturday, Sunday, or legal court holiday*;

2. The Petition and Summons were served on BWW Law Group on the same day as the hearing; and

3. The trial court entered the Injunction Order even though BWW Law Group never filed a responsive pleading to the Petition.

Virginia circuit courts do not conduct a full trial on the merits on the second business day after the filing of a petition for injunctive relief, or the same day the petitioner serves the petition and summons on the respondent. Circuit courts proceed to trial on the merits once the parties are at issue, and this Court has repeatedly recognized that "[e]very litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense….The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935) (internal citations omitted); *see also* 1 Bryson on Virginia Civil Procedure § 8.07 (2018) ("[w]hen the defendant has put in his response or the time allowed therefore has expired, the parties are at issue, or more properly the cause is matured"). BWW Law Group never filed a responsive pleading to the Petition, so Mrs. Lane and BWW Law Group were never at issue in the First Action, and that

cause never matured. Nonetheless, Bayview contends that the January 3, 2017 hearing on the Petition constituted a full trial on the merits.[4]

Mrs. Lane could not have sought damages or rescission based on a wrongful foreclosure sale in the First Action. Instead, she sought a temporary injunction to stop the January 4, 2017 foreclosure sale. The trial court's decision regarding Mrs. Lane's Petition could not fully adjudicate her legal rights as to foreclosure by Bayview:

> A temporary injunction allows a court to preserve the status quo between the parties while litigation is ongoing *Iron City Sav. Bank v. Isaacsen,* 158 Va. 609, 625, 164 S.E. 520, 525 (1932); *Claytor v. Anthony*, 56 Va. (15 Gratt.) 518, 527 (1860) (monographic note) ("[T]he proper purpose of [a temporary] injunction [is] to preserve the present status until a full hearing on the merits shall be had."). Granting or denying a temporary injunction is a discretionary act arising from a court's equitable powers. *See Manchester Cotton Mills v. Town of Manchester*, 66 Va. (25 Gratt.) 825, 827 (1875).

Commonwealth ex rel. Bowyer v. Sweet Briar Inst., 2015 Va. Unpub. LEXIS 22, *3, Record No. 150619 (2015). This Court approved of the following

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[4] In opposing Mrs. Lane's Petition for Appeal, Bayview argues that Mrs. Lane could have obtained more time to litigate in CL1600991-00 by filing the Petition sooner or obtaining a hearing date after January 3, 2017. This argument ignores reality. The foreclosure sale was not advertised until December 14, 2017, and Equity Trustees did not mail notice of that sale to Mrs. Lane until December 19, 2017, at the earliest. (JA 117, 147-172). Also, seeking a hearing after the completion of the foreclosure sale would have mooted the purpose of filing the Petition, i.e. obtaining a temporary reprieve from foreclosure.

encapsulation of claim preclusion: "'[t]he law should afford one full, fair hearing relating to a particular problem – but not two." *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 143, 795 S.E.2d 887, 890 (2017) (quoting Kent Sinclair, Guide to Virginia Law & Equity Reform and Other Landmark Changes § 11.01, at 246 (2006). Virginia law recognizes that temporary injunction proceedings do not constitute full trials on the merits, and, therefore, rulings regarding temporary injunctions are not final adjudications of the rights of the parties involved. Mrs. Lane never received her "one full, fair hearing" regarding the foreclosure process, so the trial court's ruling improperly deprived her of her day in court by barring the claims in the Second Action. *Funny Guy*, 293 Va. at 143, 795 S.E.2d at 890.

2. There is No Claim Preclusion Because There is No Final Order in the First Action (Assignments of Error 1 and 2)

Claim preclusion does not apply to bar the relief sought in the Amended Complaint because there was no final judgment on the merits in the First Action. The Injunction Order contains findings and states that "the Plaintiff's Petition is Denied." Jan. 10, 2017 Order. It does not enter judgment in favor of BWW Law Group, it does not dismiss Mrs. Lane's Petition with prejudice, and it does not contain any language to indicate that it is a Final Order. It does state "[t]his matter is ended" but Mrs. Lane submits that this is not sufficient to render the Injunction Order final. Jan. 10, 2017 Order. In effect,

the Order denied a *pro se* petition for temporary injunctive relief and nothing more. In this regard, the facts of this case are analogous to *Scales v. Lewis*, 261 Va. 379, 541 S.E.2d 899 (2001). In *Scales*, the defendant in a personal injury action sought and obtained dismissal on a plea of *res judicata* in the trial court based on dismissal of a prior subrogation action brought in the name of the plaintiff by her insurer. *Scales*, 261 Va. at 381-382, 541 S.E.2d at 900. Rather than entering judgment for the defendant, the Court in the prior subrogation action marked the case "DISMISSED." *Id*. at 382, 541 S.E.2d 900. In reversing the trial court's dismissal on *res judicata* grounds, the Virginia Supreme Court found that "the record in the prior matter shows that the general district court did not enter a valid, final judgment against" the plaintiff, so the "trial court erred in ruling that [the plaintiff's] action against [the defendant] is barred by *res judicata* and collateral estoppel. *Id.* at 383, 541 S.E.2d at 901.

The Injunction Order is analogous to an order sustaining a demurrer but not dismissing the case. "An order that merely sustains a demurrer is not a final order; to be final, it must go further and dismiss the case." 1-12 Bryson on Virginia Civil Procedure § 12.01 (2017); *see also Bibber v. McCreary*, 194 Va. 394, 395, 73 S.E.2d 382, 383 (1952). Because the Injunction Order did not enter final judgment in favor of BWW Law Group or dismiss Mrs. Lane's

Petition, it is not a final order, creating an absolute bar to Bayview's request for dismissal on grounds of *res judicata*. As discussed above, the Court's decision on Mrs. Lane's request for a temporary injunction against BWW Law Group could not fully and finally adjudicate her legal rights as to foreclosure by Bayview. In essence, the Injunction Order amounts to an advisory opinion because the determination that Mrs. Lane failed to name the proper party to be enjoined means that the remaining "findings" in the Injunctive Order are superfluous. The failure to name the proper party in the First Action rendered moot the "findings" regarding the propriety of Bayview's foreclosure action, and Virginia "courts are not constituted…to render advisory opinions, to decide moot questions, or to answer inquiries which are merely speculative." *Fairfax v. Shanklin*, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964).

Moreover, the Injunction Order is void as to finality because BWW Law Group and Mrs. Lane were not at issue when the Court entered that Order, and the only pleading before the Court was Mrs. Lane's Petition. BWW Law Group never filed a written response to the Petition. Mrs. Lane had no written notice of BWW Law Group's defense to the petition until she appeared at Court on January 3, 2017, and the trial court accepted evidence proffered by BWW Law Group's counsel. Under Virginia law, the Injunction Order is void as to its finality: "[p]leadings are as essential as proof, the one being

unavailing without the other. A decree cannot be entered in the absence of pleadings upon which to found the same, and if so entered it is void." *Potts*, 165 Va. at 207, 181 S.E. at 525 (internal citations omitted).

Bayview attempts to differentiate *Scales* and *Potts* through misplaced reliance on *McLane v. Vereen*, 278 Va. 65, 677 S.E.2d 294 (2009). The procedural oddity of the First Action readily distinguishes this appeal from *McClane*, a case in which the parties stipulated to a consent decree that later resulted in imposition of fines for continued zoning violations. Unlike *McClane*, the First Action involved a supposed trial on the merits two business days after the filing of the Petition and absent the filing of any responsive pleading by BWW Law Group. Further, *McLane* addressed the finality of a consent decree in an action seeking, *inter alia*, permanent injunctive relief, not a petition filed to seek only temporary injunctive relief. *Id.* Because there was no Final Order in the First Action, the trial court erred in finding that claim preclusion barred the Amended Complaint.

3. There is No Claim Preclusion Because the Second Action Arises from Different Conduct than the Conduct Underlying the First Action (Assignments of Error 1 and 2)

Even if this Court found that the trial court concluded the First Action with a Final Order following a full hearing on the merits, there is no claim preclusion because the Amended Complaint arises from separate and

distinct conduct on the part of Bayview, readily divisible from conduct by BWW Law Group. As an initial matter, Bayview and BWW Law Group each played distinct roles in the events before, during, and after the foreclosure sale of the residence. Bayview and Mrs. Lane shared a contractual relationship as creditor and debtor, respectively, in which BWW Law Group had no involvement. Under that contractual relationship, Bayview and Mrs. Lane shared rights and duties flowing from the operative note and deed of trust and Virginia law governing those agreements. BWW Law Group shared none of those rights and duties because it was a stranger to the note and deed of trust. Further, BWW Law Group's actions related to the residence occurred only after Bayview purported to accelerate the note, the action underlying Count One of the Amended Complaint, and the remaining claims in the Amended Complaint involved conduct attributable to Bayview, not BWW Law Group.

Unlike *Funny Guy*, this appeal involves trial court application of claim preclusion to bar Mrs. Lane's claims against a party uninvolved in the First Action arising out of separate and distinct conduct. Therefore, the Amended Complaint presents no risk of "subject[ing] the parties – and the judicial system – to two separate lawsuits to resolve one underlying dispute." *Funny Guy*, 293 Va. at 141, 795 S.E.2d at 889. The application of claim preclusion

by the trial court violates the principle that "[a] party may not plead res judicata unless he himself would have been bound had the judgment been adverse to him." 1 Bryson on Virginia Civil Procedure § 12.04 (2018). If the trial court found for Mrs. Lane on the Petition, transferring the application of that ruling to Bayview would violate the tenets of fairness underlying the judicial system. Likewise, allowing the denial of the Petition to shield Bayview from claims arising out of its separate and distinct conduct deprives Mrs. Lane of her day in court based on that conduct.

4. There Is No Claim Preclusion Because the Cause of Action in the Second Action Differs from the Lack of a Cause of Action in the First Action (Assignments of Error 1 and 2)

The Amended Complaint sought damages and equitable relief arising out of Bayview's conduct before, during, and after the foreclosure sale. In contrast, the Petition sought a temporary injunction to stop a *prospective foreclosure* by BWW Law Group, which, as the trial court recognized, was not the correct party to enjoin from foreclosing on the residence. (JA 183). In Virginia, "a cause of action is the operative facts which give rise to [a] right of action." *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983). The operative facts giving rise to the Amended Complaint do not involve BWW Law Group, hence BWW Law Group's absence as a defendant in the Amended Complaint. Moreover, Bayview's course of conduct

continued after the filing of the Petition and the January 3, 2017 hearing, and Virginia has recognized the existence of "situations where multiple causes of action may be found to inhere in a transaction or course of conduct," including "some claims pursued in equity for injunctive relief where a legal claim for damages is later brought." 1-14 Virginia Civil Procedure § 14.11 (2017) (citing *Wright v. Castles*, 232 Va. 218, 349 S.E.2d 125 (1986)).

Prior to the foreclosure, Mrs. Lane lacked a legal right to seek injunctive relief against BWW Law Group[5], and she never sought injunctive relief against Bayview and Equity Trustees before the foreclosure. Mrs. Lane only sought relief against Bayview after the foreclosure, based on Bayview's course of conduct in the foreclosure process, not the conduct of BWW Law Group. Therefore, the "operative facts" giving rise to the Amended Complaint only exist with respect to BWW Law Group because there are simply no "operative facts…giv[ing] rise to [a] right of action" against BWW Law Group. *First Va. Bank-Colonial*, 225 Va. at 81, 301 S.E.2d at 13. The absence of a cause of action in the First Action is fatal to Bayview's attempt to bar the Amended Complaint through claim preclusion. The trial court found that Mrs.

[5] BWW Law Group contended in response to the Petition that it was not properly named as a defendant, and the trial court adopted that contention by entering the Injunction Order. Essentially, the trial court found that Mrs. Lane possessed no cause of action as to BWW Law Group to give rise to supposed right of action asserted in the Petition.

Lane improperly named BWW Law Group, eliminating the possibility of a "set of operative facts" as to BWW Law Group. *Id.* Therefore, the cause of action at issue in the Amended Complaint necessarily differed from the absent cause of action in the First Action.

5. There Is No Claim Preclusion Because Bayview Failed to Establish Privity with BWW Law Group (Assignments of Error 1 and 2)

Even if the Injunction Order constituted a final judgment on the merits, there is no claim preclusion because Bayview failed to establish privity with BWW Law Group. "The preclusive effect of a judgment upon a cause of action *arises only* where the parties to the first suit (or their privies) are the same as the parties to the second (or their privies)." 1-14 Virginia Civil Procedure § 14.11 (2017) (emphasis supplied).

For claim preclusion to bar the Amended Complaint, Bayview was required to establish that it was in privity with BWW Law Group as to the Injunction Order in the First Action. "The touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal right." *State Water Control Bd. v. Smithfield Foods*, 261 Va. 209, 214, 542 S.E.2d 766, 769 (2001). BWW Law Group and Bayview had no identity of interest in the First Action because the Court expressly found that "Plaintiff has failed to

name Equity Trustees, LLC as a party to this action," and Bayview foreclosed on the residence through Equity Trustees, not BWW Law Group. There was no evidence before the trial court to establish the existence of a legal relationship between Bayview and BWW Law Group, other than the assertions of counsel for Bayview in Bayview's responsive pleading to the Amended Complaint. In any event, BWW Law Group was not the proper party to be named in the First Action, so it could not assert a legal right for Bayview in the context of that case.

This Court demands a "careful examination into the circumstances of each case" in the "determination of just who are privies" for claim preclusion purposes. *Nero v. Ferris*, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981) (citation omitted). Bayview repeatedly contends that Mrs. Lane should not be permitted multiple challenges to the foreclosure sale, but neither Bayview, Mr. Von Allman, or Equity Trustees was forced to defend against Mrs. Lane's Petition in the First Action. The trial court conducted no "careful examination" before finding privity and ruling that claim preclusion barred the Second Action as to Bayview. The implicit finding of privity by the trial court was error, and its judgment must be reversed.

6. Bayview Failed to Establish Issue Preclusion (Assignments of Error 1 and 2)

The trial court erred in its apparent finding that issue preclusion barred

the relief sought in Count One of the Amended Complaint because (1) the parties in the First Action and this case are not the same, and Bayview is not in privity with BWW Law Group; (2) the issues of fact in this case were not actually litigated in the First Action; (3) the issues of fact relating to pre-acceleration notice were not essential to the trial court's Injunction Order; and (4) there was no valid, final judgment entered against Mrs. Lane in the First Action.

In Virginia,

> The doctrine of collateral estoppel precludes the same parties to a prior proceeding from litigating in a subsequent proceeding any issue of fact that was actually litigated and essential to a final judgment in the first proceeding. The doctrine applies even when the subsequent proceeding involves a different claim for relief, but: (1) the parties to the two proceedings must be the same; (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding; (3) the issue of fact must have been essential to the prior judgment; and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.

1-14 Virginia Civil Procedure § 14.11 (2017). The trial court incorrectly found that Bayview established all four elements necessary to invoke issue preclusion, and its judgment must be reversed.

A. Bayview Failed to Establish Privity with BWW Law Group

For the same reasons set forth above in paragraph 5 of her argument, Bayview failed to establish privity with BWW Law Group. Accordingly, the

trial court erred to the extent it found that issue preclusion applied to bar Mrs. Lane from prosecuting Count One of the Amended Complaint.

B. The Issues of Fact Pertaining to Bayview's Compliance with the Pre-Acceleration Notice Requirements of the Deed of Trust Were Not Actually Litigated in the First Action

Because the Court entered the Injunction Order in connection with a petition for a temporary injunction against BWW Law Group, Mrs. Lane had no opportunity to fully and fairly litigate Bayview's compliance with paragraph 17 of the deed of trust. BWW Law Group never filed a responsive pleading to the Petition, and Mrs. Lane never had the opportunity to depose or serve any written discovery on BWW Law Group, much less Bayview. The trial court nonetheless held that actual litigation of the pre-acceleration notice issue had occurred in the First Action. Paragraph 4 of the Injunction Order provides "Bayview Loan Servicing, LLC sent the Plaintiff a pre-acceleration notice in compliance with Paragraph 17 of the Deed of Trust." Jan. 10, 2017 Order.[6] However, the trial court reached this conclusion after conducting a brief evidentiary hearing on January 3, 2017, prior to any discovery by either

[6] It is true that this Court found issue preclusion in an action at law based on a trial court's previous order denying a temporary injunction in *Patterson v. Saunders*, 194 Va. 607, 74 S.E.2d 204 (1953). However, the injunction suit defendants in *Patterson* actually answered the bill in chancery, so the parties were at issue at the time of the order denying the requested injunction. Additionally, the issue of title deemed preclusive was an essential issue in the injunction suit.

Mrs. Lane or BWW Law Group. Moreover, the trial court entered the Injunction Order even though BWW Law Group and Mrs. Lane were never at issue on any of the issues raised in Petition and after finding that BWW Law Group was not a proper party to the First Action. This Court has held that "a matter not in issue cannot be 'actually litigated.'" *Snead v. Bendigo*, 240 Va. 399, 402, 397 S.E.2d 849, 851 (1990). Because the parties in the First Action were not at issue, the language in the Injunction Order related to the pre-acceleration notice should have no bearing on Mrs. Lane's claims in the Amended Complaint.

C. The Court's Assessment of the Disputed Pre-Acceleration Notice Was Not Essential to the Injunction Order

The trial court found in the Injunction Order that Mrs. Lane named the incorrect party in her Petition. This defect alone was sufficient for the trial court to deny the request for a temporary injunction. Therefore, the subsequent findings by the trial court which relate to the propriety of the foreclosure process were not essential to the denial of the injunction. Because Bayview's compliance with the pre-acceleration requirement of the deed of trust was not essential to the Injunction Order, Mrs. Lane's claim in Count One of her Amended Complaint is not barred by issue preclusion. *See Snead v. Bendigo, supra*; *Bates v. Devers*, *supra*.

D. There Was No Valid, Final Judgment Entered Against Lane in the First Action

As set forth above, because Bayview failed to establish that the Injunction Order constitutes a valid, final judgment entered against Mrs. Lane, there can be no issue preclusion.

CONCLUSION

WHEREFORE, Mrs. Lane prays that the Supreme Court of Virginia reverse the April 26, 2018 Order and May 14, 2018 Order of the trial court and remand the Second Action to the trial court for trial on the Amended Complaint.

Respectfully submitted,

GLORIA B. LANE

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CERTIFICATE

Pursuant to Rule 5:26(h) and 32(a)(3)(i) of the Rules of the Supreme Court of Virginia, counsel for the Appellant, Gloria B. Lane, certifies that on January 29, 2019, the undersigned counsel:

1. Complied with the requirements of Rules 26 and 32 of the Rules of the Supreme Court of Virginia with regard to the filing and service of the Opening Brief of Appellant and the Joint Appendix;

2. Caused an electronic version, in Portable Document Format (PDF), of the Opening Brief of Appellants signed by counsel of record for the Appellant and of the Joint Appendix to be filed with the Clerk of this Court by electronic transmission in accordance with the VACES Guidelines and User's Manual using the Virginia Appellate Court eBriefs System;

3. Caused to be served on opposing counsel copies thereof by e-mail transmission to said counsel's e-mail address as stated below;

4. Caused to be filed in the Office of the Clerk of this Court three (3) printed copies of the Opening Brief of Appellant, along with three (3) printed copies of the Joint Appendix;

5. Caused to be served on opposing counsel a printed copy of said Opening Brief of Appellant and a printed copy of the Joint Appendix by mailing a true copy of the said Opening Brief and Joint Appendix, postage pre-paid, by Priority Mail counsel for Appellees as set forth below:

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6. This Opening Brief of Appellant does not exceed fifty (50) pages, excluding its cover page, table of contents, table of authorities, and certificate.

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