In The

Supreme Court of Virginia

RECORD NO. 180979

GLORIA B. LANE,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLEE

Richard E. Craig (VSB No. 1041)
Amy L. Bradley (VSB No. 80155)
BRIGLIA HUNDLEY, P.C.
1921 Gallows Road, Suite 750
Tysons Corner, Virginia 22182
Telephone: (703) 883-0880
Facsimile: (703) 883-0899
rcraig@brigliahundley.com
abradley@brigliahundley.com

Counsel for Appellee – Eric Charles Von Allman

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

QUESTION PRESENTED 3

ARGUMENT 3

I. Standard of Review 3

II. The Circuit court properly held that the Plaintiff's claims were barred by *res judicata* due to claim preclusion 3

a. The Plaintiff's claims share the same cause of action as the previous suit, as they arose from the same transaction or occurrence 5

b. A final order was entered on the previous suit when the judge, after a full hearing, denied the Plaintiff's petition and dismissed the case 9

c. The parties are all privies of each other because they are defending the same legal rights 12

III. The Court properly held that the plaintiff's claims were barred by *res judicata* due to issue preclusion 15

CONCLUSION 17

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page(s)

CASES

Asterita v. Ghent Dev. Partners,
No. CL07-6408, 2009 Va. Cir. LEXIS 23 (Cir. Ct. Jan. 6, 2009).....5

David White Crane Serv. v. Howell,
282 Va. 323, 714 S.E.2d 572 (2011) 3

First Va. Bank-Colonial v. Baker,
225 Va. 72, 301 S.E.2d 917 (1974) 5, 7

Funny Guy, LLC v. Lecego, LLC,
293 Va. 135, 795 S.E. 2d 887 (2013) 6, 7

Lee v. Spoden,
776 S.E.2d 798 (Va. 2015) 4

Potts v. Mathieson Alkali Works,
165 Va. 196, 181 S.E. 521 (1935) 11, 12

Raley v. Haider,
747 S.E.2d 812 (Va. 2013) 13

SAF Funding, LLC v. Taylor,
No. CL15-3022, 2017 Va. Cir. 316 (Portsmouth Cir. Ct. Oct. 27, 2017)...5, 6

Scales v. Lewis,
261 Va. 379, 541 S.E.2d 899 (2001) 10

Smith v. McLaughlin,
769 S.E.2d 7 (2015) 3

State Water Control Bd. V. Smithfield Foods,
261 Va. 209, 542 S.E.2d 766 (2001) 12, 13, 14

STATUTE

Va. Code Ann. § 8.01-272 4

Va. Code Ann. § 8.01-281 4

Virginia Civil Procedure § 14.11 15

RULES

Va. Sup. Ct. R. 1:6 .....*passim*

Va. Sup. Ct. R. 1:6(a).....7, 8

Va. Sup. Ct. R. 5:28 1

OTHER AUTHORITY

2 Friend's Virginia Pleading and Practice § 33.02 3

BRIEF OF ERIC CHARLES VON ALLMAN IN OPPOSITION TO THE PETITION FOR APPEAL

Pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, Eric Charles Von Allman ("Von Allman"), by counsel, respectfully submits this Brief of the Appellee in response to the Opening Brief filed by Gloria B. Lane ("Lane"). For the reasons set forth below Von Allman respectfully requests that Gloria Lane's Appeal be dismissed.

INTRODUCTION

This appeal arises from Lane's ongoing challenges to the foreclosure sale of a residential property located at 761 W 5th St., Chase City, Virginia, which was initiated by Appellee, Bayview Loan Servicing, LLC ("Bayview"), and completed on January 4, 2017 by Equity Trustees, Substitute Trustee ("Equity Trustees"). Lane filed her Petition for Injunction (CL16 – 991) on December 28, 2016 in the Circuit Court for Mecklenburg County which was set for hearing on January 3, 2017, the day prior to the date set for the foreclosure sale. At the hearing on the merits the court dismissed her petition with prejudice.

In the subsequent action before the same court (CL17 – 719) the subject of this appeal, Lane again challenged the validity of the January 4, 2017 foreclosure. Considering the Demurrer and Plea of *Res Judicata* filed by Defendant, Bayview, the court ruled that Lane's claims are barred by *res judicata* as the prior litigation, by final order, conclusively established that Bayview acted appropriately in the

foreclosure and confirmed its validity. In this appeal, Lane assigns a number of errors and seeks to overturn the court's ruling and to have the matter remanded for trial on the merits

STATEMENT OF THE CASE

Lane filed her Complaint in CL17 – 719 against Bayview, Equity Trustees, and Appellee, Eric Charles Von Allman ("Von Allman"), the purchaser at foreclosure, on September 15, 2017 in the Circuit Court for Mecklenburg County, and an Amended Complaint November 20, 2017. On December 11, 2017 Bayview filed its Demurrer and Plea of *Res Judicata*. The court heard arguments from both parties on the Plea on February 12, 2018 and found that *res judicata* barred Lane's suit, that the Demurrer should be dismissed as moot and that Lane's Amended Complaint should be dismissed with prejudice. On May 14, 2018, the trial court entered its Final Order finding that the Plea of *res judicata* precluded Lane's suit against Bayview, Equity Trustees, Trustee and Von Allman, and dismissing the Amended Complaint with prejudice as to those parties. Lane filed her Notice of Appeal on May 11, 2018, and an Amended Notice of Appeal on May 25, 2018.

The record reveals that on January 3, 2017, Lane and BWW Law Group, as counsel for Equity Trustees, both presented documentary evidence and arguments bearing on the validity of the foreclosure. The court, after hearing arguments and

viewing the evidence, entered its Final Order on January 10, 2017, denying the petition.

QUESTION PRESENTED

1. Did the Circuit Court correctly conclude that Lane's challenges to the validity of the Foreclosure are barred by *res judicata*?

ARGUMENT

I. Standard of Review.

A circuit court's decision to sustain a plea in bar is reviewed under the *de novo* standard where "[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law." *Smith v. McLaughlin*, 769 S.E.2d 7, 12 (2015) (quoting *David White Crane Serv. v. Howell*, 282 Va. 323, 327, 714 S.E.2d 572, 575 (2011)).

II. The circuit court properly held that the Plaintiff's claims were barred by *res judicata* due to claim preclusion.

Lane initiates her discussion of whether claim preclusion bars her claims by interjecting her view that on January 3, 2017 she was simply seeking a temporary injunction to stop a prospective foreclosure. She then proceeds to cite 2 Friend's Virginia Pleading and Practice § 33.02 (2018) stating that "temporary 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." She attempts to buttress her argument with the proposition that she was

dealing with a "prospective foreclosure" on January 3, 2017 and a completed foreclosure in the case under appeal here, the implication apparently being that a prospective foreclosure would only warrant a temporary injunction. What is missing from Lane's lengthy explanation is her identification of any item, element, statement or other indication in the record of the January 3, 2017 proceeding that she was seeking anything other than a permanent injunction.

While her treatise on injunctions is interesting and undoubtedly accurate, it is misplaced. At the hearing in the case at hand, the court initiated that discussion with counsel, and counsel pointed to nothing indicating that Lane, on January 3, 2017, sought a temporary injunction and not a permanent injunction.

Lane then turns to the topic of claim preclusion. Claim preclusion is the subject of Va. Sup. Ct. R. 1:6 promulgated in 2006 by this Court to bring Virginia's application of the doctrine of *res judicata* in line with the majority of other states and the federal judiciary. Bayview, in its Demurrer and Plea of *Res Judicata*, filed in CL17 – 719, succinctly and correctly outlined the Court's current view of the doctrine and preclusive effects. Bayview cites *Lee v. Spoden*, a 2015 case, as setting out the four (4) preclusive effects contemplated in Rule 1:6 which are grouped into two (2) categories: claim preclusion and issue preclusion. *Lee v. Spoden*, 776 S.E.2d 798 (Va. 2015). The rule adopts a relatively simple transactional test that the legislature has incorporated into Va. Code §§ 8.01- 272 and 8.01- 281 regulating the

pleading of actions. Relying on Virginia case law predating Rule 1:6 must be done with care. Presuming the presence of a final judgment, the test for claim preclusion is whether the subsequent case involves identified conduct, a transaction or an occurrence and parties (or the privies) of the prior case – no more, no less. Case law at odds with this test can no longer be regarded as good law. The rule as interpreted and applied in *Asterita v. Ghent,* a 2009 circuit court case illustrates that the claims and rights asserted in the two cases need not be the same or even similar. *Asterita v. Ghent Dev. Partners*, No. CL07-6408, 2009 Va. Cir. LEXIS 23 (Cir. Ct. Jan. 6, 2009).

a. <u>The Plaintiff's claims share the same cause of action as the previous suit, as they arose from the same transaction or occurrence.</u>

Lane contends that her cause of action (operative facts which give rise to a right of action citing *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 917 (1974)) did not exist until Bayview completed the foreclosure of the Lane residence. She argues that the causes of action in the two cases are not the same, and presumably, she is contending that the bar only applies if the causes are the same. The argument is directly contrary to Rule 1:6 and the holding in *Asterita*. No. CL07 – 6408, 2009 Va. Cir. LEXIS 23. Lane goes on to cite *SAF Funding, LLC v Taylor*[1]

[1] SAF Funding is a circuit court case which is factually quite unlike the case at hand. The subject matter was a structured settlement sanctioned by the trial court, but which was later modified by successive acts of, or transactions between the parties, each giving rise to new facts.

for the correct proposition that the doctrine of *res judicata* is inapposite where subsequent to the [first] judgment, facts have arisen which may alter the rights of the litigants. *SAF Funding, LLC v. Taylor*, No. CL15-3022, 2017 Va. Cir. 316 (Portsmouth Cir. Ct. Oct. 27, 2017). Lane may be correct with respect to subsequent facts which materially change the *conduct, transaction or occurrence* arising subsequent to the first case, but her argument misses the mark entirely. The lower court found that the conduct, transaction or occurrence in the subsequent case then at bar, were the same as those in the previous case decided against Lane (i.e. the validity of the foreclosure). The lower court found this point to be dispositive, referencing the findings of fact in the previous case "paragraph four on page two, Bayview Loan Servicing LLC sent the plaintiff a pre-acceleration notice in compliance with paragraph 17 of the deed of trust." R. at 306. Lane's complaint rests entirely on the validity of the pre-acceleration notice. Lane produced no evidence or cogent argument that there were subsequent facts which invalidate the pre-acceleration notice or the foreclosure.

Lane attempts to distinguish this matter from *Funny Guy, LLC v. Lecego, LLC,* 293 Va. 135, 141, 795 S.E. 2d 887, 889 (2013) by pointing out that, unlike the parties in *Funny Guy*, not all parties were present in the first case. Lane then states that *res judicata* is only appropriate if the party would have been bound by the first judgement. This point goes directly against Lane's argument, since the trial court's

decision regarding the validity of the pre-acceleration notice and foreclosure is the only relevant issue, and its holding did in fact effect all present defendants' rights to sell or purchase the property. Her additional argument that, unlike *Funny Guy*, the second action arises out of separate and distinct conduct is not convincing, especially since she follows it with an assertion that there is 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. This once again states exactly the opposite of what Lane is attempting to prove. The underlying dispute in this case is the validity of the pre-acceleration notice and foreclosure. Regardless of the fact that the foreclosure has now occurred, the dispute over its validity is exactly the same dispute the trial court heard in the first case.

Lane gratuitously cites *First Va. Bank – Colonial* for the proposition that "a cause of action is the operative facts which give rise to [a] right of action" and then attempts to tie the quotation to her contention that the causes of action in the two cases at issue are not the same. *First Va. Bank – Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 917 (1974). In that case the court was simply distinguishing "cause of action" from "right of action". The court was not addressing or discussing a test such as is set out in Rule 1:6(a). At the lower court's hearing on Bayview's plea of *res judicata*, after considerable dialogue with counsel for Lane and Bayview, the court found that Lane's pleadings including exhibits in the [first] action for injunctive

relief alleged and exhibited the same facts as were plead in the subsequent action under scrutiny here. The foreclosure occurring after the judgment produced no distinguishable facts. It appears that Lane is saying that in the first case she had a cause of action and a right of action for injunctive relief but no right of action for rescission or damages because the foreclosure had not yet occurred. However, after all is said, Rule 1:6(a) prescribes the definitive test, and it does not mention right of action.

Next, Lane argues that the causes of action are distinguishable on the basis that injunctive relief is equitable, and the damages sought in the second action, in part, sound in tort. The facts giving rise to the cause of action derive from the identified conduct, transaction or occurrences complained of in the first case did not materially change. Seeking to enjoin a foreclosure and subsequently seeking to rescind the same foreclosure and seeking damages arising from the same foreclosure share the same cause of action.

In Summary, the question is not when Lane's rights of action arose, but, rather, whether the identified conduct (acts of Bayview) or transactions or occurrences (a set of proceedings in one foreclosure) from which the right to injunctive relief arose were the same as those giving rise to the claims asserted in the present case. The lower court found that they were the same. Lane cites further material and cases which lend no merit to her argument. The lower court did not err.

b. <u>A final order was entered on the previous suit when the judge, after a full hearing, denied the Plaintiff's petition and dismissed the case.</u>

Lane next asserts that the order entered on January 10, 2017 in the first case (CL 16 – 991) is not a "final judgment on the merits" of the case and "does not enter judgment in favor of BWW Law Group". Lane continues that "it [the order] does not dismiss Lane's Petition with prejudice and does not contain any language to indicate that it is a Final Order." She then observes that the language "This matter is ended" is included in the order but suggests that the language is insufficient to indicate that the court intended the order to be a final order. While Lane and her counsel assert that the order was not final, they took a somewhat confusing and contradictory position in the circuit court proceedings. R. at 282. During the proceedings, Judge Nelson asked why Lane "took no steps at all for at least longer than 21 days" and did not file an appeal in the first action, but instead choose to "much later file a completely different action." R. at 281-82. Counsel's response was "[t]he clerk would not have accepted a filing in that case because according to the clerk's records, that matter had been ended." R. at 282.

Lane says that the order simply denied a *pro se* petition for emergency injunction and nothing further. That the petition was "*pro se*" is of no consequence. The petition sought injunctive relief on an array of grounds purportedly supported by a significant amount of documentary evidence. Lane presented testimony, and the court determined that the relief sought was unwarranted. The order denied

precisely the remedy sought by Lane and plainly was intended to put an end to the matter in so many words ("This matter is ended").

Cited by Lane is *Scales v. Lewis*, a 2001 subrogation case originally filed in General District Court by an insurer against an uninsured motorist seeking to recover its loss in covering property damage to its insured's automobile. *Scales v. Lewis*, 261 Va. 379, 541 S.E.2d 899 (2001). The matter was disposed of by the Court, not by rendering any judgment for either party, but by marking the Warrant in Debt "Dismissed". The insured then brought suit in the Circuit Court against the uninsured motorist for damages in excess those covered by her insurer. The defendant, uninsured motorist, plead *res judicata*. The Circuit Court denied the defendants' plea on the basis that the record below did not show any final judgment against the defendant. The ruling in *Scales* as to *res judicata* is consistent with the case at bar. The critical difference is that in the case at bar the record is replete, and the order is clearly a final order.

Completely changing direction, Lane then declares without any authority or support whatsoever, that the "January 10 order is analogous to an order sustaining a demurrer but not dismissing the case." A demurrer is typically filed when a complaint fails in some respect to state a viable cause of action. When a court sustains a demurrer, it's order normally grants leave to amend the complaint on terms determined by the court, if the court believes that there is, or could be, a cause of

action if the matter is property plead. When no such leave is granted, the plaintiff has 21 days within which to make a motion. In contrast, when a plea in bar on the basis of *res judicata* is sustained, Plaintiff still has the 21 days to file motions, but, in practice, there is little to be done other than to appeal. An order sustaining a plea in bar is *ipso facto* final.

Lane's next argument posits that Lane and BWW Law Group were never at issue, and the January 10 order is therefore void. In support, Lane cites *Potts v. Mathieson*, a case vastly different from the two cases under examination here, and seemingly unconnected with the topic of claim preclusion. She cites a passage from *Potts* relating to the necessity and purpose of pleadings in the framing the basis for a complaint and/or grounds for defense. *Potts v. Mathieson Alkali Works*, 165 Va. 196, 181 S.E. 521 (1935). Her point seems to be that because only Lane filed written pleadings in the first case, and BWW Law Group did not, the court had no basis on which to rule. BWW Law Group appeared at the hearing on January 3, 2017, two (2) business days after Lane filed her petition on December 29, 2016. It was over New Year's week-end. Because BWW Law Group filed no pleadings, Lane complains that she was not advised (in plain unambiguous language) as to how BWW Law Group intended to defend her petition for injunction. The contention is that without a full set of pleadings, quoting *Potts* "there can be no judgment entered on which to found [sic] the same." In response, Von Allman points out that such is

what happens in emergency hearings, and the passage cited is presented entirely out of context. If Lane's proposition is correct, there could never be a judgement order based on *ex parte* proof. Additionally, the statement by the court in *Potts*, asserting that pleadings are essential, was proffered while the court discussed its inability to grant recovery beyond what is asked for by a party. The only party asking for relief beyond dismissal of this action is Lane, and she filed pleadings and had the opportunity to present all of her claims and evidence in the prior hearing.

Lane's arguments in support of her assertion, that there is no final order in the first case, are entirely contrived and without merit. It is apparent that the lower court fully intended to sustain the plea of *res judicata* and entered a final order fully disposing of the case presented by Lane with all of its letters and exhibits.

c. <u>The parties are all privies of each other because they are defending the same legal rights.</u>

In Lane's view, admitting that the order in CL 16 – 91 (first case) was final for the sake of argument, there can be no claim preclusion because Bayview did not establish privity with BWW Law Group. First, Bayview was not a party to CL16 – 991. The sole defendant was BWW Law Group, which entity prevailed against Lane. The privity question arises when Bayview asserts it claim of *res judicata* against Lane in CL17 – 719 (second Case). It is not something that either Bayview or BWW Law Group establishes. It either exists or it does not. See *State Water Control Board v. Smithfield Foods, Inc.*, 542 S.E. 2d 766, 771 (Va. 2001) "Either

the parties share an identity of interest or they do not." Hypothetically, the party seeking claim preclusion under *res judicata* must be in privity with the party asserting a common and identical right or cause in the prior litigation. In this examination, Bayview is seeking claim preclusion based on a judgment order entered in favor of BWW Law Group before the same court.

Bayview addressed privity to the extent necessary in its Demurrer and Plea of *Res Judicata* in the second case. Acknowledging that Rule 1:6 specifically excludes privity from the scope of the rule, and leaves intact Virginia case law addressing the principle of privity.

Bayview relies on *Raley v. Haider,* a 2013 case, for the proposition that "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 party's right" quoting the 2001 case of *State Water Control Board*, Id. at page 769 citing numerous cases. Lane argues that BWW Law Group and Bayview had no identity of interest in that case because the court found that plaintiff (Lane) failed to name Equity Trustees, LLC as a party (in CL16 – 991) and Bayview foreclosed through Equity Trustees and not BWW Law Group. Lane does not explain how its failure to name a party could have any effect on privity existing between two other parties, one having prevailed against Lane in the first case and the other having prevailed against Lane in the second case on the basis of claim preclusion. Bayview

did not determine how, who, when or why Lane sued BWW Law Group in CL16 – 991.

Lane goes on to say that Bayview presented no evidence to establish a **legal** (emphasis added) relationship between Bayview and BWW Law Group as if a legal relationship somehow is determinative of privity. While the meaning of Lane's term "legal relationship" is not clear, there is a proprietary relationship between BWW Law Group and Equity Trustees. The determinate factor here is the identity of the interests of the parties. The term "interests" is broadly interpreted and includes a party's legal interests as is evident in the court's discussion in *State Water Control Board.* In the first case, BWW Law Group is sued by Lane seeking to enjoin it from proceeding with a foreclosure. In the second case, Lane is suing Bayview for causing the same foreclosure to be conducted on the basis of the same set of grievances in evidence in the first case. The interests are identical, that's what "establishes" the privity, and from the evidence presented and argument, it was not necessary that the court make a separate specific finding.

Lane's brief discussion of *Nero v. Ferris* adds nothing to the discussion. If Lane wishes to infer that the Court in CL17 – 779 did not use care in its examination of the circumstances, she should have made it an assignment of error. Lane is reaching here, and her argument is not persuasive.

III. **The Court properly held that the Plaintiff's claims were barred by *res judicata* due to issue preclusion.**

Lane by way of introduction to her final argument, trots out her standby saws and proceeds to abuse the dying horse:

1) the parties in CL16 – 991 and CL17 – 779 are not the same parties and Bayview is not in privity with BWW Law Group;
2) the factual issues in the present case were not actually litigated in the first case;
3) the factual issues related to the pre-acceleration notice were not essential to the trial courts January 10 order; and
4) there was no valid final order in CL 16-991.

She then moves on to quote a lengthy passage from "1-14 Virginia Civil Procedure § 14.11 (2017) which reiterates the four (4) elements of the Doctrine of Collateral Estoppel as to relitigating any fact that was essential to a final judgment in the first proceeding – even when the subsequent proceeding involves a different claim of relief." She then states that the trial court incorrectly found that Bayview established the elements necessary to invoke issue preclusion. Then she follows with her four reasons:

a. Bayview failed to establish privity with BWW citing her previous argument on the subject of privity. Lane says the court erred to the extent that it found that issue preclusion barred her from prosecuting Count One of her Complaint.

In response Von Allman again, points to Rule 1:6 which does not mention issue preclusion or collateral estoppel. The effect of collateral estoppel, then, is subsumed into the provisions of Rule 1:6. Had the Boyd-Gates Conference and the Rule Advisory Committee of the Judicial Council wished to carve out a special place for collateral estoppel or any of the other myriad of doctrines and formulations populating the historical course of *res judicata*, they would have so recommended. The court applied the mandate manifest in Rule 1:6 which radically changed the way *res judicata* is to be visualized and applied by Virginia Courts.

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 CL 16-991.

In response, Von Allman hastens to point out that Rule 1:6 prescribes no requirements that any particular set of facts or claims be actually litigated or that its application requires that discovery be initiated and completed. Collateral estoppel in the application of *res judicata* prior to Rule 1:6 did require the actual litigation of facts in the first case if they were to be precluded in the second case. Collateral

estoppel is not mentioned in Rule 1:6. The Court's object in adopting Rule 1:6 was to simplify and create certainty in the application of the doctrine. *Res Judicata* is sometimes referred to as the judicial reflection of public policy. Judicial economy and relieving parties and courts of the expense and weariness of duplicitous litigation is an underlying factor in the prominence of *res judicata* in our system.

c. The court's assessment of the disputed pre-acceleration notice was not essential to the January 10 order.

Rule 1:6 is not concerned with the essential elements of collateral estoppel in its application as earlier discussed.

d. There was no valid final judgment entered against Lane in CL 16-991.

Bayview established from an evidentiary standpoint that the January 10 order was a valid, final judgement entered against Lane. Moreover, the two cases were heard in the same court by the same jurist who found in the second case that the order was a valid final order. Lane's problems with the final order have been thoroughly examined. Let's give the horse a break.

CONCLUSION

Lane's argument, that the order in CL16 – 991 is not a final order, fails. The order may not be the most artful masterpiece of drafting, but it makes all the appropriate findings of fact and law and disposes of all of the claims before the court. It also contains the words, "This matter is ended" which can hardly be construed to

indicate the continuance of the case. Lane's counsel admits that he didn't believe that at the time of his retention he could get a filing past the clerk in CL16 – 991 because it was closed.

In Von Allman's responses to Lane's Authorities and Arguments, we point out that the Court, in 2004, in recognition that the numerous cases in the historical context present a difficult and confusing background for the application of the doctrine of *res judicata*, set up Rule 1:6 to allow for uniform application of *res judicata* going forward. The Court essentially commissioned the Boyd-Gates Conference and the Rule Advisory Committee of the Judicial Council to address the problem, recognizing in a practical sense, that the Court had lost its way, thereby undermining the basic purposes of *res judicata*. Rule 1:6 was the result of the Conference and the Committee's efforts, and the Court wasted no time in its adoption of the rule.

Change is seldom a smooth process and there are always elements in any societal group that resist, largely out of an unconscious ability to fully adapt and embrace the change. Rule 1:6 is so utterly simple and straight forward in its approach to what was previously a perplexing and confusing process, it perhaps is somewhat difficult to fully accept. That said, we need to be mindful that there is a significant body of case law preceding the adoption of Rule 1:6. There are numerous cases examining and ruling on the application of *res judicata* that are not specifically

overruled and appear to remain good law. These cases now must be viewed through the lens mechanism provided by Rule 1:6 and its straight forward transactional formula.

For example, Lane appears to continue to believe that the tortuous collateral estoppel analysis in determining a case's effect on issue preclusion remains a mandatory checkbox in determining whether *res judicata* is applicable. Not to say that collateral estoppel no longer has its place and purpose, but Rule 1:6 very clearly provides a new, far simpler and more practical means of determining whether *res judicata* is applicable in any particular instance, and it does not mention issue preclusion or collateral estoppel.

Lane's Authorities and Arguments miss the important point that the essential purpose of *res judicata* is to eliminate needless litigation, such as litigation over the validity of a foreclosure both before and after the sale based on identical facts and evidence. There is no basis on which this Court should grant Lane's appeal.

For the foregoing reasons, this Respondent respectfully requests that Lane's Appeal be dismissed.

Dated: February 19, 2019

Respectfully Submitted,

/s/ Richard E. Craig

Richard E. Craig (VSB No. 1041)
Amy L. Bradley (VSB No. 80155)
Briglia Hundley, P.C.
1921 Gallows Road, Suite 750
Tysons Corner, Virginia 22182
Email: rcraig@brigliahundley.com
abradley@brigliahundley.com
Telephone: (703) 883-0880
Facsimile: (703) 883-0899
Counsel for Eric Charles Von Allman

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2019, pursuant to Rule 5:26, three paper copies of the Brief of Appellee have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Brief of Appellee was served, via email, upon:

Drew D. Sarret (VSB No. 81658)
The Sarrett Law Firm, PLLC
513 Forest Avenue, Suite 205
Richmond, Virginia 23229
Email: drew@sarrettlawfirm.com
Phone: (804) 303-1951
Facsimile: (804) 250-6005
Counsel for Appellant, Gloria B. Lane

Christy L. Murphy (VSB No. 73253)
Bischoff Martingayle, PC
208 E Plume Street, Suite 247
Norfolk, Virginia 23510
Email: clmurphy@bischoffmartingayle.com
Phone: (757) 965-2793
Facsimile: (757) 440-3924
Counsel for Bayview Loan Servicing LLC

Robert R. Michael (VSB No. 74148)
BWW Law Group, LLC
8100 Three Chopt Road, Suite 240
Richmond, Virginia 23229
Email: Robert.Michael@bww-law.com
Phone: (804) 521-6121
Facsimile: (804) 521-6171
Counsel for Equity Trustees, LLC, as Substitute Trustee

/s/ Richard E. Craig
Richard E. Craig (VSB No. 1041)