

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Appellate Case No. 2016-001616

Alan F. McNeal and Adrienne McNeal, Appellants,

v.

Ocwen Loan Servicing, LLC and Nationstar Mortgage, LLC,

Of whom Ocwen Loan Servicing, LLC is the Respondent.

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

On or about May 16, 2006, Appellants Alan F. McNeal and Adrienne McNeal ("Appellants") executed a Promissory Note ("Note") in favor of Low Country National Bank in the original principal amount of \$417,000.00. (Am. Compl. ¶ 12). On that same date, Appellants executed a Mortgage ("Mortgage") to secure the repayment of the Note and pledged the property located at 25 Timber Trail, Beaufort, South Carolina ("Property") as collateral for the Note. (The Note and Mortgage will collectively be referred to as the "Loan"). In or around 2010, Appellants began to experience financial difficulties, which caused them to fall behind on the repayment obligations under the Loan. (Am. Compl. ¶ 26). On or about September 7, 2011, Appellants began the process of attempting to modify the Loan to try to avoid foreclosure of the Property. (Am. Compl. ¶ 28). During the modification process, servicing of the loan transferred to Ocwen Loan Servicing, LLC ("Respondent"). Respondent ultimately denied Appellant's request for a loan modification and commenced a foreclosure action ("Foreclosure Action") on or about February 16, 2011.

In June 2011, Appellants moved out of the Property in anticipation of the impending foreclosure sale. (Am. Compl. ¶ 35). In early 2012, when Appellants became aware that the property had not yet been sold, Appellants placed the Property on the market in an attempt to avoid foreclosure. (Am. Compl. ¶¶ 37, 38). In April 2012, Appellants received a cash offer from a purchaser for \$530,000.00 ("Offer"), and the Offer was submitted to Respondent for approval. (Am. Compl. ¶¶ 40, 41). Respondent ultimately refused to approve the Offer and the Offer was withdrawn by the potential purchaser in August 2012. (Am. Compl. ¶¶ 43, 44, 46).

Nationstar Mortgage ("Nationstar") began servicing the Loan and substituted in as the Plaintiff in the Foreclosure Action. (Am. Compl. ¶ 51). A foreclosure judgment ("Foreclosure

Judgment") was entered on Marcy 27, 2014 and the Property was sold at auction on May 5, 2014. (Am. Compl. ¶ 58). Nationstar waived its right to a deficiency judgment against Appellants and issued a Form 1099 for the forgiveness of the remaining debt. (Am. Compl. ¶¶ 59, 60).

I. The Trial Court correctly dismissed the cause of action for Fraud because Appellants failed to state sufficient facts to constitute a cause of action for Fraud. Additionally, Appellants claims are barred by *res judicata*.

Appellants first cause of action is for fraud. Rule 9(b) of the South Carolina Rules of Civil Procedure require that allegations of fraud be pled with particularity. To establish fraud, the following elements must be shown: (1) a representation; (2) the falsity of the representation; (3) the materiality of the representation; (4) knowledge of its falsity, or reckless disregard for its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). "Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." *Id.* Appellants' allegations of fraud are set forth in Paragraphs 78-102 of the Amended Complaint. However, as will be shown through a paragraph-by-paragraph analysis below, Appellants fail to allege facts sufficient to support a cause of action for fraud.

Paragraph 78 of the Amended Complaint consists entirely of conclusory allegations made by Appellants' counsel. It does not contain any ultimate facts and is only a laundry list of Respondent's alleged bad deeds.

Paragraph 79 alleges that Respondent "misrepresented (itself) as the lienholder in the Foreclosure Action." However, under *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013), "a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." There is no dispute that Respondent is the servicer of the loan; therefore, Respondent has standing to foreclose and the allegation in the Foreclosure Action was not false.

In their initial brief, Appellant attempts to distinguish between "lienholder" and "real party in interest." However, even if there is a difference between the terms, there is no allegation that the alleged misnomer damaged Appellants in any way; none of Appellants claims for damages stem from the alleged misnomer. *See generally* Am. Compl.

Paragraph 80 alleges that a representative of Appellee told Appellants that Appellants had permission to place the Property for sale. This representation cannot constitute fraud because Appellants had no right to rely on this statement. South Carolina is a lien theory state. *See generally* Title 29, S.C. Code Ann. This means that not only did Appellants have title to the Property at all relevant times, they also had the ability to sell the Property at any time. Appellants cite no case law nor other authority to support their proposition that Respondent's (or anyone's) permission was required to sell the Property to satisfy the total amounts due under the Note and Mortgage. If Appellants' intention was to satisfy the Loan by using the proceeds received from a future sale of the Property, they could have proceeded without input from any other party.

To the extent Appellants are arguing that Respondent had a duty to allow them time to sell the property in order to satisfy the amounts owed, this argument is completely without

support under South Carolina law. There is no requirement to forestall a foreclosure to allow a borrower time to sell the Property.

Paragraph 81 alleges that Respondent "misrepresented and denied (Appellants') right to pay off the outstanding amounts owed pursuant to the Note and Mortgage." This statement is a conclusory allegation that has no supporting facts, in violation of Rules 8(a) and 9(b), SCRPC.

Paragraph 82 alleges that Appellee misrepresented its compliance with the Supreme Court Administrative Order 2011-05-02-01 ("Administrative Order"). However, the Administrative Order does not provide for a private right of action for enforcement. *See* Sec. V(a) below. Therefore, this allegation cannot support the basis of a fraud claim.

Paragraph 83 is irrelevant to this appeal because it concerns a representation allegedly made by Nationstar, which, pursuant to a previous order by this Court, is no longer a party to this appeal.

Paragraphs 84 through 93 involve representations allegedly made by Respondent in the Foreclosure Action. Appellant is generally complaining about representations made by Respondent in the Foreclosure Action regarding the amount of the debt, entitlement to a deficiency, the amount of the monthly payments, etc. However, any claims based upon issues from the Foreclosure Action are now barred by the principals of *res judicata*. "Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 305 (Ct. App. 2003).

"To establish *res judicata*, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Id.*

All of these elements have been met. First, the two parties in the current action are the same as those in the Foreclosure Action. Second, the subject matter, i.e. the foreclosure of the Appellants' Property, is the same. Third, each of the issues that Appellants raise now were necessary to the determination of whether Respondent was entitled to a final judgment of foreclosure in the Foreclosure Action.

Each of these claims were issues that either were litigated or should have been litigated in the Foreclosure Action. These issues were central to the Foreclosure Action and the Appellants' failure to raise them at that time are fatal to their fraud claims now.

The remaining fraud allegations in Paragraphs 94-100 do nothing more than recite the elements of fraud in violation of Rules 8(a) and 9(b), SCRCP. Moreover, all of the allegations in these paragraphs relate to statements made and acts performed during the pendency of the Foreclosure Action. These alleged acts were all resolved in the Foreclosure Action and are barred by *res judicata*; they cannot support an independent cause of action now. *See Nelson*.

II. The Trial Court correctly dismissed the cause of action for violation of the Fair Debt Collection Practices Act because Appellant failed to state a cause of action under that statute.

The Appellants' second cause of action is for alleged violations of the Fair Debt Collections Practices Act ("FDCPA"), 15 §§ 1692(e) and (f). However, the Appellants' allegations wholly consist of a parroted recitation of the language in §1692. (Am. Compl. 26-27). The Amended Complaint does not specify what misleading statements were used, what amounts were unauthorized, or by what unfair means Respondent used to collect the debt. *See* (Am. Compl. ¶106). Appellants' attempts in their brief to now explain what was intended to be alleged in the Amended Complaint cannot save an otherwise insufficiently pled cause of action.

See Berry v. McLeod, 328 S.C. 435, 441, 492 S.E.2d 794, 797 (Ct. App. 1997) ("Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.").

Moreover, Appellants were required to raise these allegations in the Foreclosure Action. Appellants' basis for this cause of action rests entirely on activities performed during the Foreclosure Action. As argued above, the principals of *res judicata* prevent Appellant from re-litigating these issues in a separate action.

III. The Trial Court correctly dismissed the cause of action for Breach of Contract with Fraudulent Intent because Appellant failed to state sufficient facts to constitute a cause of action.

In South Carolina, a plaintiff can make a claim for punitive damages for breach of contract if he can show that the breach was accompanied by a fraudulent act. *Smith v. Canal Insurance Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). "This fraudulent act, although separate and distinct from the act(s) constituting the breach, must accompany the breach and not be too remote in either time or character." *Id.* However, none of the enumerated acts listed in paragraph 137 of the Complaint can constitute fraud, even if taken to be true:

In paragraph 137(c),¹ Appellants allege that Respondent misrepresented its compliance with the Administrative Order" because Respondent failed to "notify the court it had prevented the [Appellants] from selling the subject property." However, nothing in the Administrative Order requires Respondent to take this type of action. The Administrative order only requires a foreclosing lender to notify the court of the completion of the foreclosure intervention process. *In re Mortg. Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011). There is no allegation

¹ Sub-Paragraphs a, b and e refer to acts allegedly taken by Nationstar, which has been dismissed from this action.

that Respondent failed to notify the trial court of the completion of the foreclosure intervention process, as required by the Administrative Order.

In Paragraph 137(d), alleges that Respondent misrepresented its entitlement to a foreclosure of the property. However, proceeding with foreclosure after an admitted default cannot constitute fraud. Also, as argued above, Appellants were required to raise any defenses to the foreclosure in the Foreclosure Action itself.

Similarly, in Paragraph 137(f), Appellants allege that the amounts charged in the Foreclosure Action were improperly assessed. However, again, the total amounts owed under the Note and Mortgage were adjudicated in the Foreclosure Action; re-litigating these issues is also barred by *res judicata*.

IV. The Trial Court correctly dismissed the cause of action for Unfair Trade Practices because Appellants failed to allege that Respondent engaged in unfair or deceptive acts; in the alternative, the alleged acts by Respondent do not have an impact on the public interest.

To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). *Wright v. Craft*, 372 S.C. 1, 23 640 S.E.2d 486, 498 (Ct. App. 2006). Appellant failed to allege that appellee engaged in unfair or deceptive acts. Also, Appellant failed to allege that the acts affected the public interest.

a. There are no allegations of unfair or deceptive acts

Appellants set forth a laundry list of bad acts allegedly committed by Respondent. (App. Br. 31). However, an examination of the alleged "unfair and deceptive acts" shows that all of the

acts were those taken by Respondent in the prosecution of the Foreclosure Action. Among other things, Appellants allege that Respondent misrepresented the balance owed on the Loan, misrepresented itself as the lienholder, and misrepresented compliance with the Administrative Order. (App. Br. 31). Each of these "bad acts" were actually defenses and/or counterclaims that should have been raised in the Foreclosure Action. The court adjudicated these issues when it issued a judgment in the Foreclosure Action and took it to sale. As argued above, the principals of *res judicata* prohibit Appellant from re-litigating issues that were previously adjudicated in the Foreclosure Action.

b. Respondent's acts do not affect the public interest.

Even if the "unfair acts" alleged by Appellant can be re-litigated (which Respondent denies), the dismissal of Appellants' cause of action for UTPA should be affirmed because Appellants fail to allege that acts allegedly committed by Respondent affect the public interest. Courts have held that conduct that only affects the parties to the transaction provides no basis for a UTPA claim. *Jefferies v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). This suit only involves conduct between Appellant and Respondent, so a UTPA claim would generally not be applicable.

Nonetheless, the requirement for "impact on the public interest may be shown if the acts or practices have the potential for repetition." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). "The potential for repetition may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Hollman v. Woolfson*, 384 S.C. 571, 580, 683 S.E.2d 495, 499 (2009), *citing Singleton*, 358 S.C. at 379, 595 S.E.2d at 466.

Because the transaction at issue only involves Appellants and the Respondent, in order to fulfill the public interest requirement, Appellants must show this potential for repetition. *See Jefferies* However, the Amended Complaint utterly fails to show this potential. Appellants complain about Respondent's alleged conduct in other states but otherwise just parrot the language from the statute that Respondent's actions "have a real and substantial potential for repetition and affect the public interest." (Am. Compl. 40). Even the allegations regarding Respondent's conduct in other states are only tangentially related to the issues at hand. Importantly, Appellants fail to allege that the issues involved in those consent orders relate to the very specific allegations made by Appellants in this litigation, which is that Respondent allegedly refused to approve the sale of Appellant's home for \$530,000. (Am. Comp. ¶¶ 40-45). The allegations contained in those paragraphs are very specific to the business dealings between Respondent and Appellant and in no way affect or could affect any other party.

Appellants try to save their claim by arguing that because Respondent still conducts the same business activity as complained about by Appellants, Respondent's alleged actions affect the public interest. The South Carolina Supreme Court has previously found that the fact that a company remains in the same business and faces the same opportunities to repeat the conduct is sufficient to satisfy the requirement for showing a potential for repetition. *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). However, Appellant's construction of this statement strains the limits of credulity. Under Appellants' theory, the mere fact that a company chooses to remain in business after an allegation of unfair practices makes it automatically subject to a claim under UTPA.

Fortunately, subsequent opinions such as *Hollman, supra*, clarify that simply remaining in business does not automatically make subsequent actions "subject to potential repetition." The

putative plaintiff must also allege additional facts which demonstrate the potential for repetition, such as showing that the defendant previously took the same action or a that the defendant has a defective policy or procedure that would create such a potential. *Hollman*, 384 S.C. at 580, 683 S.E.2d at 499. Appellants make no such allegations. Respondent's actions clearly do not affect the public interest and the UTPA claim was properly dismissed.

V. The Trial Court correctly dismissed the causes of action for failure to comply with Rule 8 of the South Carolina Rules of Civil Procedure because the Complaint did not show facts that would entitle Appellants to relief under their remaining causes of action.

Appellants next make the broad argument that the trial court erred in dismissing all of the causes of action because Appellant failed to comply with Rule 8 of the South Carolina Rules of Civil Procedure. Rather than analyzing the causes of action to show how sufficient facts were pled for each cause of action, Appellants simply make the blanket statement that each of the "allegations contain statements of every element of each cause of action which are supported by factual statements that show the [Appellants] are entitled to the relief they requested." (App. Br. 33). However, Respondent will specifically show that Appellants have failed to state facts sufficient to support the remaining causes of action.²

a. Negligence

Appellant's fourth cause of action is for negligence. Under South Carolina law, "if the cause of action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." *Enhance-It, LLC v. Am. Access Techs., Inc.*, 413 F. Supp. 2d 626, 631, 2006 U.S. Dist. LEXIS 7917 (2006), citing *Meddin v. Southern Ry.-*

² Appellee refers the Court to Sections I - IV above which contain arguments regarding Appellants' causes of action for fraud, breach of contract with fraudulent intent, FDCPA, and UTPA.

Carolina Division, S.C. 155, 62 S.E.2d 109, 112 (1950); *see also Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.3d 52 (1996) (dismissal of negligence action sustained because the basis of the negligence was breach of contract).

Appellants try to couch their claims in terms of negligence by listing numerous "duties" allegedly owed by Respondent. (Am. Compl. 29-31). But an examination of these "duties" shows that Appellants are again simply complaining about events that occurred in the Foreclosure Action and the alleged failure of Respondent to accept their payoff. First, as argued above, anything that occurred in the Foreclosure Action cannot be re-litigated under the principals of *res judicata*. Second, the alleged failure to accept a payoff is an allegation that Respondent breached the contractual provisions in the Note and Mortgage. Under the clear South Carolina law stated above, Appellant cannot bring a negligence cause of action that has its genesis in a breach of contract.

To the extent Appellants are basing the negligence allegations on an alleged violation of the South Carolina Supreme Court's Administrative Order 2011-05-02-01 ("Administrative Order"), this fails as well. The Administrative Order has no private right of action for enforcement. It only provides a mechanism for the judge to find sanctions against an offending party within the corresponding foreclosure action; it does not provide for separate damages:

In the event the Court determines that any part to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation the assessment of reasonable attorney's fees and costs against the culpable party.

In re Mortg. Foreclosure Actions, 396 S.C. 209, 214, 720 S.E.2d 908, 910 (2011). South Carolina Courts have consistently held that where a statute does not provide a private right of action, a litigant cannot attempt to shoehorn a violation of the statute into another independent

cause of action. *See, e.g., Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) ("There is no private right of action in South Carolina for the unauthorized practice of law."); *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004) ("The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute."); *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007) ("The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.").

Even though the Administrative Order is not a statute, it is clearly an analogous situation. The language of the Administrative Order plainly shows that there was no intent by the Supreme Court to establish a private right of action. The trial court's order dismissing Appellants' cause of action for negligence should be affirmed.

b. Wrongful Foreclosure

The Appellants' fifth cause of action is for wrongful foreclosure. (Am. Compl. 33). However, South Carolina does not recognize a cause of action for wrongful foreclosure. There are no reported cases in South Carolina for wrongful foreclosure; it simply does not exist. To the extent Appellants are complaining about the events that occurred in the Foreclosure Action, they were required to raise these claims or defenses in the Foreclosure Action, as discussed above.

c. Slander of Title

Appellants' seventh cause of action is for slander of title. (Am. Compl. 38). The basis of this allegation is that Respondents had an obligation to release the lis pendens filed in the Foreclosure Action in connection with Appellants' proposed payoff and sale of the Property. This claim is improper for two reasons. First, "[t]he law in South Carolina is clear that the filing of a lis pendens cannot form the basis of an action for slander of title." *Pond Place Partners, Inc. v. Poole*, 567 S.E.2d 881, 892 (2002). "The filing of a lis pendens is absolutely privileged" and such action "enjoys the privileged accorded to judicial proceedings." *Id.* at 896-897.

Second, this cause of action attempts to impose liability for failing to release a lis pendens for a sale that admittedly did not actually occur. Although Appellants argue that the sale should have occurred, there is no basis for their contention that Appellees should have released a lis pendens after a sale that never actually happened. The responsibility to release a lis pendens does not actually arise until the underlying lien is satisfied, which never occurred. The trial court's order dismissing Appellants' cause of action for slander of title should be affirmed.

d. Declaratory Judgment

Appellants' ninth cause of action is a request for declaratory relief in which they ask the court to rule that Respondent should have approved an offer for the sale of the Property. (Am. Compl. 49). However, declaratory judgment is inappropriate in this situation.

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute which is contingent, hypothetical, or abstract." *Fireman's Insurance Co., of Newark, NJ v. Cincinnati Insurance Co., et al.*, 302 S.C. 234, 236, 394 S.E.2d 855, 857 (1990). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty

which is denied by the adverse party." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995).

In the instant action, there is no justiciable controversy. Appellants seek a declaratory judgment to determine "whether or not the Sale would have resulted in proceeds sufficient to pay the amounts owed pursuant to the Note and Mortgage." (Am. Compl. 49). In other words, Appellants are trying to obtain an adjudication on a sale that did not occur. Notably, Appellants' right to sell the Property is not a right that is addressed by the Note and Mortgage. Therefore, Appellants are not seeking a "declaration of rights" under the Note and Mortgage, *see* S.C. Code Ann. § 15-53-30, but are instead asking the court to address a hypothetical scenario that extends beyond the contractual terms in the Note and Mortgage. The cause of action for declaratory judgment was properly dismissed by the trial court.

VI. The Trial Court correctly dismissed the causes of action for fraud against Respondent because the Appellants did not plead fraud with specificity, as required by Rule 9 of the South Carolina Rules of Civil Procedure.

This issue was addressed in Section I, above.

VII. Appellant has admitted that the Trial Court correctly made findings of fact regarding the breach of contract claims and the provisions of the note.

This argument is puzzling because Appellants have agreed in their initial brief that they are "basing their breach of contract claim on the prepayment provision of the Note." (App Br. 37). However, they now take issue with the trial court's finding that confirms the prepayment provision is the only element of the contract in dispute. The trial court's finding is clearly supported not only by the plain allegations in the Complaint, but also by the admission of the Appellants.

VIII. The Trial Court properly dismissed the remaining causes of action against Respondent with prejudice because any amendments would be futile.

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). However, the court can dismiss an action with prejudice "if it is clear that no relief can be granted under any set of facts that can be proved in support of its allegations." *Id.*, citing *Giuliani v. Chuck*, 1 Haw. App. 379, 620 P.2d 733, 737 (Haw. App. 1980).

In this case, it is clear that none of the other causes of action alleged by Appellants in the Amended Complaint could be supported and that dismissal with prejudice was appropriate. As argued extensively above, all of Appellants' other causes of action were naked attempts to re-litigate the foreclosure action. This is clearly not allowed under the principals of *res judicata*.

CONCLUSION.

For the foregoing reasons, Respondent respectfully requests the Court to affirm the order of the Trial Court.

Respectfully submitted,

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