Circuit Court for Baltimore County
Case No. 03-C-13-013909
The Honorable Julie L. Glass

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2396

September Term, 2015

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THE BANK OF NEW YORK MELLON, TRUSTEE, *et al.*

v.

HEINZ OTTO GEORG, *et al.*

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Graeff,
Kehoe,
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: March 10, 2017

In 2012, First Horizon, the former owner of Mr. Heinz and Ms. Susan Georgs' mortgage, instituted a suit for reformation of the mortgage. After a bench trial, Judge Jan Marshall Alexander, of the Circuit Court for Baltimore County, ruled in favor of the Georgs. Three years later, The Bank of New York Mellon, the current owner of the Georgs' mortgage, and Old Republic National Title Insurance Company, the title insurer of the mortgage (collectively referred to as "BNYM" throughout this Opinion), also sued for reformation of the Georgs' mortgage. Judge Julie L. Glass, also of the Circuit Court for Baltimore County, ruled in favor of the Georgs again, relying on principles of *res judicata* and collateral estoppel from the 2012 trial held before Judge Alexander.

BNYM now appeals from Judge Glass' grant of a motion for judicial decision under Rule 2-502[1] in favor of the Georgs, and raises two issues for our review.[2] BNYM argues that Judge Glass erred when she: (1) ruled that Judge Alexander's rulings in the first trial—the First Horizon trial—barred BNYM's litigation of the instant case, under the principles of *res judicata* and collateral estoppel; and (2) ruled that the principles of judicial estoppel and collateral estoppel did not bar the Georgs from asserting that BNYM was in privity with First Horizon.

For the reasons stated below, we affirm Judge Glass' grant of the Georgs' motion.

[1] *See infra* note 8.

[2] BNYM actually raises four issues, but we combine the first two issues for the sake of clarity, and we discuss any possible bar to the Georgs' arguments under principles of judicial estoppel and collateral estoppel together as a second issue.

## BACKGROUND

After the 2012 trial before Judge Alexander, First Horizon took an appeal to this Court. Our unreported opinion in that appeal told the history of the case:

> The Georgs owned a residence in Hunt Valley, Maryland[,] [as tenants] by the entireties. In 2006, the Georgs sought a loan from First Horizon[3] to refinance existing loans secured by mortgages or deeds of trust on the property. The Georgs' application stated that Mr. Georg was to be the sole borrower. First Horizon agreed to lend Mr. Georg approximately $1.13 million …, an amount sufficient to satisfy existing deeds of trust on the property and to provide a cash disbursement to Mr. Georg of approximately $197,000. As part of its normal loan procedure, First Horizon prepared a deed of trust to the Georgs' residence to secure its loan. Through an error on First Horizon's part, this deed of trust did not provide for Ms. Georg's signature even though First Horizon was aware that she and her spouse owned the property as tenants by the entireties. The loan closed on September 26, 2006. At settlement, Mr. Georg signed a note … payable to First Horizon in the principal amount of the loan and a deed of trust … purportedly securing payment of the Note by establishing a first line against the Georgs' property. While she signed other documents at settlement, Ms. Georg executed neither the Note nor the First Horizon deed of trust.[4] The full amount of the loan proceeds were disbursed and the prior lender paid in full.

[3] [This footnote was contained in the original unreported opinion from this Court.] First Horizon's corporate status is not the same as it was at that time in 2006. First Horizon began as a corporate entity called First Horizon Loan Corporation, a wholly-owned subsidiary of First Tennessee Bank, N.A., and later merged into First Tennessee, N.A., and became First Horizon Loans. We will refer to the entity generically as First Horizon throughout this Opinion.

[4] [This footnote was *not* contained in the original unreported opinion from this Court.] Old Republic National Title Insurance Company ("Old Republic") issued title insurance to First Horizon. The title insurance protected First Horizon against any issues that could occur during the execution of the mortgage. In the event of any such issues, like

*First Horizon Loans v. Heinz Otto Georg, et al.*, No. 760, September Term, 2012, Slip op. at *1-2 (unreported opinion) (filed September 30, 2013).[5] In sum, First Horizon failed to have Ms. Georg sign the Note or the deed of trust, even though her signature on both documents was required to encumber the property because of its legal status as a tenancy by the entireties. The result, of course, was that First Horizon could no longer foreclose on the property in case of a default on the loan by Mr. Georg.

This Court's unreported opinion continued by describing the events leading to the First Horizon trial:

> At some time thereafter, the Georgs ran into financial difficulties and defaulted on the Note. First Horizon then realized that Ms. Georg had not executed the Deed of Trust and filed a complaint against … the Georgs seeking reformation of the deed of trust or other equitable relief intended to encumber the Georgs' property with the First Horizon deed of trust.[6] First Horizon later filed an amended complaint, adding claims for equitable subrogation and imposition of an equitable mortgage. In both the original and the amended complaint,

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the failure to have Ms. Georg sign the Note and deed of trust, the Title Policy gave Old Republic the option of either paying the claim or attempting to cure the defect in the deed of trust. As such, Old Republic completely controlled the prosecution of the First Horizon lawsuit—it elected to have the lawsuit filed in First Horizon's name; it paid for, and regularly communicated with First Horizon's counsel; and it discussed and approved litigation strategy in the lawsuit.

[5] Reliance on our prior unreported opinion is permitted by Rule 1-104 because the citation is offered as law of the case not for its precedential value. Rule 1-104(b).

[6] [This footnote was *not* contained in the original unreported opinion from this Court.] First Horizon submitted a title claim to Old Republic based on what it claimed to be Ms. Georg's failure to execute the deed of trust. In response, Old Republic retained counsel to file suit and attempt to reform the deed of trust, rather than pay the claim.

First Horizon stated that it was the [owner of the Note and therefore it was the] party secured by the First Horizon deed of trust. Trial was set for April 23, 2012. …

At some point—the exact date is unclear, but it appears to have been several months prior to the scheduled trial date—counsel for the Georgs queried counsel for First Horizon whether [First Horizon] was actually the holder of the Note. Counsel for First Horizon posed this question to their client, received an affirmative response[,] and passed the information on to the Georgs' lawyers. This, however, was inaccurate. At some point after settlement—the exact date is in dispute—First Horizon [had] assigned the Note to the Bank of New York Mellon [BNYM], as trustee of a securitized mortgage trust. First Horizon apparently informed its counsel of this assignment a few days before the scheduled trial date. On April 20, 2012, the Friday before trial was to begin on Monday, April 23, 2012, counsel for First Horizon served a motion titled "Correction to Caption of Complaint and Name of Plaintiff" on the Georgs, but did not file it with the court until the case was called on Monday, April 23, 2012. In its motion, First Horizon stated the caption and name of plaintiff in the case should be changed to:

> First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicer in its capacity as agent for The Bank of New York Mellon, Trustee for the Holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMS 2006-FA8.

The Georgs filed a motion to strike First Horizon's "Correction to Caption of Complaint and Name of Plaintiff" on the morning of trial, Monday, April 23, 2012.

The Court treated First Horizon's filing seeking a correction to the caption as a motion for the substitution of a plaintiff and denied First Horizon's request stating that "[t]he rules do not allow for the substitution of a plaintiff … unless one of the original plaintiffs still remains in the case … ." The court then permitted First Horizon to present an alternate argument, not

> previously asserted in its pleadings, that it [had standing to sue in this case because it] was authorized by a master pooling and servicing agreement ["Agreement"][7] with [BNYM] to seek reformation of the loan on [BNYM's] behalf and in its name.

*Id.* at *2-4. Thus, Judge Alexander rejected First Horizon's attempt to change the caption of the case on the day of trial, holding that this was an improper attempt to substitute the parties in the case. Judge Alexander's decision forced First Horizon to litigate the case in its own name, even though at the time of trial it was only the master servicer of, and not the owner of, the Georgs' mortgage.

The trial then proceeded with First Horizon presenting its case-in-chief. First Horizon tried to prove that Ms. Georg knew that she was supposed to sign the Note and deed of trust, that she had intended to sign the documents, and that her failure to do so was a mistake on her part. According to First Horizon, because it also made a mistake in failing to have Ms. Georg sign the documents, this was a mutual mistake, and therefore the court had the power to reform the Note and the deed of trust.

First Horizon also presented evidence purporting to show that it had standing to bring the lawsuit. First Horizon argued that the Georgs' loan to BNYM, which it sold to

[7] [This footnote was *not* contained in the original unreported opinion from this Court.] The Agreement was the instrument used by BNYM for the bulk purchase of mortgages and notes from First Horizon. The Agreement clearly designated First Horizon as the master servicer, but not the owner, of the mortgages and notes sold to BNYM. First Horizon argued that the Agreement included the Georgs' mortgage loan and deed of trust as one of the mortgages sold to BNYM. As discussed below, however, at the time of trial, First Horizon was unable to produce the necessary schedule that identified the loans controlled by the Agreement.

BNYM in a pool together with other loans, was subject to the terms of the Agreement. According to First Horizon, specific language in the Agreement proved that, despite that it was only the master servicer of the Georgs' loan, it had standing to sue on the loan and deed of trust on BNYM's behalf. At trial, however, First Horizon could not produce a schedule of loans subject to the Agreement. This meant that First Horizon could not prove that the provisions of the Agreement—purporting to give First Horizon standing to seek reformation of the Georgs' loan in its own name—actually applied to the Georgs' loan and deed of trust.

The Georgs' made a motion for judgment at the close of First Horizon's case. Judge Alexander ruled on the merits, finding that the mistake was unilateral and not mutual:

> I'm granting the motion at the close of [First Horizon's] case, [because First Horizon] has not [satisfied] the burden of going forward with this matter for the reasons I have stated from the bench. There is no evidence that [Ms.] Georg was knowledgeable about this transaction, knowledgeable that a mistake had been made[,] or knowledgeable that it was her intent to be included on this deed of trust. … [First Horizon] was in complete control. They made a mistake. They don't get a do over unless they can show that a mistake was mutually made by the parties[,] and without a showing that [Ms.] Georg knew that this mistake had taken place, I cannot allow this case to go forward any further.

After Judge Alexander ruled for the Georgs on the merits, counsel for First Horizon then pressed him to rule on two more issues: (1) whether, under the Agreement, First Horizon had standing to sue for reformation of the Note and deed of trust in its own name, even though, at best, it was only the master servicer of the Note; and (2) whether,

notwithstanding First Horizon's failure to prove the case on the merits, the Georgs would have to pay back the loan under the doctrine of equitable subrogation. Judge Alexander obliged, and ruled that: (1) First Horizon never established that it had standing to sue in its own name under the Agreement because it did not produce the loan schedule that listed the Georgs' loan as one of the loans subject to the Agreement; and (2) First Horizon was not entitled to equitable subrogation. Finally, after further discussion with counsel for both First Horizon and the Georgs, Judge Alexander summarized his two alternative rulings:

> I will say that I do not find that [First Horizon] had standing, however, *in the alternative* [that] if I am wrong with regard to the issue of standing, I do not find that [First Horizon] has met its burden of production to have the case go forward based on the evidence for the reasons previously stated.

(Emphasis added). Judge Alexander's subsequent, written order similarly stated his holdings as being in the alternative: "[T]his Court finds that [First Horizon] does not have standing to bring this action against [the Georgs]. *In the alternative*, this Court finds that even if [First Horizon] had standing to pursue this action, the evidence which [First Horizon] presented was insufficient to meet its burden of production." (Emphasis added). First Horizon then filed a direct appeal to this Court, which this Court dismissed as untimely. *First Horizon Loans v. Heinz Otto Georg, et al.*, No. 760, September Term, 2012, Slip op. at *14 (unreported opinion) (filed September 30, 2013).

One month after this Court issued its mandate on First Horizon's appeal, Old Republic and BNYM filed a second lawsuit. Plaintiffs predicated the second lawsuit on the

same law, facts, and causes of action: that First Horizon and Ms. Georg had made a mutual mistake in failing to include Ms. Georgs' signature on the loan documents. Following discovery, the Georgs filed a motion for summary judgment, or in the alternative, for judicial decision under Rule 2-502.[8] Judge Glass ruled in favor of the Georgs, granting their motion on *res judicata* and collateral estoppel grounds. This appeal followed.

[8] Rule 2-502 provides:

> **Separation of Questions for Decision by Court**
>
> If at any stage of an action a question arises that is within the sole province of the court to decide, whether or not the action is triable by a jury, and if it would be convenient to have the question decided before proceeding further, the court, on motion or on its own initiative, may order that the question be presented for decision in the manner the court deems expedient. In resolving the question, the court may accept facts stipulated by the parties, may find facts after receiving evidence, and may draw inferences from these facts. The proceedings and decisions of the court shall be on the record, and the decisions shall be reviewable upon appeal after entry of an appealable order or judgment.

Md. Rule 2-502. One of the "issues that [has] been deemed suitable for preliminary determination under Rule 2-502 … [is] the *res judicata* effect of a prior decision." *Crise v. Md. Gen. Hosp., Inc.*, 212 Md. App. 492, 519 (2013) (citations omitted). Judge Glass determined that Rule 2-502 was a more appropriate vehicle than summary judgment to resolve the Georgs' motion because they premised their motion on the principles of *res judicata* and collateral estoppel. Judge Glass also found in the alternative that had she addressed the Georgs' motion under the summary judgment standard she still would have determined that no material facts were in dispute and that the Georgs were entitled to summary judgment as a matter of law.

## ANALYSIS

BNYM argues that Judge Alexander made his two rulings in the First Horizon trial, on the merits and on standing, as *contingent* on one another, and not in the *alternative*. According to BNYM, once Judge Alexander found that First Horizon did not have standing to bring the first lawsuit, and his decision on standing was not reversed on appeal, then the his standing decision controls. If Judge Alexander's standing decision controls, then his ruling on the merits was superfluous and no longer had any preclusive effect on the instant case. Thus, BNYM's primary contention on appeal is that Judge Glass erred when she found that Judge Alexander's rulings were independent, and made in the alternative, and therefore barred BNYM's litigation of the instant case under the principles of *res judicata* and collateral estoppel. Lastly, BNYM also argues that the principles of judicial estoppel and collateral estoppel bar the Georgs from asserting that BNYM was in privity with First Horizon. We will address these contentions in turn.

### I. Preclusive Effect of the Rulings in the First Horizon Trial

BNYM argues that Judge Glass erred in finding that the rulings made by Judge Alexander in the First Horizon trial were on alternative grounds and were not contingent on one another. As a result, it argues that Judge Glass should not have found that Judge Alexander's decision on the merits had a preclusive effect on its ability to prosecute the instant case. The Georgs respond that Judge Glass correctly found that *res judicata* and collateral estoppel from Judge Alexander's rulings in the First Horizon trial bar the present

action instituted by BNYM. *First*, we will discuss the nature of Judge Alexander's rulings at the conclusion of the First Horizon trial. *Second*, we will discuss the effects of those rulings on this subsequent litigation, under the principles of *res judicata* and collateral estoppel. Because we hold that Judge Glass did not err in finding that Judge Alexander made alternative, independent rulings in the First Horizon trial, and because we hold that Judge Glass correctly determined that those rulings had a preclusive effect in this subsequent second trial, we affirm Judge Glass' ruling on this issue.

*A. Alternative Rulings*

At the conclusion of First Horizon's case-in-chief in the first trial, Judge Alexander ruled on the merits of First Horizon's claims. Judge Alexander heard all of the evidence presented by First Horizon and found that First Horizon failed to meet its burden of production to show a mutual mistake. Specifically, he found that First Horizon failed to prove that Ms. Georg had the necessary intent to be included on the deed of trust. As quoted above, Judge Alexander ruled:

> I'm granting the motion at the close of [First Horizon's] case, [because First Horizon] has not [satisfied] the burden of going forward with this matter for the reasons I have stated from the bench. There is no evidence that [Ms.] Georg was knowledgeable about this transaction, knowledgeable that a mistake had been made[,] or knowledgeable that it was her intent to be included on this deed of trust. … [First Horizon] was in complete control. They made a mistake. They don't get a do over unless they can show that a mistake was mutually made by the parties[,] and without a showing that [Ms.] Georg knew that this mistake had taken place, I cannot allow this case to go forward any further.

Only after First Horizon pressed Judge Alexander to rule on standing as well, did he actually rule on that issue. To that effect, Judge Alexander found that First Horizon also did not have standing to sue on the Note because it failed to produce the loan schedule that indicated that the Georgs' Note was included in the Agreement. After reviewing the totality of the discussion during the trial that preceded Judge Alexander's rulings, Judge Glass, in this case, made a factual determination that Judge Alexander intended his rulings on the merits and on standing to be, not contingent on one another, but alternative, independent holdings.

BNYM contends that Judge Alexander's two rulings were contingent on one another for two reasons. *First*, according to BNYM, it is a settled legal rule that any time a court gives two rulings, those rulings should automatically be considered contingent. *Second*, BNYM argues that in this case specifically, as a factual matter, Judge Alexander intended his rulings to be contingent on one another. The Georgs respond that we must make a factual determination as to the nature of the two rulings in each specific case based on the totality of the evidence surrounding the two rulings. Moreover, the Georgs continue, the totality of the facts in this case suggests that Judge Alexander intended his rulings to be alternative rulings, and not contingent on one another.

BNYM first attempts to draw a comparison between this case and the case of *Tower Oaks Blvd., LLC v. Procida*, 219 Md. App. 376 (2014), to prove both of its conclusions. This argument, however, is unconvincing. According to BNYM, this Court's

characterization of the rulings in *Tower Oaks*—that the trial court's ruling on the merits of the defense of unclean hands was contingent to, and not independent of, the trial court's ruling that Tower Oaks' governing documents did not authorize it to contest the foreclosure action, *see id.* at 392-93—proves that two rulings in any case are automatically contingent upon one another. Just because a trial court makes two rulings, however, does not transform those rulings into contingent rulings. This Court's characterization of the rulings in *Tower Oaks* was fact-specific to the particulars of the *Tower Oaks* case. And, in *Tower Oaks*, we did not provide a test for future cases. *See id.* at 390-93. Thus, *Tower Oaks* does not do what BNYM hopes—create a legal rule that any time a judge issues two rulings, those rulings are automatically contingent on one another.

Moreover, the result in *Tower Oaks* also does not prove as a factual matter that we should treat the two rulings in this case as contingent. One important difference between this case and *Tower Oaks* is the order in which the trial court considered the two issues. And, we think the order of the rulings helps explain why we reach opposite conclusions regarding the characterization of the rulings in the two cases. In *Tower Oaks*, the trial court first disposed of the case on procedural grounds and only then considered the arguments on the merits. *Id.* at 388-89. Here, by contrast, Judge Alexander heard all of the evidence presented by First Horizon and ruled on the merits. Only after the request by First Horizon to rule on standing did Judge Alexander also rule on that issue. The order of Judge Alexander's consideration of the issues and his initial ruling on the merits, while not

dispositive, is evidence that he intended his subsequent ruling on standing to be alternative to his ruling on the merits. Therefore, although *Tower Oaks* came out differently, the order that Judge Alexander considered the issues presented by First Horizon supports Judge Glass's factual determination that Judge Alexander made his rulings in the alternative.

BNYM then argues that under the Restatement (Second) of Judgments § 20, two rulings given by a trial court should automatically be interpreted as contingent on one another, rather than as alternative rulings. That section of the Restatement (Second) states:

> A dismissal may be based on two or more determinations, at least one of which, standing alone, would not render the judgment a bar to another action on the same claim. In such a case, if the judgment is one rendered by a court of first instance, it should not operate as a bar.

*Id.* at comment e. Although BNYM surmises that the Restatement (Second) operates to render two rulings as automatically contingent on one another, that conclusion is not so simply derived. We do not treat every case with two rulings as automatically having contingent rulings, and nothing in the Restatement (Second) compels an opposite result.

The Restatement (Second) bases its conclusion—that, in the abstract, two rulings should operate as contingent on another—on two factual considerations. *First*, "[e]ven if another of the determinations, standing alone, would render the judgment a bar, that determination may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta." *Id. Second*, "of critical importance, the losing party, although entitled to appeal from

both determination[s], may be dissuaded from doing so as to the determination going to the "merits" because the alternative determination[], which in itself does not preclude a second action, is clearly correct." *Id.* Neither of these factual considerations applies in the instant case. To the first point, Judge Alexander based his ruling on First Horizon failing to meet its burden of production. He heard First Horizon's entire case-in-chief and ruled for the Georgs on the merits. He only ruled on standing after First Horizon pressed him to do so. There is no allegation, nor could there be, that Judge Alexander was not paying careful attention to the issues presented. Thus, the concern of the Restatement (Second)—that a second holding would not be carefully rendered—does not apply. As to the second point, First Horizon took a direct appeal to this Court, on both standing and on the merits, which this Court ultimately dismissed as being untimely. *See First Horizon Loans v. Heinz Otto Georg, et al.*, No. 760, September Term, 2012, Slip op. at *14 (unreported opinion) (filed September 30, 2013). The presentation of Judge Alexander's rulings did not dissuade BNYM from appealing the adverse decision on the merits, and therefore the concern of the Restatement (Second) does not apply. As such, BNYM's insistence on employing the proposition of the Restatement (Second) to create a blanket rule for every case with two rulings is unavailing.

In this case, we hold that Judge Glass did not err in finding that Judge Alexander made alternative, and not contingent, rulings. Judge Glass employed the proper method of determining the status of the two rulings—she examined the totality of the facts

surrounding the rulings—and she concluded that that Judge Alexander took a "belt and suspenders" approach. As explained above, Judge Alexander heard First Horizon's entire case-in-chief and based his ruling on First Horizon's failure to meet its burden of production. He only ruled on standing after First Horizon pressed him to do so. Furthermore, Judge Alexander specifically stated in both his oral ruling from the bench and in his written order that he was making alternative rulings. Finally, BNYM has presented no evidence that would compel us overturn Judge Glass' fact-driven decision on this issue. For these reasons, we hold that Judge Glass did not err in determining that Judge Alexander intended his rulings in the First Horizon trial to be independent and given in the alternative.[9]

[9] As an aside, it would strain the imagination to give BNYM another chance to litigate this case merely because First Horizon fortuitously pressed Judge Alexander to include a ruling on standing after he had already ruled in the Georgs' favor on the merits. In our view, BNYM's argument is analogous to the invited error doctrine. Under that doctrine, "a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error. *State v. Rich*, 415 Md. 567, 575 (2010) (citation omitted). "[A] party may not request an instruction and later complain on appeal that the requested instruction was given." *Id.* (citation omitted). "The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal." *Id.* (citation omitted). Although this case does not involve the same sort of allegation of error, we can apply a similar principle—BNYM cannot benefit from First Horizon's request for Judge Alexander to add a ruling on standing after he already ruled on the merits. For this reason as well, BNYM's argument to relitigate this case must be rejected.

Thus, when we examine this subsequent litigation through the lenses of *res judicata* and collateral estoppel, we focus, just as Judge Glass did, on the preclusive effect of Judge Alexander's alternative, independent ruling on the merits of the First Horizon trial.[10]

*B. Effect of Res Judicata and Collateral Estoppel*

Judge Glass found that the alternative, independent rulings on the merits in the First Horizon trial barred this second suit instituted by BNYM against the Georgs, under the doctrines of *res judicata* and collateral estoppel. Comparing the two doctrines:

> Collateral estoppel is concerned with the issue implications of the earlier litigation of a different case, while *res judicata* is concerned with the legal consequences of a judgment entered earlier in the same cause. The two doctrines are based upon the judicial policy that the losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on issues raised, or that should have been raised.

*Colandrea v. Wilde Lake Comty. Ass'n, Inc.*, 361 Md. 371, 390-91 (2000) (citations omitted). We will discuss the elements of *res judicata* and collateral estoppel separately, and analyze those elements in light of the facts in our case.

"A decision under Rule 2-502 is a trial on the merits, with respect to the issues decided. Thus, as in all actions tried without a jury, we shall review questions of law *de*

[10] BNYM also argues that Judge Glass erred when she found that Judge Alexander entered a final judgment on the merits regarding First Horizon's equitable subrogation claim. BNYM disputes that there was a final judgment. Directly contrary to BNYM's position, however, is Judge Alexander's statement at the conclusion of 2012 trial that: "With regard to the subrogation, I do not find in favor of [First Horizon] in that regard. They … are not entitled to that. They cannot step into the place of the new … loan note holder." It is clear, therefore, that Judge Alexander entered an express final judgment on the merits of the equitable subrogation claim, and that Judge Glass did not err in so finding.

*novo* and shall not set aside the circuit court's findings of fact unless they are 'clearly erroneous.'" *Bender v. Schwartz*, 172 Md. App. 648, 664 (2007) (citing Md. Rule 8-131(c)) (italics added); *see also* Md. Rule 8-131(c). Whether *res judicata* or collateral estoppel applies to a particular case is a question of law that we review *de novo*. *See Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 368 (2016) (citation omitted) (collateral estoppel); *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719, 734 (2010) (*res judicata*).

*1. Res Judicata*

Judge Glass rejected the instant litigation instituted by BNYM against the Georgs, under the doctrine of *res judicata*. *Res judicata* is composed of three elements:

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

*Spangler v. McQuitty*, 449 Md. 33, 65 (2016) (citation omitted). Thus, *res judicata* "bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation." *Id.* (internal quotations and citation omitted).

Under the first element of *res judicata*, the parties in the present litigation must be the same as, or in privity with, the parties to the earlier litigation. For *res judicata* purposes,

non-parties in a prior lawsuit are considered to be in privity with a party in that lawsuit when the non-party has:

> a direct interest in the subject matter of the suit, and ha[s] a right to control the proceedings, make defense[s], examine the witnesses, and appeal if an appeal lies. So, where persons, although not formal parties of record, **have a direct interest in the suit,** and in the advancement of their interest **take open and substantial control of its prosecution**, **or they are so far represented by another that their interests receive actual and efficient protection,** any judgment recovered therein is conclusive upon them to the same extent as if they had been formal parties.

*Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 141 (2012) (citation omitted) (emphasis in original and added). Put another way, "[p]rivity in the *res judicata sense* generally involves a person so identified in interest with another that he represents the same legal right." *FWB Bank v. Richman*, 354 Md. 472, 498 (1999) (emphasis added).

In this case, Judge Glass was legally correct in finding that both BNYM and Old Republic were in privity with First Horizon. While First Horizon was the master servicer of the Note at the time of the first trial, BNYM both actually owned the Note, and was the successor-in-interest to First Horizon, which owned the Note before BNYM.[11] BNYM therefore had a direct interest in the First Horizon suit, had the same interests in the suit as

[11] As explained earlier, the fact that BNYM both owned the Georgs' mortgage, and was the successor-in-interest to First Horizon who owned the Georgs' mortgage before BNYM, is true at least according to First Horizon's representations during the first trial, and BNYM's representations in the instant case. First Horizon did not provide the loan schedule, which would have served to prove BNYM's ownership of the mortgage, during the First Horizon trial. BNYM only provided the loan schedule as part of this second litigation.

did First Horizon, and BNYM's interests received sufficient protection by First Horizon's prosecution of the first lawsuit. Additionally, Old Republic, the title insurer, completely controlled the prosecution of the First Horizon lawsuit—it elected to have the lawsuit filed in First Horizon's name; it paid for, and regularly communicated with First Horizon's counsel; and it discussed and approved litigation strategy in the First Horizon lawsuit. Therefore, Judge Glass' conclusion that both BNYM and Old Republic were in privity with First Horizon was legally correct.

The second element of *res judicata* requires that the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation. "[A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action and is conclusive, not only as to all matters decided in the original suit, *but also as to matters that could have been litigated in the original suit*." *Colandrea*, 361 Md. at 392 (citations omitted) (emphasis in original). Here, Judge Glass found that the instant case included the same causes of action—including, reformation of the deed of trust, equitable subrogation, and equitable mortgage, amongst others—based on the same exact set of facts alleged in the First Horizon trial. And, as stated in *Colandrea*, any other causes of action added by BNYM in this second case under the same set of facts would also be barred as necessary legal consequences of the judgment in the First Horizon trial. *Id.* at 392. Therefore, Judge Glass was legally correct that this second element of *res judicata* was fulfilled.

Under the final element of *res judicata*, there must have been a final judgment on the merits in the prior litigation. Here, as we held above, *supra* Part I.A., Judge Glass properly determined that Judge Alexander's rulings on the merits of the First Horizon trial—that First Horizon did not meet its burden of production on the merits to show a mutual mistake that Ms. Georg had the necessary intent to be included on the deed of trust—and on standing, were made as alternative, independent holdings. Therefore, Judge Glass' legal conclusion that there was a final judgment on the merits in the first trial was correct.

Because this case meets all three elements of the *res judicata* calculus, we hold that Judge Glass was legally correct in determining that *res judicata* barred BNYM and Old Republic from relitigating the same claims raised in the First Horizon trial again in the instant case.

*2. Collateral Estoppel*

Judge Glass also rejected the instant litigation instituted by BNYM against the Georgs, under the doctrine of collateral estoppel. Before a court applies the doctrine of collateral estoppel, four questions must be answered in the affirmative:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> (2) Was there a final judgment on the merits?
>
> (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

*Garrity*, 447 Md. at 369 (citations omitted). In sum, "collateral estoppel may be invoked when in a second suit *between the same parties*, even if the cause of action is different, any determination of fact that was actually litigated and was essential to a valid and final judgment is conclusive." *Shader v. Hampton Imp. Ass'n, Inc.*, 443 Md. 148, 161-62 (2015) (citation omitted) (emphasis in original).

Under the first element of collateral estoppel, the issue decided in the prior adjudication must be identical with the one presented in the instant action. Here, Judge Glass found that the issue presented in the First Horizon trial—whether Ms. Georg had the requisite knowledge and intent during the execution of the deed of trust—controls the outcome of the claims for reformation of the deed, equitable subrogation, and equitable mortgage, and was already decided in the First Horizon trial. Because BNYM raised the exact same issues in the instant case, and raised those issues under the same facts as in the First Horizon trial, Judge Glass made a correct legal determination that the first element of collateral estoppel was fulfilled.

The next two elements of collateral estoppel can be resolved the same way that we dealt with them in the *res judicata* context. *See infra* pgs. 18-20. The second element requires that there be a final judgment on the merits in the first trial. As we explained above, Judge Glass' finding that Judge Alexander's ruling on the merits was an alternative, independent holding, satisfies this prong. The third element of collateral estoppel requires

that the party against whom the plea is asserted must be either a party or in privity with a party to the prior adjudication. "The analysis of privity *for purposes of collateral estoppel* focuses on whether the interests of the party against whom estoppel is sought were fully represented, with the same incentives, by another party in the prior matter." *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584, 628 (2013) (emphasis added). As explained above in the discussion of *res judicata*, Judge Glass' legal determination that First Horizon fully represented the interests of BNYM and Old Republic in the first trial was correct. Therefore, Judge Glass was legally correct that the third element of collateral estoppel—privity—was fulfilled.

Under the fourth element of collateral estoppel, the party against whom the plea is asserted must have been given a fair opportunity to be heard on the issue. As Judge Glass found, Judge Alexander allowed First Horizon, who was in privity with BNYM and Old Republic, to present its entire case-in-chief during the first trial before ruling that First Horizon had not met its burden of production on the merits. Moreover, although First Horizon only sought to interject BNYM into the first trial through a last minute change of the case caption that Judge Alexander denied, BNYM and Old Republic could have prosecuted the case from the beginning as named parties, or could have petitioned Judge Alexander to allow them to join as named parties at his discretion during the prosecution of the case. *See* Md. Rule 2-341 (amendment of pleadings). Therefore, Judge Glass' ruling that the parties were given a fair opportunity to be heard on the issue was legally correct.

Because this case meets all four elements required for a finding of collateral estoppel, we hold that Judge Glass was legally correct in determining that collateral estoppel barred BNYM and Old Republic from relitigating the issues raised in the First Horizon trial again in the instant case.

## II. Judicial Estoppel and Collateral Estoppel against the Georgs

Next, BNYM contends that because the Georgs argued in the first trial that First Horizon did not have standing to sue on the Note, that principles of judicial estoppel and collateral estoppel bar the Georgs from asserting that BNYM and Old Republic were in privity with First Horizon.

"Judicial estoppel … precludes a party from taking a position in a subsequent action inconsistent with a position taken by him or her in a previous action." *Dashiell v. Meeks*, 396 Md. 149, 170 (2006) (internal quotations and citations omitted). It is designed to "protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system." *Id.* at 171. Judicial estoppel applies where: "(1) the party took an inconsistent position—either legal or factual—in an earlier litigation, (2) a court accepted the earlier inconsistent position, and (3) the party intentionally misled the court to gain an unfair advantage." *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 472 (2012). Whether judicial estoppel applies in a particular case is left up to the sound discretion of the trial judge. *Dashiell*, 396 Md. at 173.

We hold that Judge Glass did not abuse her discretion in declining to apply the doctrine of judicial estoppel to the Georgs' argument. *First*, as Judge Glass determined, the Georgs' positions are not inconsistent. Standing and privity are not mutually exclusive arguments. In the First Horizon trial, the Georgs argued that the party who brought the first suit—First Horizon—was not the proper party to bring the suit because it lacked standing. According to the Georgs' argument, with which Judge Alexander agreed, First Horizon was not permitted to sue in its own name for reformation of the Note and the deed of trust. In the instant litigation, the Georgs argued that the parties who brought this second suit—BNYM and Old Republic—were barred from bringing the suit because they were in privity with First Horizon. The Georgs contended that BNYM and Old Republic had, respectively, either the same protected, direct interest in the First Horizon suit, or completely controlled the prosecution of the First Horizon lawsuit. First Horizon's procedural inability to bring the first lawsuit in its own name had no bearing on the relationship between and amongst BNYM, Old Republic, and First Horizon. Thus, the Georgs' positions in the two cases are not in conflict.

*Second*, Judge Glass was in the best position to decide, assuming for the sake of argument that the Georgs' positions on standing and privity were inconsistent, whether the Georgs intentionally and voluntarily misled her. Judge Glass specifically determined that they had not done so. In fact, the Georgs were forthcoming about the relationship between the positions. BNYM has not provided any evidence to overturn Judge Glass's

determination on this point. And, such a finding—that there was no intent to mislead the court—is determinative. Therefore, BNYM's argument that Judge Glass abused her discretion in failing to invoke judicial estoppel against the Georgs is unavailing.

BNYM's final contention—that the doctrine of collateral estoppel bars the Georgs from asserting a privity argument in the instant case—is also without merit. By finding that the Georgs successfully established that BNYM and Old Republic were in privity with First Horizon, Judge Glass implicitly found that collateral estoppel did not bar the Georgs from making a privity argument in the second lawsuit. We agree with Judge Glass' conclusion. As explained above when discussing BNYM's judicial estoppel contention, standing and privity are not mutually exclusive arguments. Arguing that First Horizon lacked standing does not preclude the Georgs from arguing that it was in privity with BNYM in this case. For this reason, Judge Glass' legal determination that collateral estoppel did not bar the Georgs from presenting a privity argument in this case was correct.

**CONCLUSION**

Because we hold that: (1) Judge Glass correctly determined that Judge Alexander's alternative ruling on the merits in the First Horizon trial triggered *res judicata* and collateral estoppel to deny BNYM and Old Republic a second bite at the litigation apple in the instant case; and (2) Judge Glass did not abuse her discretion in declining to apply judicial estoppel and collateral estoppel to bar the arguments made by the Georgs on the issue of privity, we affirm Judge Glass' grant of the Georgs' motion for judicial decision.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**