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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GRISELDA L. GILLARD,

Plaintiff and Appellant,

v.

FIDELITY NATIONAL TITLE  
INSURANCE COMPANY et al.,

Defendants and Appellants.

D067604

(Super. Ct. No. 37-2010-00062020-  
CU-IC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Craig A. Miller, Craig A. Miller; David A. Niddrie and Niddrie Addams Fuller for Plaintiff and Appellant.

Garrett & Tully, Ryan C. Squire and Zi C. Lin for Defendants and Appellants.

Griselda L. Gillard sued Fidelity National Title Insurance Company (Fidelity) for breach of contract, bad faith, and declaratory relief after it denied insurance coverage for an alleged defect to her title to real property in Fallbrook, California (the Fallbrook

property). In her lawsuit, she also sought declaratory relief her debt obligations and underlying trust deeds in favor of Bank of America and GMAC Mortgage (GMAC) were void because of her alleged title defect.

The court bifurcated trial into a bench trial on Gillard's declaratory relief claims (Phase 1) and a jury trial on her contract and bad faith claims against Fidelity (Phase 2). In Phase 1, the court found Gillard's title defective and held Fidelity liable under the title insurance policy. In Phase 2, after the court granted Fidelity's nonsuit motion as to Gillard's request for punitive damages, the jury returned a verdict in Gillard's favor and awarded her \$1.45 million in damages. The court entered judgment for Gillard on all but one claim: it denied her request to declare Bank of America and GMAC's notes and deeds of trust void. Fidelity appeals the judgment; Gillard cross-appeals the order granting nonsuit as to punitive damages and the denial of declaratory relief as to her debt obligations.<sup>1</sup>

We affirm in part, reverse in part, and remand to the trial court. We conclude the issue of whether Gillard's title to the Fallbrook property was defective was actually

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<sup>1</sup> On October 12, 2016, we granted the motion filed by defendant, respondent, and cross-appellant Bank of America and third party Bank of New York Mellon (BONY) to substitute BONY for Bank of America in this action. (Code Civ. Proc., § 368.5; Cal. Rules of Court, rule 8.36(a).) As a result of a July 2010 assignment, BONY holds the beneficial interest in the 2004 Countrywide deed of trust to the Fallbrook property, and Bank of America holds no interest. BONY and Bank of America filed their substitution motion after briefing in this appeal was nearly complete. For the sake of clarity and symmetry with the trial court record and appellate briefs, we refer to Bank of America throughout this opinion to refer to the interest held by defendant, respondent, and cross-appellant BONY. (See *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 506, fn. 1.)

litigated and necessarily decided in a prior lawsuit (the *Ralls* action), rendering Gillard collaterally estopped from relitigating the issue. As the court ruled in *Ralls*, Gillard holds fee simple title to the Fallbrook property. Consequently, Fidelity is not liable for breach of contract or bad faith; the trial court properly rejected her request for punitive damages from Fidelity; and there is no basis to declare her loans or underlying trust deeds to Bank of America and GMAC void.

### FACTUAL SUMMARY

In March 2004, Gillard purchased the Fallbrook property through a grant deed from Steven Legare, a real estate developer, for \$820,000.<sup>2</sup> Lawyer's Title Insurance Corporation (later acquired by Fidelity) conducted a title search and issued Gillard a title insurance policy. To finance the purchase, Gillard took out two loans from Countrywide Home Loans in the amount of \$650,000 and \$88,000, respectively, secured by trust deeds to the Fallbrook Property.<sup>3</sup>

In December 2005, Gillard's husband quitclaimed his interest in the Fallbrook property to Gillard. Gillard took out a \$270,000 home equity loan from GreenPoint

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<sup>2</sup> We refer to Steven Legare and his wife, Alice Legare, by their first names for clarity and intend no disrespect.

<sup>3</sup> Bank of America assumed the \$650,000 adjustable rate note as the successor to Countrywide Home Loans. As noted above, BONY acquired the beneficial interest under the 2004 Countrywide deed of trust in 2010.

Mortgage Funding, Inc., secured by a trust deed to the Fallbrook property.<sup>4</sup> She used part of the proceeds from that loan to repay her \$88,000 loan.

At the time she bought the Fallbrook property, Gillard believed Steven, a married man, held sole title. Steven purported to acquire the Fallbrook property in 2002 as his "sole property" by means of a grant deed. To the extent his wife, Alice, held any community property interest in the Fallbrook property, an October 2002 interspousal transfer grant deed and a February 2004 quitclaim deed both purported to convey that interest to Steven before Gillard bought the Fallbrook property.

In December 2008, Gillard discovered Steven had actually signed the 2004 quitclaim deed for Alice, such that Alice may have retained her community property interest in the Fallbrook property.<sup>5</sup> This information came to light during discovery in the *Ralls* action (San Diego Superior No. GIC 873555), a construction defect lawsuit Gillard filed in 2006 against Steven and his business partners relating to the Fallbrook property.

After discovering Steven had signed the 2004 quitclaim deed for Alice, Gillard reviewed her title insurance policy and sought insurance coverage from Fidelity. Fidelity denied coverage on grounds "there was not an existing adverse claim to title represented by the alleged forgery of the community property clearance quitclaim deed." Gillard moved out of the Fallbrook property in January 2009 and stopped repaying her loans to

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<sup>4</sup> GMAC assumed the loan as the successor to GreenPoint Mortgage Funding, Inc.

<sup>5</sup> At trial in this action, Steven admitted he also forged the notary jurat for Bebe Walker, the notary named in the 2004 quitclaim deed.

Bank of America and GMAC and her property taxes later that year. In December 2009, Gillard filed for Chapter 7 bankruptcy. She discharged her debts to Bank of America and GMAC in June 2010.

Meanwhile, *Ralls* proceeded to a bench trial before Judge Halgren. At the end of that trial, Gillard rejected an offer for Alice to quitclaim her interest in the Fallbrook property to Gillard.<sup>6</sup> In December 2009, Judge Halgren entered judgment for Gillard in *Ralls* on her construction defect, breach of contract, and negligence claims and awarded her \$101,697 in damages against Steven and his business partners.<sup>7</sup> However, the court *denied* Gillard's request in *Ralls* to declare her 2004 grant deed to the Fallbrook property void. In its statement of decision, the court found Alice had ratified Steven's signature on the 2004 quitclaim deed, such that Steven held sole title when conveying the property to Gillard.

In November 2010, Gillard's husband, a real estate attorney, asked Fidelity to reconsider its prior claim denial, explaining defects in Gillard's chain of title to the Fallbrook property had rendered her title unmarketable. Fidelity again denied coverage absent evidence of an adverse claim. Fidelity's denial prompted the instant lawsuit.

In 2011, Alice and Steven signed declarations before a notary public stating Alice had signed neither the 2002 interspousal deed nor the 2004 quitclaim deed, and that

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<sup>6</sup> At trial in this action, Gillard explained she rejected the offer because she feared Alice's and Steven's judgment liens might attach to the Fallbrook property.

<sup>7</sup> Steven filed for bankruptcy, and Gillard discharged her damages claims against the bankruptcy estate in 2011.

Steven had signed the latter pursuant to Alice's oral (not written) authorization to sign her name to legal documents. In March 2012, Fidelity's attorneys asked Alice to sign a quitclaim deed conveying any retained interest in the Fallbrook property to Gillard. Alice did so, but Gillard claimed the 2012 quitclaim deed was never delivered to her. In 2013, Gillard listed but could not sell the Fallbrook property after she disclosed the alleged title defect to potential buyers.

### PROCEDURAL BACKGROUND

In November 2010, Gillard sued Fidelity, Bank of America, and GMAC for breach of contract, breach of the implied obligation of good faith and fair dealing, and declaratory relief in connection with the alleged title defect to the Fallbrook property arising from Alice's alleged lingering community property interest.<sup>8</sup> The operative Fourth Amended Complaint, filed in March 2012, sought a "judicial determination" as to whether: (1) the 2002, 2004, and 2012 deeds purporting to transfer Alice's community property interest were void; (2) Gillard received the fee simple title she bargained for; (3) Fidelity's title insurance policy covered the defect; and (4) the loans and trust deeds held by Bank of America and GMAC were void due to Gillard's void title. The court granted the parties' joint request to bifurcate trial into a bench trial on these four issues (Phase 1) and a jury trial on the contract and bad faith claims against Fidelity (Phase 2).

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<sup>8</sup> At the request of Fidelity, Bank of America, and GMAC, Alice was added as a defendant as an indispensable party. Gillard also asserted a negligence claim against Bebe Walker, the notary named in the 2004 quitclaim, but the court dismissed all claims against Walker without prejudice in January 2013.

Phase 1 took place in November 2014 before Judge Taylor. The court heard testimony from Alice, Steven, realtor William Richard, and Gillard and received into evidence all relevant deeds, the purchase agreement, and loan documents to the Fallbrook property. Although the court described Gillard's unmarketability problem as a "self-created problem" and questioned her motives in moving out and seeking insurance coverage, it ruled in Gillard's favor and issued declaratory relief on three of the four requested grounds.

In its statement of decision, the court determined Steven acquired the Fallbrook property in 2002 as community property, notwithstanding the 2002 deed conveying the property to Steven as his "sole property." Thus, Alice held a community property interest in the Fallbrook property. Although the court found no fraudulent intent behind Steven's actions, it found Alice had not given him written authorization to sign real property deeds for her. Applying the equal dignities doctrine, the court concluded the 2002 interspousal and 2004 quitclaim deeds were ineffective to transfer Alice's community property interest to Steven.<sup>9</sup> The court also found the defects in the 2002 and 2004 deeds were not cured by Alice's 2012 quitclaim deed transferring her interest to Gillard because there was no evidence it had been delivered to Gillard. Thus, the court found Gillard's title to the Fallbrook property defective due to Alice's lingering community property interest.

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<sup>9</sup> Because a deed must be in writing under the statute of frauds, the equal dignities doctrine requires that authorization for a person to sign a deed on behalf of another also be in writing. (*O'Banion v. Paradiso* (1964) 61 Cal.2d 559, 563; Civ. Code, § 2309.)

Next, the court evaluated whether Fidelity's title insurance policy covered the defect. The court found it did; Fidelity's policy covered title defects, as well as defects to a document upon which title was based due to improper signing, sealing, acknowledgement, delivery, or recordation. The court concluded a jury could find Gillard had suffered "actual loss" within the meaning of the policy and that Gillard did not receive the fee simple title she had bargained for. The court left it to the jury to determine the existence and scope of Gillard's damages. The court deferred Gillard's request for declaratory relief invalidating her debt obligations to Bank of America and GMAC until after the conclusion of Phase 2.

On December 1, 2014, the date set for Phase 2 to begin, Fidelity filed a motion for judgment on the pleadings accompanied by a voluminous request for judicial notice. Fidelity argued Gillard lacked standing because she had not abandoned her claims against Fidelity in her bankruptcy case. Fidelity also argued Gillard was precluded from relitigating the validity of her title to the Fallbrook property because *Ralls* had adjudicated that issue against her. The court admonished Fidelity for its eleventh hour motion but continued Phase 2 to give Gillard an opportunity to respond. On December 5, 2014, the court rejected both arguments and denied Fidelity's motion.<sup>10</sup>

A three-day jury trial commenced on Gillard's breach of contract and bad faith claims against Fidelity. The court instructed the jury on its Phase 1 findings that Gillard had a title defect covered by Fidelity's policy. Gillard took the stand; her counsel also

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<sup>10</sup> To avoid repetition, we discuss the *Ralls* decision and the trial court's collateral estoppel ruling in the discussion section.



examined Michael Moss (Fidelity's claims counsel) and Sarah Schwartztraub (an appraiser). At the close of Gillard's case in chief, Fidelity filed a motion for nonsuit (Code Civ. Proc., § 581c), arguing Gillard's claims were untimely and challenging her request for punitive damages. The court rejected Fidelity's statute of limitations argument but granted nonsuit as to Gillard's punitive damages request, concluding there was only modest or mild evidence of a bad faith claim denial by Fidelity. Thereafter, Fidelity rested without calling any witnesses. While the jury deliberated, the court asked the parties to brief the last remaining issue, as to whether Gillard's debt obligations to Bank of America and GMAC were unenforceable due to her title defect.

On December 11, 2014, the jury returned a verdict in Gillard's favor. It awarded Gillard \$890,000 on her breach of contract claim and \$560,000 on her claim for breach of the implied obligation of good faith and fair dealing.

Following the verdict, the court denied Gillard's request for declaratory relief as to her debt obligations to Bank of America and GMAC, stating Gillard sought a windfall by seeking to collect from Fidelity while avoiding repaying her loans, and nothing in law or equity would permit the court to rule the loans "void and invalid." The court further declined her request to declare the deeds of trust securing the loans in favor of Bank of America and GMAC void, finding Gillard had ratified the trust deeds by "keeping the money she borrowed and making some payments as agreed."

On February 19, 2015, the court entered judgment for Gillard on her claims against Fidelity for breach of contract and breach of the implied obligation of good faith and fair dealing. The court granted declaratory relief that: (1) Gillard's title was

defective due to defects in deeds purporting to convey Alice's community property interest; (2) Gillard did not receive the fee simple title she had bargained for; and (3) her title defect was covered under Fidelity's policy. The court entered judgment in favor of defendants as to Gillard's request to declare Bank of America and GMAC's notes and trust deeds void due to her title defect. Fidelity appealed, and Gillard cross-appealed. Bank of America and GMAC joined in Fidelity's arguments on appeal.

## DISCUSSION

On appeal, Fidelity argues the title insurance policy covers only actual loss and that Gillard failed to show an adverse claim to trigger coverage. To the extent Alice held a community property interest in the Fallbrook property, Fidelity claims she ratified signatures made by Steven on her behalf and would be estopped and time-barred from challenging Gillard's title. Fidelity also argues Gillard's claims are barred by collateral estoppel and judicial estoppel due to prior rulings in the *Ralls* action.

Gillard cross appeals the trial court's order granting nonsuit on her punitive damages claim. She also challenges the court's ruling that, notwithstanding her title defect, the trust deeds held by Bank of America and GMAC were enforceable.

As we explain, we conclude Gillard is collaterally estopped from relitigating the validity of her title; the *Ralls* court entered judgment against Gillard on the identical issue after it found no basis to declare her grant deed to the Fallbrook property void. Because Gillard holds fee simple title to the Fallbrook property, Fidelity is not liable under the title insurance policy, and the judgment in Gillard's favor must be reversed. Moreover, because Gillard holds valid title to the Fallbrook property, the trial court did not err in

granting nonsuit as to her request for punitive damages or in denying her request to declare Bank of America and GMAC's notes and trust deeds to the property void.

## I.

### COLLATERAL ESTOPPEL

#### A. *Procedural Background*

In the instant lawsuit against Fidelity, Gillard sought declaratory relief that: (1) the 2002 interspousal deed, 2004 quitclaim deed, and 2012 quitclaim deed were void; (2) Fidelity's title insurance policy covered the defect; and (3) Gillard did not receive the fee simple title she bargained for.<sup>11</sup> In essence, Gillard asked the trial court to find her title to the Fallbrook property defective and eligible for insurance coverage because Alice failed to effectively convey her community property interest in the property through the 2002, 2004, or 2012 deeds bearing her name.

Gillard previously litigated whether her title to the Fallbrook property was void. In *Ralls*, her 2006 construction defect lawsuit against Steven and his business partners, Gillard sought "a declaration by the court that the deed transferring [the Fallbrook] property to her and the related transactional documents [we]re void" because Steven had signed the 2004 quitclaim deed for Alice. In December 2009, Judge Halgren entered judgment for Gillard on her construction defect, breach of contract, and negligence claims but *denied* her request for declaratory relief. In its September 2009 statement of decision, the court found Alice had authorized Steven to sign the 2004 quitclaim on her

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<sup>11</sup> Gillard also sought declaratory relief that her loans and trust deeds held by Bank of America and GMAC were void due to her void and invalid title, but that issue is not pertinent to Fidelity's collateral estoppel argument on appeal.

behalf. The court rejected Gillard's argument Alice's authorization was void under the equal dignities doctrine unless in writing, stating it was "not aware of any cases where a conveyance signed by a spouse with oral authorization was set aside at the behest of the buyer." Finally, the court rejected that Gillard would have to disclose Alice's potential interest to future buyers, noting Alice had never asserted an interest in the property and would likely be estopped or viewed as having ratified Steven's actions were she to later protest. In short, the court concluded it "d[id] not find a basis to declare the [2004 grant] deed void" as a result of Steven having signed the 2004 quitclaim deed for Alice.

Fidelity was not a party to *Ralls*, but it was aware of those proceedings. Before Phase 1 began, Gillard filed a motion in limine to exclude certain evidence from *Ralls*. Fidelity opposed her motion, arguing *Ralls* was relevant because Judge Halgren had ruled Gillard received clear title to the Fallbrook Property. Judge Taylor asked Fidelity for a copy of Judge Halgren's statement of decision at that time. Yet, Fidelity did not provide the court a copy until *after* Phase 1 concluded and the court had issued a tentative ruling finding Gillard's title void.

On December 1, 2014, the date set for Phase 2 to begin, Fidelity filed a motion for judgment on the pleadings arguing Gillard was collaterally estopped from challenging the validity of her title to the Fallbrook property. The court admonished Fidelity for raising the defense at the eleventh hour after four years of litigation, noting that if collateral estoppel applied, there was no basis to try the issues raised in Phase 1. Nevertheless, the court continued the jury trial to give Gillard an opportunity to respond. In her opposition to Fidelity's motion, Gillard argued: (1) there was no final judgment in *Ralls* because the

case had been stayed pending bankruptcy proceedings; (2) Fidelity waived its right to assert the defense; (3) new facts or changed conditions weighed against applying collateral estoppel; and (4) applying collateral estoppel would be unfair and contrary to public policy.

On December 5, 2014, the court denied Fidelity's motion. The court found Gillard's waiver argument persuasive, stating Fidelity's delay in filing the motion had "imposed great prejudice upon the court and plaintiff's counsel." The court further ruled it would have denied the motion even had it been timely. The court explained that for res judicata or collateral estoppel to apply, "the issue or cause of action in the first case and the issue or cause of action in the second case must be 'identical' "—i.e., have "identical factual allegations" at stake. The court found the issues in the two cases were not "identical" because *Ralls* did not decide whether Gillard's title was void in relation to Fidelity's title insurance policy.

B. *Contentions on Appeal and Standards of Review*

On appeal, Fidelity challenges the trial court's ruling rejecting its collateral estoppel defense. Fidelity contends all the elements of collateral estoppel were met and that Gillard was precluded from relitigating whether her title to the Fallbrook property was void. Fidelity argues collateral estoppel dispenses with Gillard's entire case and requires reversal of the judgment. Gillard disagrees, arguing: (1) Fidelity waived the defense; (2) new facts or changed conditions weigh against applying collateral estoppel; (3) the issue in *Ralls* is not identical; and (4) equitable reasons weigh against application. We consider the application of collateral estoppel de novo on appeal. (*Roos v. Red*

(2005) 130 Cal.App.4th 870, 878 (*Roos*); *Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1415 (*Smith*).)

The trial court found Fidelity had waived its collateral estoppel defense. As Gillard argues, ordinarily the issue of waiver is a question of fact, and the trial court's finding is binding on the appellate court if supported by substantial evidence. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1052-1053.) However, waiver is a question of law, subject to independent review, where the evidence is not in conflict and is susceptible of only one reasonable inference. (*Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 171; *Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1206 (*Saint Agnes*).)

At oral argument, Gillard argued the trial court made a *factual* finding of waiver. Her counsel pointed to billing records submitted with Gillard's opposition that suggested counsel for Fidelity's predecessor had reviewed the *Ralls* statement of decision as early as September 2009. However, these billing records do not render waiver a question of fact. Plainly, substantial evidence supports the trial court's *factual* finding Fidelity knew about the *Ralls* ruling long before it asserted collateral estoppel in this case. Aside from the billing records, Fidelity's counsel claimed during motions in limine before Phase 1 that *Ralls* was relevant because it addressed "whether [Gillard] had received clear title to the property." When the court admonished Fidelity for not asserting collateral estoppel earlier, counsel offered only that Fidelity "previously had a copy of the [*Ralls*] statement of decision, but not a certified copy of it."

On appeal, our analysis does not turn on the court's factual finding regarding Fidelity's knowledge of *Ralls*. Waiver is the intentional relinquishment of a known legal right after knowledge of the facts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 (*Waller*).) Taking as a given Fidelity had "knowledge of the facts" (the *Ralls* ruling) long ago but did not assert collateral estoppel until an eleventh hour motion for judgment on the pleadings, the question becomes whether Fidelity thereby *waived* or instead preserved a known legal right. Because Fidelity's knowledge of *Ralls* and the timing of its defense are neither in dispute nor subject to more than one reasonable inference, "the issue of waiver is one of law and the reviewing court is not bound by the trial court's ruling." (*Saint Agnes, supra*, 31 Cal.4th at p. 1206.)

C. *Legal Principles*

In *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN Holdings*), the California Supreme Court distinguished collateral estoppel, or *issue* preclusion, from res judicata, or *claim* preclusion. Claim preclusion acts to bar relitigation of the same cause of action in a second suit between the same parties or their privies. (*Id.* at p. 824.) "*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action . . . the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*Id.* at p. 824.) In accordance with due process, issue preclusion may be asserted only against a party to the first lawsuit or one in privity with a party. (*Ibid.*)

Collateral estoppel "operates 'as a shield against one who was a party to the prior action to prevent' that party from relitigating an issue already settled in the previous

case." (*DKN Holdings, supra*, 61 Cal.4th at p. 827.) "The point is that, once an issue has been finally decided *against* such a party, that party should not be allowed to relitigate the same issue in a new lawsuit." (*Ibid.*) Thus, collateral estoppel serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." (*Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 326.)

Even when the threshold elements of collateral estoppel are met, its application is not automatic. The doctrine is to be applied " 'only where such application comports with fairness and sound public policy.' " (*Smith, supra*, 153 Cal.App.4th at p. 1414.) Specifically, "the public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343 (*Lucido*).)

D. *Fidelity Preserved its Collateral Estoppel Defense*

At the outset, we must address whether Fidelity preserved its collateral estoppel defense. Plainly, Fidelity's decision to assert the defense at the eleventh hour was counterproductive to efficient case management and wasteful of court resources. The trial court found Fidelity was "clearly aware" of the *Ralls* decision before Phase 1 began and justifiably admonished Fidelity for its unreasonable delay. Nevertheless, we conclude Fidelity preserved its right to assert the defense.



As discussed *ante*, waiver is the intentional relinquishment of a known legal right after knowledge of the facts. (*Waller, supra*, 11 Cal.4th at p. 31.) "The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right." (*Ibid.*) Doubtful cases are decided against a waiver. (*Ibid.*)

A collateral estoppel defense may be waived. (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 89 (*Sargent Controls*); *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332 (*Franklin Mint*)). "The fundamental rule that a reviewing court does not consider arguments or theories that could have been but were not raised below 'is especially applicable to the doctrine of estoppel, which includes factual elements that must be established in the trial court.' " (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 490, fn. 6.)

*Dillard v. McKnight* (1949) 34 Cal.2d 209 (*Dillard*) is instructive on the question of waiver. In *Dillard*, parents of a decedent filed a wrongful death lawsuit against an automobile driver; at trial, the court found the driver was acting within his scope of employment when the accident occurred. (*Id.* at p. 212.) The parents then filed a second wrongful death lawsuit against the driver's employers. (*Ibid.*) In that action, the court found the driver was *not* acting within his scope of employment when the accident occurred. (*Ibid.*) On appeal, the parents argued the ruling in the first case was dispositive of the scope of employment issue in the second. (*Id.* at p. 213.) The Supreme Court rejected their argument as "too late," noting the parents failed to assert issue preclusion "until they moved unavailingly for a new trial" in the second case. (*Id.* at pp.

217-219.) Similarly, in *Franklin Mint*, a party waived its collateral estoppel defense where it "never attempted in the trial court to submit evidence from the underlying proceedings to prove that the same issues were tried and determined in that action." (*Franklin Mint, supra*, 184 Cal.App.4th at p. 332.)

These authorities stand for the proposition that collateral estoppel is waived as a defense unless asserted "in the course of the second trial." (*Dillard, supra*, 34 Cal.2d at p. 218; see *Sargent Controls, supra*, 136 Cal.App.4th at p. 89 [" '[c]ollateral estoppel is waived if not *raised* in the trial court' "].) "[F]airness is at the heart of a waiver claim. Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) Here, unlike in *Dillard* and *Franklin Mint*, Fidelity *did* argue collateral estoppel before the trial court, albeit at a late stage, by filing a motion for judgment on the pleadings before the Phase 2 jury trial began. Gillard *did* have an opportunity to file an opposition brief, and the trial court deferred Phase 2 of trial to fully consider Fidelity's defense. (Cf. *Franklin Mint, supra*, 184 Cal.App.4th at p. 332.)

"[U]nlike res judicata as a bar, collateral estoppel requires no special pleading." (7 Witkin Cal. Procedure (5th ed. 2008) Judgment, § 348.) A motion for judgment on the pleadings operates as a general demurrer and may be brought at any time prior to trial or at the trial itself. (*Dudley v. Dept. of Transp.* (2001) 90 Cal.App.4th 255, 260; *Stoops v.*

*Abbassi* (2002) 100 Cal.App.4th 644, 650.)<sup>12</sup> Although it would have been better practice for Fidelity to assert its collateral estoppel defense earlier, Fidelity preserved the defense by raising it in a timely filed motion for judgment on the pleadings. Accordingly, Fidelity did not intentionally relinquish its right to assert collateral estoppel, as would be required to find waiver. (*Waller, supra*, 11 Cal.4th at p. 31.)

We likewise find no forfeiture, which entails a " 'failure to make the timely assertion of a right.' " (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 [distinguishing waiver and forfeiture]; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 262, fn. 19 [same].) Because Fidelity asserted collateral estoppel in a timely filed motion for judgment on the pleadings, it did not forfeit its right to assert the defense.

E. *Gillard is Collaterally Estopped from Relitigating whether her Title to the Fallbrook Property is Void*

"[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings, supra*, 61 Cal.4th at p. 825.) There is no dispute as to the fourth element: Fidelity asserts issue preclusion against Gillard, who was a party in *Ralls*. The three remaining elements are likewise met.

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<sup>12</sup> Section 438 of the Code of Civil Procedure sets forth time limits for statutory motions for judgment on the pleadings. However, nonstatutory motions continue to be recognized and are not subject to the same time limits. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶¶ 7:277, 7:285.)

First, the *Ralls* judgment, entered in December 2009, is final.<sup>13</sup> Fidelity argues the judgment became final on April 7, 2010, 30 days after the pending new trial motion was deemed denied by operation of law. (Code Civ. Proc., § 660.) Alternatively, Fidelity argues the judgment became final no later than July 25, 2014, after the bankruptcy stays were lifted. We need not decide which is correct because Gillard does not dispute the finality of the *Ralls* judgment on appeal.

Second, the issue in this case is identical to the issue decided in *Ralls*. In *Ralls*, Gillard sought declaratory relief her title was void due to Steven having signed the 2004 quitclaim deed for his wife, Alice. In this case, Gillard sought declaratory relief her title was void because of the same defect in the 2004 quitclaim deed and/or defects in the 2002 interspousal deed and 2012 quitclaim deed. Thus, in both this case and *Ralls*, Gillard asked the courts to decide whether her title to the Fallbrook property was defective as a result of alleged defects in documents purporting to convey Alice's community property interest in the property.

The trial court framed the issue in this case as whether Gillard received "defective title" or whether a document upon which Gillard's title was based was invalid because it was not "properly signed, sealed, acknowledged, delivered or recorded," as those terms were defined in Fidelity's title insurance policy. The court concluded this issue was different from the one litigated in *Ralls* because *Ralls* did not consider language in

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<sup>13</sup> We grant Fidelity's motion for judicial notice of the January 7, 2010 notice of entry of judgment, the October 20, 2010 minute order, and the December 6, 2010 minute order in *Ralls*. (Evid. Code, §§ 452, subd. (d) & 459, subd. (a).)

Fidelity's title insurance policy when it declared there was no title defect. The trial court misconstrued the "identical issue" requirement of collateral estoppel.

Whether an issue is "identical" depends on the *issues* actually decided, not on how a cause of action is framed or the nature of relief requested. (*DKN Holdings, supra*, 61 Cal.4th at p. 824; *Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1231 (*Lumpkin*).) Were it otherwise, " 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' " (*Lumpkin*, at p. 1231.) Hence, courts routinely apply issue preclusion where two proceedings involving different causes of action present identical factual issues. (See, e.g., *Lumpkin*, at pp. 1231-1232; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 400 (*Murphy*); *Basurto v. Imperial Irrigation District* (2012) 211 Cal.App.4th 866, 888.) That *Ralls* did not involve a title insurance claim or require analysis of Fidelity's insurance policy is immaterial. What matters is *Ralls* decided the identical issue—whether Gillard's title to the Fallbrook property was void on account of defects in documents purporting to convey Alice's community property interest.<sup>14</sup> Indeed, it is inconsequential whether *Ralls* even reached the correct result; issue preclusion applies regardless of whether the issue was correctly decided in the first action. (*Roos, supra*, 130 Cal.App.4th at p. 887; *Lumpkin*, at p. 1232.)

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<sup>14</sup> It is also immaterial Gillard did not allege the 2002 interspousal deed and 2012 quitclaim deed were defective in *Ralls*. *Ralls* ruled Alice ratified Steven's signature on the 2004 quitclaim deed. That finding alone was sufficient in both that case and in this one to conclude Gillard holds valid title to the Fallbrook property.

Gillard argues additional evidence emerged after Judge Halgren's December 2009 ruling in *Ralls*. However, "the fact a party asserts new legal or factual theories *or new evidence* relevant to an issue previously decided does not affect the applicability of the collateral estoppel bar." (*Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1090, italics added; see *Roos, supra*, 130 Cal.App.4th at p. 888 ["existence of 'new evidence' normally does not bar the application of collateral estoppel"].) "An exception to collateral estoppel cannot be grounded on an alleged discovery of more persuasive evidence. Otherwise there would be no end to litigation." (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748.)

As to the third and final element, there is no question *Ralls* actually litigated and necessarily decided the validity of Gillard's title to the Fallbrook property. In *Ralls*, as here, Gillard sought declaratory relief her title to the Fallbrook property was void due, in part, to Steven signing the 2004 quitclaim deed for Alice. Gillard had a "full and fair opportunity to litigate the issue" through trial. (*DKN Holdings, supra*, 61 Cal.4th at p. 826.) She lost at trial and did not appeal. "The purpose of issue preclusion is 'to prevent a party from repeatedly litigating an issue in order to secure a different result' when it had a full and fair opportunity to do so previously." (*Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179.) Because *Ralls* considered the same issue and decided Gillard holds valid title to the Fallbrook property, she is precluded from relitigating that issue here.

F. *Application of the Doctrine Promotes Public Policy*

" 'Collateral estoppel is an equitable concept based on fundamental principles of fairness.' " (*Murphy, supra*, 164 Cal.App.4th at p. 398.) Even where the technical requirements are met, courts must consider whether applying the doctrine would further the public policies of preserving the integrity of the judicial system, promoting judicial economy, and protecting litigants from harassment by vexatious litigation. (*Lucido, supra*, 51 Cal.3d at p. 343; *Roos, supra*, 130 Cal.App.4th at p. 886.)

The first policy interest, preserving the integrity of the judicial system, strongly favors applying collateral estoppel. In evaluating this factor, courts consider whether inconsistent judicial determinations of the same issue would undermine the integrity of the judicial system. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 879; *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 483.) Here, two superior courts in San Diego County have reached conflicting determinations on the same factual issue. Applying the doctrine would avoid inconsistent rulings and promote the integrity of our judicial system.

The remaining policy factors are less applicable. Judicial economy is only weakly promoted given Fidelity's delay in asserting the defense; applying the doctrine would do little to minimize repetitive litigation. (Cf. *Castillo v. City of Los Angeles, supra*, 92 Cal.App.4th at p. 483.) Likewise, because Fidelity was not a party to *Ralls*, the policy interest of protecting litigants from vexatious litigation does not apply. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 833.)

On balance, we conclude applying collateral estoppel would promote public policy. Gillard had an opportunity to fully litigate whether Steven signing the 2004 quitclaim deed on Alice's behalf rendered her title to the Fallbrook property void. The *Ralls* court considered and rejected that view, and Gillard chose not to appeal. She cannot take a second bite at the apple by relitigating the same issue in a separate action against the title insurer.

G. *Effect of Applying the Doctrine*

*Ralls* decided there is no defect in Gillard's title to the Fallbrook property, and Gillard is collaterally estopped from relitigating that issue. Although Steven signed the 2004 quitclaim deed for Alice, *Ralls* determined that deed effectively conveyed any community property interest Alice held in the property to Steven. As a result, Steven held sole title to the Fallbrook property when he conveyed it to Gillard in March 2004. Therefore, today, Gillard holds valid title to the Fallbrook property, and she received the fee simple title she bargained for. The trial court erred in granting Gillard declaratory relief that her title was defective, she did not receive fee simple title, and Fidelity's policy covered the defect.

That conclusion disposes of the entire appeal. Because Gillard holds valid title to the Fallbrook property, Fidelity was neither obligated to provide coverage nor to defend Gillard's title, and it did not breach its contract with Gillard by failing to do so. (See, e.g., *Waller, supra*, 11 Cal.4th at p. 37 [insurer has no duty to defend where policy provides no coverage].) Absent a breach of contract, Fidelity did not breach the implied covenant of good faith and fair dealing. (*Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1153



["a bad faith claim cannot be maintained unless policy benefits are due"]; *Waller, supra*, at pp. 35-36 [same].) We therefore reverse the trial court's judgment on Gillard's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.<sup>15</sup>

Our conclusion Gillard holds fee simple title to the Fallbrook property also resolves all issues raised in Gillard's cross-appeal. Because Fidelity is not liable under the title insurance policy, the trial court did not err in granting Fidelity's motion for nonsuit as to Gillard's request for punitive damages. Likewise, Gillard's argument as to the notes and deeds of trust held by Bank of America and GMAC is *premised* on her title to the Fallbrook property being defective, and there was no error in denying that request for declaratory relief.

## II.

### REQUEST FOR JUDICIAL NOTICE

Gillard requests judicial notice pursuant to California Rules of Court, rule 8.252 and Evidence Code sections 452 and 459 of an appellate brief filed by Fidelity's counsel in an unrelated action, *Liberty National Enterprises, L.P. v. Chicago Title Insurance Company*, No. B234341 (2d DCA, Div. 8). Gillard contends Fidelity's counsel took a position contrary to the one taken by Fidelity here while representing California Land

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<sup>15</sup> Because we reverse on collateral estoppel grounds, we do not reach Fidelity's alternative arguments that: (1) coverage under the title policy required proof of an adverse claim to Gillard's title; (2) Gillard is judicially estopped from challenging her title; (3) the court erred in applying the equal dignities doctrine to invalidate the 2002 interspousal deed and 2004 quitclaim deed; and (4) Gillard failed to mitigate or avoid damages.

Title Insurance as to whether title insurance coverage requires proof of an adverse, third party claim to title. Gillard's request for judicial notice is denied. That Fidelity's appellate counsel took a contrary position when representing a different client in unrelated litigation has no bearing as to positions counsel may assert on behalf of Fidelity here. Further, we do not reach Fidelity's argument as to whether title insurance coverage requires a third party claim, and judicial notice is properly denied as to matters "not relevant to the disposition of any issue on appeal." (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 653.)

#### DISPOSITION

Insofar as the trial court denied Gillard's request for declaratory relief as to the notes and deeds of trust held by Bank of America and GMAC in the Fallbrook property, the judgment is affirmed. In all other respects, the judgment is reversed, and the cause is remanded for the court to issue a new judgment consistent with this opinion. In the interests of justice, each party will bear its own costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.