

**IN THE SUPREME COURT OF THE STATE OF MONTANA****Supreme Court Cause No. DA 21-0493**

**J&L LANDS, LP**, a Montana Limited Partnership,  
Plaintiff and Appellee,

vs.

**JERRY W. NEZAT**,  
Defendant and Appellant.

**APPELLANT'S REPLY BRIEF**

An appeal from the decision of the Honorable Dan Wilson, Judge of the Eleventh Judicial District, in and for the County of Flathead, under the above caption and Cause No. DV-18-111(D)

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# REPLY BRIEF of APPELLANT

In his reply brief, Jerry will respond to Appellee's (J&L's) arguments in the order they are addressed in *Appellee's Answer Brief* ("*Appellee's Brief*").

## I. COLLATERAL ESTOPPEL

*A. J&L and the District Court are wrong; issue preclusion (collateral estoppel) is not applicable here where there was a stipulated order of dismissal.*

The District Court erred by applying the doctrine of collateral estoppel. Collateral estoppel is clearly *not applicable* here where the issue in the prior case was resolved by a consent order (order of dismissal pursuant to a stipulation requesting dismissal). Unearthing the authority that so holds takes some digging, but those authorities are clear; when an action is dismissed with a stipulated order for dismissal, collateral estoppel's requirement of a judgment on the merits is *not* satisfied. *Res judicata* may bar relitigation of the dismissed claim, but collateral estoppel is *not* applicable to bar future litigation of the issues involved.

As the authorities discussed below show, J&L (and the District Court) miss an important distinction between claim preclusion and issue preclusion and as a result, J&L is mistaken in its assertion that: “. . . the voluntary dismissal of a cause of action with prejudice constitutes a final judgment on the merits for the purposes of res judicata *and collateral estoppel.*” *Appellee's Brief*, p. 5 [emphasis added]. As this Court recognized in *Linder v. Missoula County*,

discussed *infra*, “consent judgments ordinarily support claim preclusion **but not issue preclusion**.” Collateral estoppel – issue preclusion – is not applicable here.

By applying the doctrine as it did, the District Court did not consider the evidence Jerry offered to show that Mary Meadows never acquired a valid interest in his property; evidence that was not refuted by J&L. That evidence at the very least establishes a disputed fact essential to J&L’s claim, and given that J&L came forward with no evidence in rebuttal, this Court should rule it has been established that Meadows never had a valid interest in Jerry’s property. Accordingly, the lien of J&L’s judgment against Meadows never attached to Jerry’s property.

***B. There must be a judgment on the merits in the prior action.***

J&L argues, and the District Court erroneously ruled that, “voluntary dismissal with prejudice constitutes a final judgment on the merits.” *Order Granting Summary Judgment*, p. 13, Dkt. 41, *Appellee’s Brief*, p. 5. It is well recognized that issue preclusion requires a **substantive decision on the merits** in the prior action, and that a dismissal based on a stipulation of the parties does **not** satisfy that requirement.

Both J&L and the District Court rely on *res judicata* cases and fail to recognize that the requirement of a final judgment on the merits is not the same for collateral estoppel; that voluntary dismissal with prejudice **does not** constitute a final judgment on the merits for purposes of issue preclusion. In

*Linder v. Missoula County*, 824 P.2d 1004, 1006-07, 251 Mont. 292, 296-97 (1991), this Court recognized that a voluntary dismissal does not support issue preclusion, stating [emphasis added]:

Issue preclusion does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation . . . In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. ***Thus consent judgments ordinarily support claim preclusion but not issue preclusion.*** Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* Sec. 4443, at 382-385 (1985) (emphasis added).

Citing *Linder* as well as Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4443, and other authorities, the Supreme Court of Wyoming reached the same conclusion in *Markstein v. Countryside I, LLC*, 2003 WY 122, 77 P.3d 389, ¶ 25, stating [emphasis added]:

We even went further in our analysis in *Amoco*, at ¶ 12, to address the effect of collateral estoppel on settlements or consent judgments. Therein, we established that normally issue preclusion (collateral estoppel) does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation and that, in most circumstances, it is recognized that consent agreements are usually intended to preclude any further litigation on the claim presented (*res judicata*) but are not intended to preclude further litigation on any of the issues presented (collateral estoppel). Hence, we determined that ***consent judgments will ordinarily support claim preclusion (res judicata) but not issue preclusion (collateral estoppel)***. [Citations to Wright, Miller & Cooper, *Linder v. Missoula County*, and other authorities omitted].

The District Court and J&L made the mistake of relying on the same two *res judicata* cases, *Touris v. Flathead County*, 2011 MT 165, ¶ 15, 361 Mont. 172, 258 P.3d 1, and *Beasley v. Flathead County*, 2009 MT 121, ¶ 19, 350 Mont.

177, 206 P.3d 915. With issue preclusion, however, actual judicial deliberation producing an affirmative resolution *based on the merits* is essential. Resolutions that do not go to the merits can support *res judicata* – claim preclusion – but *not* collateral estoppel.

The prior case in this instance – the case Jerry brought against Meadows to establish the invalidity of the quitclaim deed that put Meadows on the title to Jerry’s property – was settled and dismissed pursuant to the parties’ stipulation. The consequence of precluding Jerry from presenting evidence on that issue was to treat the judgment as if it was a determination that Jerry’s claims lacked merit. The reality, however, is that Jerry got the relief he was seeking because his claims did have merit. Once Jerry got Ms. Meadows to the steps of the courthouse she gave Jerry a deed (with no payment by Jerry) conveying her purported interest in the property back to Jerry. Once that deed had been signed by Meadows and delivered to Jerry, Jerry stipulated to the dismissal of his claims. The District Court describes this resolution in detail based on its review of the record of which it took judicial notice. *Order Granting Summary Judgment*, pp. 13-14, Dkt. 41.

***C. Other court decisions and authorities.***

Citing *Linder, supra*, and following the *Restatement (Second), Judgments* § 27, the Court in *Hill v. State Employees Retirement Commission*, 83 Conn.App. 599, 612-13, 851 A.2d 320 (2004), explained that an issue resolved by

“confession, consent, or default,” is not actually litigated for purposes of collateral estoppel, stating [emphasis added].

However, “[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.” 1 Restatement (Second), supra, § 27, comment (e), p. 257.

\* \* \*

Under the Restatement (Second), only an issue that has actually been litigated has a preclusive effect on subsequent litigation. ***An issue that has been resolved by virtue of a settlement agreement has not actually been litigated.*** 1 Restatement (Second), supra, § 27, comment (e). Although no Connecticut cases have so held, ***courts in other jurisdictions have declined to give preclusive effect to judgments approving a settlement agreement.*** [Numerous citations to authorities, including Wright, Miller & Cooper and this Court’s decision in *Linder v. Missoula County*, omitted].

Issues resolved by default judgments likewise are not considered to have been “actually litigated and adjudged,” for purposes of collateral estoppel. This Court so held in *Lane v. Farmers Union Ins.*, 1999 MT 252, 296 Mont. 267, 989 P.2d 309. Relying on the *Restatement (Second) of Judgments* § 27, cmt. e (1982), this Court reasoned:

As concluded above, the default judgment merely restated the conclusory averments found in Farmers’ pleadings as proven facts, and in no sense were these relevant issues “actually litigated.”

Thus, the second question of the collateral estoppel test, was there a final judgment on the merits? cannot be answered affirmatively. Therefore, we hold that Lane cannot be precluded under the doctrine of collateral estoppel . . .

*Lane v. Farmers Union*, supra, ¶¶ 42, 43.

The same holding was reached in *Christian v. Sizemore*, 185 W.Va. 409, 407 S.E.2d 715 (1991), in which the Supreme Court of West Virginia explained

[emphasis added]:

As discussed above, collateral estoppel requires, among other things, an issue which has actually been litigated in an earlier proceeding, a previous judgment rendered on the merits . . .

\* \* \*

Ample authority exists for the proposition that a default judgment has no collateral estoppel effect. See Restatement (Second) of Judgments § 27e (1982). ***The Restatement recognizes that issues are not actually litigated in a default judgment action and, consequently, that default judgments are not appropriate foundations for the application of collateral estoppel.*** Id.; [Numerous citations omitted.]

This Court has been clear that preclusion on the basis of collateral estoppel requires a prior decision that actually considered the merits of the issue. Relying on the *Restatement* and *Lane v. Farmers Union, supra*, this Court stated in *McDaniel v. State*, 2009 MT 159, 350 Mont. 422, 208 P.3d 817, ¶ 39 [emphasis added]:

Element 2. Was there a final judgment on the merits in the prior adjudication? To determine whether a final judgment on the merits has been reached, we look to see if the issue was ***actually litigated and adjudged as shown on the face of the judgment.*** *Lane v. Farmers Union Ins.*, 1999 MT 252, ¶ 41, 296 Mont. 267, 989 P.2d 309. ***Before giving preclusive effect to a judgment or order, “the court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered [, and should refuse preclusion] if the decision was avowedly tentative.”*** Baltrusch, ¶ 22 (brackets in Baltrusch) (quoting Restatement (Second) of Judgments § 13 cmt. g (1982)).

Other decisions of this Court that reach the same conclusion and rely on the same authorities are discussed in Jerry’s opening brief and include, *Poplar Elementary School Dist. No. 9 v. Froid Elementary School Dist. No. 65*, 2020

MT 216, 401 Mont. 152, 471 P.3d 57, ¶ 36 and *Baltrusch v. Baltrusch*, 2006 MT 51, 331 Mont. 281, 130 P.3d 1267, ¶ 22. *Appellant's Brief*, pp. 27-34. *Accord*; *Gibbs v. Altenhofen*, 376 Mont. 61, 330 P.3d 458, ¶ 23 (2014) and *Ayala v. Stafford*, 2021 MT 185N, 491 P.3d 734, ¶15.

For an in-depth and scholarly examination of collateral estoppel and its requirement that an issue be “actually litigated,” with extensive citations to authorities (including this Court’s decision in *Lane v. Farmers Union, supra*), see the dissenting opinion in *Powell v. Lane*, 375 Ark. 178, 289 S.W.3d 440 (Ark. 2008) (“Unlike res judicata, which acts to bar issues that merely could have been litigated in the first action, collateral estoppel requires actual litigation in the first instance.”) In that opinion, Justice Wills (joined by Justice Brown) highlighted the strong policy ***against*** preclusion, writing [emphasis added]:

As noted in the Restatement (Second) of Judgments § 27 cmt. e (1982), when approaching difficult questions regarding the “actually litigated” requirement, “***policy considerations . . . weigh strongly in favor of nonpreclusion***, and it is in the interest of predictability and simplicity for such a result to obtain uniformly.”

*Powell v. Lane, supra*, 289 S.W.3d 440, 453.

Here we have only an order of dismissal granted at the request of the parties. There was no consideration of the merits of the issue by the court. Applying the doctrine here as the District Court did treats the order of dismissal as though it was a judicial determination that Jerry’s claim was rejected, which is a distortion of what actually happened. It allows J&L to assert that Jerry lost

and Meadows had in fact acquired a valid interest in Jerry's property. J&L then uses that shield to avoid addressing the facts Jerry presented to show that Meadows did *not* acquire a valid interest in his property. Applying collateral estoppel here results in "revisionist history" and is unfair to Jerry. And as the next paragraphs show, unfairness to the defendant is an important consideration with "offensive" collateral estoppel.

***D. Applying the doctrine here against Jerry – the defendant – constitutes "offensive" (as opposed to "defensive") collateral estoppel, and brings into play the added element of "fairness to the defendant."***

Invoking collateral estoppel to preclude a defendant from raising an issue in defense of a claim asserted against it by the plaintiff is sometimes referred to as "offensive" collateral estoppel. When applying the doctrine in such circumstances the additional element of fairness to the defendant should be considered. Research by the undersigned disclosed no decision of this Court addressing the distinction between offensive and defensive collateral estoppel. While the Court need not reach the question as it is clear from the authorities discussed above that issue preclusion is not applicable here, still, the distinction merits consideration, if only briefly.

In Gershonowitz, "*Issue Preclusion: A Return of the Multiple Claimant Anomaly*," University of Baltimore Law Review; Vol. 14, Issue 2 (1985), the author examines the use of offensive collateral estoppel and its potential for

unfairness to defendants, stating [footnotes omitted; emphasis and citation to *Parklane Hosiery* added]:

Commentators and subsequent decisions, however, have distinguished offensive collateral estoppel - a plaintiff seeking to estop a defendant from litigating issues the defendant had previously litigated and lost - from defensive collateral estoppel - a defendant seeking to estop a plaintiff from litigating issues the plaintiff had previously litigated and lost. ***Most courts that distinguish offensive and defensive collateral estoppel place greater limitations on offensive use.***

*Id.*, p. 232.

*Parklane* [*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)], requires different rules for offensive and defensive use because offensive collateral estoppel does not promote judicial economy as well as does defensive collateral estoppel and because ***offensive collateral estoppel may be unfair to defendants.***

*Id.*, p. 241.

*Parklane* requires courts to be more sensitive to the differences between offensive and defensive collateral estoppel. *Parklane* requires courts to use essentially the same rule as the Restatement, but to apply it in a way that demonstrates ***awareness of the potential unfairness involved in offensive collateral estoppel.***

*Id.*, p. 242.

There are at least four reasons why invoking the doctrine here would be unfair to Jerry; *viz*, 1) applying the doctrine here advances none of the policy considerations for which the doctrine was developed, 2) it treats the prior case as having been decided in a way that is the opposite of how the case was actually resolved, 3) it robs him of an important defense forcing Jerry to resist J&L's claim against his homestead with one hand tied behind his back, and 4) it relieves

J&L of the obligation to rebut the evidence marshaled by Jerry showing that Meadows never acquired a valid interest in Jerry's property.

Principles of due process and modern rules of practice evince a strong policy favoring the resolution of claims (and defenses) on their merits. *See, e.g.*, Rule 1, M.R.Civ.P. It is these principles that undergird the *Restatement's* stated policy, noted above by Justice Wills in *Powell v. Lane* – of “nonpreclusion” in the absence of a clear, duly considered judgment on the merits. The District Court's application of collateral estoppel here was clearly wrong and should be reversed.

## **II. MEADOWS NEVER HELD A VALID INTEREST IN JERRY'S PROPERTY TO WHICH THE LIEN OF J&L'S JUDGMENT ATTACHED**

In Part II of its *Brief*, J&L addresses to the fact it offered no evidence to rebut Jerry's evidence that the quitclaim deed to Meadows was invalid. *Appellee's Brief*, pp. 10-12.

### ***A. Jerry presented a substantial body of evidence establishing the deed to Meadows was invalid; J&L offered nothing in response.***

J&L asserts that Jerry's acknowledgment of the deed's signing and recording recited in the parties' agreed statement of facts is conclusive that the deed was valid. *Appellee's Brief*, p. 11; *Stmt. of Facts*, ¶ 8, Dkt. 9. J&L made the same argument to the District Court. The Court rejected it, concluding:

“J&L’s argument that Nezat has admitted that Meadows had a valid interest in the Property is unavailing.” *Order Granting Summary Judgment*, p. 8, Dkt. 41.

J&L’s strained argument ignores Jerry’s *Answer* to J&L’s *Complaint* in which Jerry denies the validity of the deed and sets forth all the grounds supporting his position. *Answer*, Dkt. 10. It also ignores the parties’ agreement to escrow the funds (entered into before the statement of agreed facts). That agreement provides: “The parties also acknowledge that Nezat does not waive or relinquish any arguments he may have regarding the propriety of the lien or enforceability of same.” *Agreement*, p. 2, ¶ 2. (That *Agreement*, dated February 16, 2018, is attached to *Appellee’s Brief* as Appendix 4.) And it ignores Jerry’s affidavit in which Jerry sets forth in detail the numerous facts that establish the invalidity of the purported conveyance. *Affidavit of Jerry W. Nezat*, Dkt. 18.

J&L offers nothing but the fact of the recorded quitclaim deed and the bar of collateral estoppel to avoid the conclusion that Meadows never acquired a valid interest in Jerry’s property. It is a tacit acknowledgment there is no evidence to contradict Jerry’s assertion of invalidity.<sup>1</sup>

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<sup>1</sup> As provided in § 70-20-202, MCA, the validity of a deed is subject to challenge with extrinsic evidence “where the validity of the agreement is the fact in dispute” (subpart 1(b)), or “. . . to establish illegality or fraud.” (Subpart 2)

***B. Jerry is entitled to summary judgment; J&L has no claim against him and the lien of J&L's judgment against Meadows never attached to Jerry's property.***

*Disler v. Ford Motor Credit Co.*, 2000 MT 304, 302 Mont. 391, 15 P.3d 864, stands for the well-known proposition that to avert summary judgment J&L had the burden of coming forward with some evidence to rebut Jerry's evidence.

Addressing these shifting burdens under Rule 56, M.R.Civ.P., the Court stated:

. . . where the record—here, the record made on summary judgment by Christopher—discloses no genuine issue of material fact, the burden then shifts to the party opposing summary judgment to present substantial evidence of a genuine issue of material fact. This burden is not met by merely making conclusory or speculative statements or by raising unsubstantiated concerns and theories in a brief. [Citation omitted.]

*Disler, supra*, 15 P.3d 864, ¶ 9.

J&L does not address any of the facts Jerry presented to support his claim that Meadows obtained her interest in Jerry's property through fraud and undue influence. That Meadows did not acquire a valid interest in Jerry's property should be deemed established and summary judgment entered in Jerry's favor.

### **III. J&L HAD NO RIGHT TO FORECLOSE AGAINST JERRY'S HOMESTEAD**

In Part III of its *Brief*, J&L responds to Jerry's assertion that J&L's filing of this foreclosure action was wrongful and not permitted by the homestead exemption statutes. *Appellee's Brief*, pp. 12-13.

***A. J&L's foreclosure action was not permitted by the homestead exemption statutes.***

J&L claims Jerry misapprehends the objective of J&L's lawsuit, glossing over its prayer for relief that even J&L concedes sought the forced sale of Jerry's exempt homestead. J&L highlights other elements of its *Complaint*, such as: "At no time did Appellee seek to invalidate or otherwise alter Appellant's homestead exemption." *Appellee's Brief*, p. 12. These diversions aside, it is undeniable that J&L sought that which it was not entitled to seek – foreclosure. J&L concedes: "The Complaint also sought the Court's Order directing the sale of the property in execution of Appellee's Judgment." *Appellee's Brief*, p. 12. And: "Appellee filed a Complaint (Dckt. 1) against Appellant . . . seeking to foreclose a judgment lien . . ." *Appellee's Brief*, p. 1.

J&L's *Complaint* is unequivocal. It sought foreclosure of its judgment lien by a court-ordered forced sale of Jerry's homestead. The *Complaint* prayed:

4. For this Court's order of a sheriff's sale held pursuant to Montana law for purposes of foreclosing Plaintiff's Judgment Lien;

*Complaint*, p. 3, ¶ 4, Dkt. 1.

That J&L sought to foreclose against Jerry's homestead is clear. Equally clear is that J&L's judgment is not among those allowed to foreclose against homestead property. Those lien holders are specified in § 70-32-202, MCA. J&L is not one of them. J&L was obligated to proceed in accordance with the appraisal process set forth in §§ 70-32-203 through 212.

***B. The steps J&L's foreclosure action forced Jerry to take do not "cure" or "moot" J&L's violation of the homestead statutes.***

The District Court reasoned that because Jerry sold the property after J&L filed its foreclosure action and Jerry then entered into an agreement with J&L to escrow a portion of the proceeds pending the outcome of the litigation, J&L's transgression was "moot." *Order Denying Nezat's Rule 59 Motion to Amend Judgment*, p. 4, Dkt. 53. The District Court said essentially, "no harm, no foul," and J&L should not be held to account for wrongfully filing a foreclosure action against an exempt homestead. Neither J&L nor the District Court offer any authority in support of the proposition that filing a forbidden foreclosure action is remedied by a post-filing change in circumstances or "cured" or "mooted" by a subsequent sale of the property. Jerry bowed to the pressure of J&L's lawsuit because he did not have any other choice except to pay off Meadows' obligation to J&L (the outcome J&L was essentially trying to extort from Jerry by filing suit on an eight year-old judgment it had never tried to collect from its judgment debtor just weeks before eighty-four year old Jerry was to close on the sale of his property so he could buy a place closer to town). *Affidavit of Jerry W. Nezat*, Dkt. 18.

The consequence of J&L's unlawful action is that the complaint J&L filed did not confer subject matter jurisdiction on the District Court to grant the relief J&L sought.

#### **IV. JERRY IS ENTITLED TO THE FULL AMOUNT OF THE HOMESTEAD EXEMPTION SINCE HE OWNED THE ENTIRE INTEREST IN THE HOMESTEAD PROPERTY**

In Part IV of its *Brief*, J&L addresses Jerry's homestead exemption.

*Appellee's Brief*, p. 14.

##### ***A. The strong public policy favoring liberal application of the homestead exemption.***

Any discussion of the homestead exemption begins with an affirmation of the strong public policy that undergirds the exemption, the genesis of which is the Montana *Constitution*. *Mont. Const.*, Article XIII, Sec. 5. A expression of the policy can be found in many of this Court's homestead exemption cases. A good example is seen in *In re Snyder*, 2006 MT 308, 335 Mont. 11, 149 P.3d 26, ¶ 13 [emphasis added]:

As Snyder points out, the Montana Constitution directs the Montana Legislature to enact liberal homestead and exemption laws. See *Mont Const.* art. XIII, § 5. As she further points out, ***exemption laws should be liberally construed in the debtor's favor.*** See, e.g., *In re Zimmermann*, 2002 MT 90, ¶ 15, 309 Mont. 337, ¶ 15, 46 P.3d 599, ¶ 15 (citation omitted).

##### ***B. Neel v. First Federal Savings & Loan.***

J&L tries to distinguish *Neel v. First Federal*, and of course on the facts, *Neel* is distinguishable. The facts in *Neel* are different than the facts here. However, the legal principle involved is the same. Exemption entitlement is determined as of the date the lien holder attempts to foreclose. It is not determined as of some earlier date as argued here by J&L (the date the lien of the

judgment attaches) or what was essentially the same argument in *Neel* that exemption entitlement should be fixed as of the date the underlying loan was made or when the bank obtained its judgment.

***C. The homestead exemption takes priority over a judgment lien such as J&L's; it does not "discharge" it.***

Addressing Jerry's homestead exemption, J&L also asserts:

The only genuine issue in this case is whether Appellant can ***discharge a valid judgment lien*** encumbering an interest in real property acquired by him vis-à-vis the filing of a declaration of homestead subsequent to acquisition of said interest in real property.

*Appellee's Brief*, p. 14.

J&L's argument illustrates one of the flaws in the reasoning employed by J&L and the District Court. Both analyze the relation between Jerry's exemption right and J&L's judgment lien as an "either/or" proposition; that recognizing Jerry's homestead exemption "invalidates" or "discharges" (in the words of J&L) or "strips" (in the words of the District Court) the lien of J&L's judgment from the homestead property.

Recognizing Jerry's exemption on his entire interest in the property does not require invalidating J&L's lien, nor does it "wash away" or "wipe away" (the terms used by J&L and the District Court) the lien of a valid judgment (which J&L's lien is not). The respective rights of the homestead claimant and the lien claimant are a matter of priorities; a matter of ensuring the homestead claimant

receives the full amount of the statutory exemption before the liens of judgment holders such as J&L are satisfied.

The correct application of the homestead exemption here is that Jerry is entitled to the exemption in proportion to his interest in the homestead property. Section 70-32-104(2), MCA. This requires that Jerry be accorded the full amount of the exemption because at the time J&L sought to execute Jerry owned the entire interest in the property. The District Court acknowledged that when J&L attempted to foreclose, Jerry owned, “100% of the interest in the property.” *Order Granting Summary Judgment*, p. 22, Dkt. 41. There is no exception in the homestead statutes; the homestead claimant is entitled to the exemption in proportion to the claimant’s interest in the homestead property. Section 70-32-104(2), MCA. If that proportionate interest is 100%, as is the case here with Jerry, exemption entitlement is 100%.

The amount of the exemption is fixed (and limited) by the Legislature. The Legislature has imposed two limits. First, the total exemption amount is limited. (The exemption was \$250,000 when J&L sought to execute; it was raised by the 2021 Legislature to \$350,000, retroactive to January 1, 2021. Section 70-32-104(3)(b), MCA.)<sup>2</sup> Second, the exemption is limited to the claimant’s proportionate interest in the homestead property. There is no

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<sup>2</sup> Jerry is entitled to protect the entire amount of net traceable proceeds from the sale of his homestead since he is entitled to the increased exemption amount that went into effect January 1, 2021. Section 70-32-104(3)(b), MCA. J&L does not dispute this conclusion that is supported by *Neel v. First Federal*, *supra*.

exception for a lien such as J&L's, whether it attached to the property when Meadows claimed an interest or at some other point in time.

If there were an exception to this rule of the nature advocated by J&L, it would have to be imposed by the Legislature and set forth in the homestead exemption statutes. Neither the District Court nor J&L have pointed to any exception in the homestead exemption statutes that allow for Jerry's exemption to be reduced to less than his proportionate interest in the property.

***D. A judgment lien such as J&L's does not create an interest in the property.***

J&L also argues that, "the interest appellant received from Meadows was *an interest in the property held by appellee* pursuant to its judgment lien." *Appellee's Brief*, p. 18 [emphasis added]. J&L held no "interest in the property." It is settled, and the District Court so found, that a judgment lien such as the one claimed by J&L does not create an interest in any specific property. *Estate of Wilhelm, infra; Order Granting Summary Judgment*, pp. 4-5, Dkt. 41.

As noted in *Estate of Wilhelm*, 233 Mont. 255, 262-63, 760 P.2d 718, 723 (1988), a judgment lien under § 25-9-301, MCA, is purely a creation of statute and is limited to its statutory reach. It creates *no interest in the real property it encumbers*. It creates *only a right of seizure of the interest of the judgment debtor in real property*. *Estate of Wilhelm, supra*, 760 P2d. at 723.

***E. Farrey v. Sanderfoot is not good authority here.***

The only authority J&L offers in support of its argument that Jerry's homestead exemption should be subordinated to the lien of J&L's judgment is *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991). *Farrey* is not good authority here and does not support an exception to Montana's homestead exemption as advocated by J&L. *Farrey* is a bankruptcy case that dealt with a homestead exemption under Section 522(f) of the Bankruptcy Code and a Wisconsin divorce decree. As Jerry pointed out in briefing in the District Court (the District Court did not rely on *Farrey*), courts and commentators have criticized *Farrey's* holding and recommend limiting its application to domestic relations cases in which the lien is imposed as part of the property division – where the lien and the property interest it encumbers “were created as part of the same transaction or judgment.” *In re Gancedo*, 608 B.R. 771 (Bankr. S.D. Fla. 2019); *Brief in Support of Cross Motion for Summary Judgment*, pp. 9-10, Dkt. 34. As the Court noted in *In re Gancedo* [emphasis added]:

Farrey does not apply here. Instead, this Court agrees with courts and commentators limiting Farrey's application to situations, particularly family law settlements or judgments, in which the lien and the property interest were created as part of the same transaction or judgment. *See In re Perez*, 391 B.R. at 192; *see also 4 Collier on Bankruptcy* ¶ 522.11[4] (16th ed. 2019) (***Farrey should not be expanded beyond the realm of domestic relations judicial liens***).

It should also be noted that the Montana bankruptcy case J&L cites applying *Farrey* ***did*** have such a fact pattern and involved a domestic relations

judicial lien. *Farrey* does not support creating an exception to Montana's homestead exemption that the Legislature has not seen fit to include in our exemption statutes.

## CONCLUSION

The doctrine of collateral estoppel is not applicable here. The un-refuted facts establish that Mary Meadows did not acquire a valid interest in Jerry's property. Accordingly, the lien of J&L's judgment against Meadows never attached to Jerry's property. This entitles Jerry to summary judgment.

A claimant can claim the homestead exemption from any of the claimant's property and is entitled to an exemption amount proportionate to its ownership interest. Sections 70-32-103 and 104, MCA. Jerry selected his homestead from the property he had owned for nearly four decades. When J&L tried to foreclose, Jerry owned the entire interest in the property. He is entitled to the full amount of the exemption.

The Court should reverse the District Court's order granting summary judgment in favor of J&L and direct the District Court to enter summary judgment in favor of Jerry.

**DATED** the 18<sup>th</sup> day of March, 2022.

Respectfully Submitted,

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[Electronically signed by]

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I hereby certify that this *Reply Brief* of the Appellant is printed with proportionately spaced Times New Roman typeface of 14 points (quoted and indented material is 13 point and footnotes are 12 point), is double spaced except for footnotes and for quoted and indented material (which is single spaced), and the word count calculated by Microsoft Word for Mac is not more than 5,000 words, excluding the cover page, tables of contents and authorities, signature block, this *Certificate of Compliance* and the *Certificate of Service*.

**HASH, O'BRIEN, BIBY & MURRAY PLLP**

[Electronically signed by]

/s/ Donald R. Murray

By: Donald R. Murray  
*Attorney for the Appellant, Jerry Nezat*

## **CERTIFICATE OF SERVICE**

I, Donald Murray, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-18-2022:

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