IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICH M. MARTIN, Appellant, vs. RAINA L. MARTIN, Respondent.	Case No. 81810 Appeal from the Eighth Judicial District Court, the Honorable Rebecca L. Burton Presiding
ERICH M. MARTIN, Appellant, vs. RAINA L. MARTIN, Respondent.	Case No. 82517 Appeal from the Eighth Judicial District Court, the Honorable Rebecca L. Burton Presiding

PETITION FOR REHEARING

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I. INTRODUCTION

With the utmost respect in mind for the Court and its opinion, Appellant Erich Martin (Erich)[1] petitions this Court for rehearing of its December 1, 2022, Opinion Affirming, pursuant to NRAP 40. Erich petitions for rehearing because (1) this Court overlooked or misapprehended material facts and questions of law in its attempt to distinguish *Howell* and *Mansell*, and in framing enforcement as one of private contract, rather than as enforcement of a court-entered judgment; and (2) this Court overlooked or misapprehended material facts and questions of law in its application of claim preclusion, and it misapplied principles of claim preclusion. Accordingly, this Court should grant rehearing.

II. LEGAL ARGUMENT

A. STANDARDS GOVERNING PETITIONS FOR REHEARING.

NRAP 40(c)(2) provides, in relevant part, that "the [C]ourt may consider rehearing in the following circumstances: (A) [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a

[1] The first names of the parties are used herein, not out of disrespect, but to avoid any confusion, given the same last name of the parties.

dispositive issue in the case. *See also, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel & Rest. Emps. & Bartenders Int'l Union Welfare Fund*, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997) (rehearing will be granted when the court has overlooked a material matter and when rehearing will promote substantial justice).

B. THIS COURT OVERLOOKED OR MISAPPREHENDED MATERIAL FACTS AND QUESTIONS OF LAW IN ITS ATTEMPT TO DISTINGUISH *HOWELL* AND *MANSELL*, AND IN FRAMING ENFORCEMENT AS ONE OF PRIVATE CONTRACT, RATHER THAN AS ENFORCEMENT OF A COURT-ENTERED JUDGMENT.

In its opinion, this Court concluded that *Howell v. Howell*, 581 U.S. 214 (2017) and *Mansell v. Mansell*, 490 U.S. 581 (1989) are distinguishable because those cases did not "involve[ ] the parties agreeing to an indemnification provision in the divorce decree property settlement." *Martin v. Martin*, 138 Nev. Adv. Op. 78, 520 P.3d 813, 817 (2022). Central to this conclusion, was this Court's consistent framing and characterization of the parties' settlement agreement that was wholly merged and incorporated into a decree of divorce as a "settlement,"[2] and recognition of the divorce decree as a contract, rather than

[2] The Court used various phrases to describe this throughout the opinion, such as "property settlement incident to a divorce decree," "negotiated property settlement," "signed marital settlement agreement," "divorce decree property settlement," "contractual commitments," "contractual issues," "contractual duties," "settled divorce decree," and "a valid, unambiguous contract between the parties." *See generally Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 815-22.

as a court-entered judgment. In doing so, however, the Court overlooked or misapprehended the material fact that, here, the Court only has before it a divorce decree (court-entered judgment)[3] that merged and incorporated all agreements, and this Court's directly controlling precedent in *Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964), which holds that an agreement merged into a decree loses its character as an independent contract and the parties' rights are based upon the decree.[4] *See id*. ("A merger destroys the independent existence of the agreement and the rights of the parties thereafter rest solely upon the decree."). Under the material facts in the record and *Day*, the divorce decree, the order incident to divorce, and the order enforcing, were court-entered judgments or orders (not contracts), ordering the indemnification

[3] It is noteworthy to highlight that while the Court framed and characterized enforcement of the divorce decree as contractual in nature, the Court's analysis of the applicability of claim preclusion conceded that this case involved enforcement of a "final judgment [that] is valid." *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 819.

[4] Following this Court's opinion in this case, the Nevada Court of Appeals reversed and remanded a case similar to this one. *Dalton v.* Dalton, No. 81599-COA, 2023 WL 1433803 (Nev. App. Jan. 23, 2023). In applying the Court's opinion in this case there, the Nevada Court of Appeals similarly "note[d] that in *Martin*, the Nevada Supreme Court did not specifically address the continued enforceability of a MSA once it is merged and incorporated into a decree of divorce, at which point the MSA loses its character as an independent agreement. *See Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964). Nevertheless, in *Martin*, the supreme court upheld the indemnification provision based on the agreement of the parties." *Id*. at *2 n.2.

or reimbursement of disability pay to Raina, as the Supreme Court held are contrary to federal law, preempted, and unenforceable. *Mansell*, 490 U.S. at 587-95.

Moreover, this Court overlooked, misapprehended, or failed to consider material questions of law, in saying that *Mansell* and *Howell* did not "involve[ ] the parties agreeing to an indemnification provision in the divorce decree property settlement." *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 817. The Supreme Court's opinion in *Howell* did not indicate whether it did or did not arise from a settlement,[5] instead it only indicated that the parties were divorced and indicated what the divorce decree stated. *Howell*, 581 U.S. at 218–19. But the *Howell* case did involve a "dissolution decree" "[p]ursuant to the parties' agreement[.]" *In re Marriage of Howell*, 238 Ariz. 407, 408, 361 P.3d 936, 937 (2015), rev'd sub nom. *Howell v. Howell*, 581 U.S. 214 (2017) ("Pursuant to the parties' agreement, the dissolution decree provides . . .). Thus, contrary to this Court's statement in its opinion, *Howell* did involve a decree that came by way of agreement.

[5] Presumably, the Supreme Court did not discuss or delve into this in its opinion in *Howell* because the parties' agreement preceding the divorce decree was immaterial, and the only relevant analytical framework was what the court-entered divorce decree itself provided. *Howell*, 581 U.S. at 221 ("State courts cannot 'vest' that which (under governing federal law) they lack the authority to give.").

More importantly, *Mansell* did in fact involve a divorce where the parties "entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits."[6] *Mansell*, 490 U.S. at 585–86. In *Mansell*, "[t]he divorce decree incorporated this settlement and permitted the division." *Howell*, 581 U.S. at 218 (describing the factual background of *Mansell*). Major Mansell moved to modify the decree to remove the retirement pay portion he had waived. *Id*. The California courts refused. *Id*. The Supreme Court reversed. *Id*. "It held that federal law forbade California from treating the waived portion as community property divisible at divorce." *Id*. Accordingly, contrary to this Court's statement in its opinion, *Mansell* did involve the parties agreeing to an indemnification provision in the divorce decree property settlement, and the Supreme Court held that it was preempted by federal law and unenforceable. *Id*.

Taking into account that *Howell* and *Mansell* did in fact involve settlements that were incorporated into divorce decrees, and *Mansell* did in fact involve an indemnification or reimbursement settlement provision that was

[6] This is a text book example of an indemnification or reimbursement provision in concept, function, and effect.

incorporated into the divorce decree, and building upon Erich's argument above that the true and correct nature of the divorce decree in this case was a court-entered judgment, and not an independently surviving settlement or contract, the Court overlooked, misapprehended, or misapplied this factual and legal intermix in holding that Erich and Raina's private contract can be enforced, rather than properly holding that it was a court-entered judgment that cannot be enforced because it was preempted, along with the order enforcing it.

Along this same line, the Court also overlooked, misapprehended, or misapplied principles of preemption and claim preclusion in stating that the Supreme Court "intimated that contractual duties lay beyond [ ] federal preemption" because "*Mansell* observed that whether res judicata applies to a divorce decree in circumstances such as these is a matter for a state court to determine and over which the United States Supreme Court lacks jurisdiction." *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 818. *Mansell* made no such observation and connection. It simply recognized that the application of claim preclusion principles was a matter of state law, while divisibility of disability benefits was entirely a matter of federal law as it was preempted. *Mansell*, 490 U.S. at 586 n.5, 594-95.

C. THIS COURT OVERLOOKED OR MISAPPREHENDED MATERIAL FACTS AND QUESTIONS OF LAW IN ITS APPLICATION OF CLAIM PRECLUSION, AND MISAPPLIED PRINCIPLES OF CLAIM PRECLUSION.

In its opinion, this Court concluded claim prelusion (res judicata) applied to the facts of this case and that the district court properly enforced the divorce decree under claim preclusion (res judicata) principles.[7] *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 819-20. In reaching this conclusion, it appears this Court overlooked or misapprehended material facts in the record or material questions of law in the case, as this Court did not address in its analysis Erich's argument that he was not afforded an opportunity before the district court to be heard regarding issue preclusion (collateral estoppel) or claim preclusion (res judicata). AOB 40-43. Raina did not assert claim preclusion in its briefing before the district court, and Erich did not otherwise address it because it was unraised prior to the district court's sua sponte assertion of it in its order. The

[7] To clarify, the district court did not substantively analyze and determine that claim preclusion (res judicata) applied. 4 AA 628-29. While it used the phrase "res judicata" in certain places and seems to have cited some case law regarding claim preclusion (res judicata), it substantively analyzed and applied issue preclusion (collateral estoppel) to the facts of the case, not claim preclusion. *Id*. The Nevada Court of Appeals in this case similarly analyzed the matter under issue preclusion, not claim preclusion. *Martin v. Martin*, 498 P.3d 1289 (Nev. App. 2021), review granted (Feb. 14, 2022), aff'd in part, rev'd in part, 138 Nev. Adv. Op. 78, 520 P.3d 813 (2022). Presumably, both did not apply claim preclusion, given the arguments below regarding the absence of a subsequent action.

improper evolution of the matter of preclusion (and related undeveloped nature of it) has constituted error as the doctrine deployed (issue preclusion or claim preclusion) against Erich has been a moving target and prevented Erich from being able to counter the sought-to-be-applied doctrine and any applicable exceptions.

Putting this point aside, however, it appears this Court overlooked or misapprehended material facts in the record or material questions of law in this case, and misapplied principles of claim preclusion, because it overlooked or misapprehended that there has been no "subsequent action," as necessary for claim preclusion to apply. So, claim preclusion cannot, and does not apply, and it is not a proper doctrinal fit for this case. Erich argued this in his opening brief. AOB 41.

As this Court correctly stated in its opinion, "[r]es judicata, or claim preclusion, applies when [a] valid and final judgment on a claim precludes a *second action* on that claim or any part of it." *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 819 (internal quotations omitted) (emphasis added). As has long-been ironclad law in Nevada, "this court applies a three-part test to determine whether res judicata applies: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) *the subsequent action* is based on the same

claims or any part of them that were or could have been brought in the first case." *Id*. (internal quotations omitted) (emphasis added).

Thus, "[r]es judicata [(claim preclusion)] applies as between separate actions, not within the confines of a single action on trial or appeal[,]" and "[r]es judicata principles commonly involve the relationships between two separate lawsuits." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4404 (3d ed.). "Claim preclusion, however, is not appropriate within a single lawsuit so long as it continues to be managed as a single action." *Id*.; *see also*, *e.g.*, *Lalowski v. City of Des Plaines,* 789 F.3d 784, 789 (7th Cir. 2015) ("The doctrine of claim preclusion, or res judicata, operates to bar a 'second suit' after a final judgment involving the same parties and causes of action. . . . However, it cannot be invoked to bar claims brought in the same suit."); *Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1296 (Fed. Cir. 2001) ("Recognizing that the issue was not really claim preclusion, since there was no earlier suit but only continuation of the same suit . . . ."); *Scosche Indus., Inc. v. Visor Gear Inc.*, 121 F.3d 675, 678 (Fed. Cir. 1997) ("[Defendant]" presents this issue as one of claim preclusion, but the principles of claim preclusion have nothing to do with this case. The question here is not whether a final judgment in one case should be given preclusive effect in a later case, which is the situation to which the principles of claim preclusion apply."); *Fla. Dep't of*

Transp. v. Juliano, 801 So. 2d 101, 107–08 (Fla. 2001) ("Because this case involves the issue of what preclusive effect the prior appeal affirming the denial of summary judgment should have on the trial court in the ***same case*** and in a subsequent appeal in the ***same case***, the doctrine of res judicata is inapplicable under these circumstances.") (emphasis in original); *Reed v. Louisiana Horticulture Comm'n*, 341 So. 3d 66, 70, reh'g denied (Jan. 14, 2022), writ denied, 336 So. 3d 89 ("At its core, res judicata envisions a second lawsuit."); *In re Marriage of Ewald v. Ewald*, 254 Or. App. 170, 177, 294 P.3d 511, 515 (2012) ("Thus, it is evident that claim preclusion operates to bar a party, if certain requirements are satisfied, from relitigating, in a separate action, a claim that was or could have been brought in the prior action").

Here, the Court overlooked or misapprehended material facts and law in relation to the third-prong of the test to determine whether claim preclusion applies—a subsequent action. Neither Raina nor Erich instituted a second or subsequent action to litigate matters already decided. Indeed, a second or subsequent action was, and has been, non-existent. Rather, Raina, in the *same case* in which the divorce decree was entered, moved to enforce it, and Erich asserted a defense to its enforcement in the *same case* in which it had been entered, rather than a second or separate action. Thus, claim preclusion does not apply because the third prong is not met. The Court's opinion concedes this

in stating "the action here [meaning this same case] enforces the original decree . . . ." *Martin*, 138 Nev. Adv. Op. 78, 520 P.3d at 820. As a result, this Court misapplied its own directly controlling case law dispositive of the issue of the applicability of claim preclusion. *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), holding modified by Weddell v. Sharp, 131 Nev. 233, 350 P.3d 80 (2015) (setting for the test for claim preclusion and requiring a "subsequent action").

III. CONCLUSION

Based upon the foregoing, respectfully, this Court overlooked or misapprehended material facts in the record or material questions of law, and misapplied or failed to consider decisions directly controlling dispositive issues in the case. Accordingly, this Court should grant rehearing.

Dated this 2nd day of February, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,129 words; or

☐ does not exceed _____ pages.

Dated this 2nd day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR REHEARING** was filed electronically with the Nevada Supreme Court on the 2nd day of February, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Marshall Willick, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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