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9  
10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11  
12 IN AND FOR COUNTY OF MARICOPA

13 JOHN W. STONE and SHIRLEY D. STONE,

14 Petitioners,

15 v.

16 JUSTICE OF THE PEACE PRO TEM JUDGE  
17 DAVID FLETCHER, in and for Maricopa  
18 County Manistee Justice Court, and KENT C.  
19 HARDING, real party in interest,  
20 Respondents.

Cause No. LC2008-000621

MOTION FOR RECONSIDERATION

Assigned to the Honorable Paul J. McMurdie

IMMEDIATE RULING REQUESTED

21 Respondent Kent C. Harding, by and through undersigned counsel, hereby moves this  
22 Court to reconsider its Order and Judgment of December 8, 2008 for the reasons set forth below.

23 I. RESPONDENT WAS NOT NOTIFIED REGARDING DEFAULT PROCEEDINGS.

24 Respondent's failure to plead or otherwise defend in this action within the time required  
25 by law was the result of excusable neglect; Respondent was never served an Application for Entry  
26 of Default by Petitioner, as required by Rule 55(a), Ariz.R.Civ.P.

II. ISSUE AND CLAIM PRECLUSION BAR PETITIONERS' SPECIAL ACTION.

Petitioners' Petition for Special Action is barred by the dual principles of collateral  
estoppel and *res judicata*. This action constitutes the most recent of numerous attempts by  
Petitioners to reverse the judgment of the trial court, by direct and indirect appeal, and through  
the filing of actions in the Superior Courts of Maricopa County and the U.S. District Court for the

1 District of Arizona.

2 Judgment became final upon the original lawsuit, CV05-03585FD, on August 16, 2005,  
3 when the deadline for appealing an action in special detainer passed without appeal. A.R.S. § 12-  
4 1179(A) (“Either party may appeal from a justice court to the superior court [...] by giving notice as  
5 in other civil actions within five calendar days after rendition of the judgment”). This lawsuit,  
6 renumbered in 2007 to CC2007-176431, has been subject to two motions in the Justice Courts –  
7 the Motion to Vacate Writ of Restitution (appealed by Defendants/Petitioners and affirmed by the  
8 Superior Court on June 3, 2008 in LC2008-000127) and the Motion to Vacate Judgment (the  
9 alleged basis for this Special Action).

10 In the matter of the first motion to vacate, the Superior Court, sitting as an appellate court  
11 of competent jurisdiction, held that the judgment of 2005 could not be attacked by Petitioner’s  
12 untimely efforts.

13 But more importantly, the Stones did not appeal the federal court’s lifting of the stay on September 6  
14 and they did not appeal the justice court order of September 7 issuing the writ. They did nothing for  
15 over two years and now their time to appeal has passed. A.R.S. § 12-1179 (A); A.R.S. § 22-261; Rule 4,  
16 Ariz. Superior Court Rules of Appellate Procedure; See *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992);  
17 See *In re National Environmental Waste Corp.*, 129 P.3d 1052, 1054 (9th Cir. 1997). Because of that  
18 they cannot now attack the rulings.

19 Exhibit 1, page 3. Instead of seeking a special action with the Supreme Court to overturn this  
20 appellate decision, Petitioners filed another motion upon the case, ignoring the explicit language of  
21 the appellate decision that indicated that judgment was, indeed, final.

22 The motions directly related to the original lawsuit are not the only litigation upon the  
23 issue of the eviction. On August 18, 2005, Petitioners filed a civil complaint in federal district court  
24 against Respondent Kent C. Harding, among many other individuals and corporations, either  
25 related or unrelated to the Peoria Justice Court eviction matter. On February 3, 2006, the Court in  
26 Stone v. Judge Redfield T. Baum et al., CV 05-2626-PHX-ROS, dismissed Petitioners’ civil complaint  
with prejudice. Included in the orders granting dismissal from the District Court was the  
observation that Petitioners were precluded from seeking to void the orders of the Justice Court or

1 the Bankruptcy Court for failure to timely appeal the matters brought before those courts.

2 On March 6, 2006, Petitioners filed a civil action, CV2006-050748, with this Court, in  
3 which they alleged claims which arose from the same occurrences involved in the adjudicated  
4 federal civil case. This Court granted Respondent's Cross Motion for Summary Judgment for the  
5 reason that the federal dismissal and *res judicata* precluded Petitioners' state court action.  
6 Petitioners filed an appeal and the Court of Appeals, Division One affirmed this Court's decision.  
7 See Stone v. Harding et al., 1 CA-CV 07-0770. The Memorandum Decision is attached as Exhibit 2  
8 to this Motion. While not citable normally, citation to the Memorandum Decision is permissible  
9 to establish a preclusion defense:

10 Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the  
11 purpose of establishing the defense of *res judicata*, collateral estoppel, or the law of the case or (2)  
12 informing the appellate court of other memorandum decisions so that the court can decide whether  
13 to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party  
14 citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or  
15 petition in which such decision is cited.

16 Rule 28(c), Ariz.R.Civ.App.P. The Court of Appeals has specifically and finally ruled upon the  
17 issue of vacating the underlying judgment, holding

18 Furthermore, given that a writ of restitution may be issued only after a court has rendered a  
19 judgment, A.R.S. § 12-1178(A) (2003), the bankruptcy court's order specifically authorizing Harding  
20 to obtain a writ without mention of obtaining a new judgment indicates that the stay was  
21 retroactively lifted and obtaining a new judgment was unnecessary. Because the lift stay order  
22 applies retroactively, the writ of restitution did not violate the stay and the trial court did not abuse  
23 its discretion when it granted summary judgment for the Defendants.

24 Exhibit 2, page 10 ¶21. The Supreme Court declined to accept Petitioners' Special Action (*see*  
25 Stone et vir. v. Hon. Portley et. al./Harding et al., CV-08-0318-SA).

26 Following the granting of summary judgment in favor of Plaintiff/Respondent (Defendant  
therein) in CV2006-050748, but before the appeal had been adjudicated, Defendants/Petitioners  
filed a new complaint before this Court. In CV2007-052216, Defendants/Petitioners again raised  
claims arising from and relating to the eviction action. This lawsuit, filed on August 17, 2007, was  
removed to the U.S. District Court on September 20, 2007 and assigned the case number CV 07-

1 1801-PHX-MHM. Slightly over one year later, on September 29, 2008, the Court granted summary  
2 judgment in favor of Plaintiff/Respondent and against Defendants/Petitioners. The Court was  
3 clear in addressing the exact nature of the lawsuit filed by Defendants/Petitioners:

4           Moreover, the factual underpinnings of the suit concern the forcible detainer and the writ of  
5 restitution—again, these claims arise from the same cause of action dealt with by the bankruptcy  
6 court, this Court in CV 05-2626 and CV 06-1324, and Maricopa County Superior Court in CV2006-  
7 050748.

8 Exhibit 3, 10:9-12. This court, as the other courts have previously done in the past three years, have  
9 dismissed the claims of Defendants/Petitioners with prejudice for one simple rationale:

10           the doctrine of res judicata forces dismissal, since there have been final judgements [sic] on the  
11 merits against the Stones in lawsuits involving the same transactions and occurrences with these  
12 same Defendants in state and federal court.

13 Exhibit 3, 11:14-16. This matter has been adjudicated and re-adjudicated, all resulting in the same  
14 result: the final judgment in CV05-03585FD, the judgment which has been renumbered into  
15 CC2007-176431 and which Defendants/Petitioners are again challenging, is final, binding, and  
16 conclusive.


17           There is no good cause why the orders of Justice of the Peace Pro Tempore Haworth should  
18 not be overturned, as Justice of the Peace Pro Tempore Fletcher sat by designation following  
19 Petitioners' demand for Haworth's recusal and Haworth's ruling directly contravened both the  
20 requirements of timely appeal as well as the disposition of the same claims in several other  
21 competent courts. Fletcher's ruling was appropriate and therefore should stand. *Res judicata* and  
22 collateral estoppel preclude Petitioners' requested relief and judgment must stand as a result of  
23 over three years' constant litigation.

24           WHEREFORE, Respondent respectfully requests this Court to reconsider its Order and  
25 Judgment of December 8, 2008.

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1 RESPECTFULLY SUBMITTED this day, the 19<sup>th</sup> of January 2009,

2 LAW OFFICES OF SCOTT M. CLARK, P.C.

3 By   
4 Scott M. Clark, Esq.  
5 Paul A. Henderson, Esq.  
6 Allyssa B. Birnley, Esq.  
7 Attorneys for Plaintiff

8 DECLARATION OF MAILING

9 The ORIGINAL of the foregoing filed this day,  
10 the 19<sup>th</sup> of January 2009, at:

11 Maricopa County Superior Court  
12 Northeast Regional Court Center  
13 18380 North 40<sup>th</sup> Street  
14 Phoenix, Arizona 85032

15 A COPY of the foregoing mailed this day,  
16 the 19<sup>th</sup> of January 2009, to:

17 Shirley D. Stone and John W. Stone  
18 20245 North 32<sup>nd</sup> Drive, Apartment 173  
19 Phoenix, Arizona 85027  
20 Plaintiffs

21 By 