[Cite as *Klaus v. Klosterman*, 2016-Ohio-8349.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Teresa M. Klaus et al.,	:	
Plaintiffs-Appellants,	:	
		No. 16AP-273
v.	:	(C.P.C. No. 13CV-4625)
Kevin M. Klosterman et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *Law Offices of James P. Connors*, and *James P. Connors*, for appellants. **Argued:** *James P. Connors*.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, P.J.

{¶ 1} Plaintiffs-appellants, Teresa M. and Frederick Klaus ("appellants" or "Klauses"), appeal the March 11, 2016 judgment of the Franklin County Court of Common Pleas which dismissed their remaining claims against defendants-appellees Kevin M. and Karen Klosterman ("appellees" or "Klostermans"). For the following reasons, we affirm in part and reverse in part.

I. The Klostermans Prior Case and Klauses' Appeals

{¶ 2} The case before us, and cases related thereto, have been before this court on numerous occasions. The genesis of the case stem from a purported cognovit note and filling of a complaint by appellees against appellants to enforce such note. The facts regarding the note are summarized in *Klosterman v. Turnkey-Ohio, L.L.C.*, 182 Ohio App.3d 515, 2009-Ohio-2508 ("*Klosterman I*"). In *Klosterman I*, we reversed and remanded the trial court's judgment in favor of the Klostermans on the cognovit note. We

found that the cognovit note did not contain a warrant of attorney as required by the statute.

{¶ 3} On remand pursuant to *Klosterman I*, the trial court vacated its judgment against the Klauses. The Klauses then filed a motion for return of funds taken by Klosterman pursuant to the voided judgment, withdrawal of collection efforts and liens, and payment of fees and expenses incurred. On January 21, 2010, the trial court denied the motion in its entirety. Subsequently, the Klostermans dismissed their complaint related to the cognovit note. The Klauses appealed the trial court's denial of the motion.

{¶ 4} In *Klosterman v. Turnkey-Ohio, L.L.C.*, 10th Dist. No. 10AP-162, 2010-Ohio-3620 ("*Klosterman II*"), we determined that because the complaint was voluntarily dismissed, we lacked jurisdiction to consider the denial of the portion of the Klauses' motion which requested (1) the return of funds, and (2) withdrawal of collection efforts. We considered only the court's denial of the portion of the Klauses' motion which requested fees and expenses. We found that the Klauses failed to support their motion for fees and expenses and affirmed the trial court's denial of the Klauses request for attorney fees.

II. The Klauses Instant Case and Trial Court Judgments

{¶ 5} More than two and one-half years after *Klosterman II*, on April 25, 2013, the Klauses filed the instant case. In response, on June 28, 2013, the Klostermans filed a letter with the court. The letter did not contain the signatures of the Klostermans and did not contain a certificate of service indicating that it was served on the Klauses. The four paragraph letter indicated that the Klostermans felt the merits of this case were argued in the *Klosterman* case and that "it [was] beyond [their] understanding how [plaintiffs] could even file this complaint." Finally, the Klostermans indicated that because appellants also sued Michael Hrabcak, the Klostermans' former attorney, they could not use him to represent them and were not able to obtain other legal counsel. The letter did not assert a defense of statute of limitations. Although appellants, in a subsequent motion for default judgment, on prior appeal and in the instant appeal, have raised the deficiencies in this letter, they never moved to strike the Klostermans' letter.

{¶ 6} On February 21, 2014, the trial court granted judgment in favor of defendants Michael Hrabcak and Hrabcak & Company LPA ("Hrabcak defendants"). The Hrabcak defendants had moved for the same and specifically asserted a statute of

limitations defense. The trial court granted judgment in favor of the Hrabcak defendants on two grounds. First, the trial court found that the four-year statute of limitations under R.C. 2305.09 barred the claims for breach of fiduciary duty, negligent representation, and fraud. Second, the trial court found that notwithstanding the statute of limitations, all claims against the Hrabcak defendants were barred by qualified immunity and privilege. Appellants did not appeal this judgment.

{¶ 7} On July 16, 2014, the trial court granted judgment in favor of defendants Curtis Knapp and Polaris Title Agency, LLC ("Knapp/Polaris Title defendants"). The court found that the Knapp/Polaris Title defendants were entitled to summary judgment on the claim of breach of contract and fiduciary duty for two reasons. First, the court found the Klauses failed to attach a copy of the escrow agreement for the sale of Rensch Road, which was the contract that was allegedly breached, in accordance with Civ.R. 10(D)(1), and otherwise presented no evidence in their memo contra to support that there was indeed a contract between the parties. Second, the court found that even if there was some evidence to support the claim that the parties had a contract, the claim nevertheless failed because the evidence establishes that Klaus authorized Knapp/Polaris Title to take the actions for which they were now being sued. The court noted an April 23, 2007 e-mail which Klaus sent to Knapp telling him to "just f******g pay [Klosterman] and close the transaction." (July 16, 2014 Decision and Entry at 6.) The court concluded that "[b]ecause there is no evidence of a contract between the parties and because the evidence demonstrates that Klaus authorized the alleged 'breach', Knapp and Polaris Title Agency are entitled to judgment as a matter of law on plaintiffs' claim for breach of contract." (July 16, 2014 Decision and Entry at 6.) The court granted summary judgment in favor of the Knapp/Polaris Title defendants and dismissed them with prejudice. In *Klaus v. Klosterman*, 10th Dist. No. 14AP-960, 2015-Ohio-2545, we affirmed this judgment on appeal.

{¶ 8} On August 27, 2014, the Klauses filed a combined motion for default and, alternatively, for summary judgment against the Klostermans. In the motion, the Klauses argued the Klostermans June 28, 2013 letter was never served on them or their counsel, did not contain a certificate of service, did not comply with the civil rules, was untimely, was not signed, did not contain any affirmative defenses, and did not constitute an answer. The Klauses argued they were entitled to default judgment on

their claims and supported the argument with three affidavits from Frederick M. Klaus and an affidavit from Teresa M. Klaus. The affidavits establish that the 15 Grandview property was sold on January 30, 2003, the Rensch Road property was sold in May or June 2007, and in "late 2007" the Klauses learned from Curtis Knapp and Polaris Title that the funds from the Rensch Road closing had been paid to the Klostermans. On October 21, 2014, the trial court denied appellants motion for default and summary judgment. The trial court held:

> In this instance, both [1] the facts in the Complaint and [2] the doctrine of the law of the case establish that Plaintiffs' claims against the Klostermans [1] are barred by the statue of limitations, [2] that there is no evidence of an enforceable contract, and [3] that Plaintiffs are estopped from pursing their claims for unjust enrichment, monies had and received, and quantum meruit/valebant. Plaintiffs' claims against the Klostermans are clearly frivolous and further litigation is futile. As such, they must be dismissed.

(Oct. 21, 2014 Decision and Entry at 3.) The court dismissed the case with prejudice. The Klauses appealed the denial of the motion for default and summary judgment. We reversed and remanded as detailed below in Klaus.

III. The Klauses First Appeal in the Instant Case and Remand

{¶ 9} In *Klaus*, we reversed and remanded the October 21, 2014 sua sponte dismissal. We found that, pursuant to Civ.R. 41(B)(1), the court was required to provide notice to the Klauses of its intention to dismiss the claim. We further found this case did not present an exception to the notice requirement because the Klauses' arguments were not frivolous. We found:

> [W]e do not find to be frivolous appellants' arguments regarding: (1) failure to raise statute of limitations as an affirmative defense; (2) untimeliness of appellees Klosterman's document; (3) lack of signature on appellees Klosterman's document; (4) lack of compliance with the civil rules of appellees Klosterman's document; (5) lack of service of appellees Klosterman's document on appellants; and (6) lack of certificate of service. We also cannot say that appellants cannot possibly prevail on the facts alleged in the complaint without a determination as to these same arguments. The trial court did not address the merits of these arguments. To address these merits at this time would be premature. The trial court also did not comply with the notice

> requirement of Civ.R. 41(B)(1). Accordingly, we sustain the first assignment of error as to the trial court's sua sponte dismissal of appellants' claims against appellees Klosterman.
>
> Finally, we decline to address whether the trial court erred in its (1) application of the statute of limitations to the claims asserted against appellees Klosterman; (2) application of estoppel to the unjust enrichment, monies had and received, and quantum meruit/valebant claims; and (3) application of law of the case in general. Upon remand, after appellants have been provided notice of the trial court's intention to sua sponte dismiss their claims, the court may choose to reconsider the same. Therefore, at this time it would be premature for us to address the same.

Id. at ¶ 29-30.

{¶ 10} On remand, on June 30, 2014, the trial court issued a notice of intent to dismiss with prejudice. The trial court notified the Klauses of its intention to dismiss their claims against the Klostermans with prejudice and also granted the Klauses leave to provide supplemental authority demonstrating why the complaint should not be dismissed. The Klauses filed a response on July 14, 2015 and argued that the law of the case doctrine does not apply against the Klostermans. The Klauses further argued that the claims against the Klostermans have never been decided and the fact that claims against different parties have already been decided does not necessarily mean that any other claim against a different party must also be dismissed. The Klauses further argued that the Klostermans to date have never filed an answer to the complaint and, therefore, default judgment should be granted as a matter of law against the Klostermans in favor of the Klauses.

{¶ 11} On March 11, 2016, the trial court dismissed the Klauses remaining claims against the Klostermans. The court applied the law of the case doctrine pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984), *Menominee Indian Tribe v. United States*, 136 S.Ct. 750 (2016). The court also applied this court's precedent in *Clymer v. Clymer*, 10th Dist. No. 95APF02-239 (Sept. 26, 1995), which extended law of the case doctrine to encompass a trial court's adherence to its own prior rulings in circumstances where a trial court ruling could have been appealed, but was not, with certain exceptions. The court noted:

> The factual allegations and claims against the Klostermans are the same as those raised against the other defendants for whom this Court previously granted summary judgment. In moving for Summary Judgment against the Klostermans, the Klaus' did not provide this Court with any new credible evidence, or indicate there was any error in the court's prior rulings in favor of the other defendants. Rather, the Klaus' merely relied on their self-serving affidavits which were uncorroborated by any other evidence. Because there was no new credible evidence for this Court to consider in ruling on the Klaus' combined Motion against the Klostermans/there was no good reason to depart from the law of the case and render a judgment inconsistent with the prior rulings. Furthermore, because a thorough review of the record from Case No. 05-CV-012889 makes clear that the Klaus' claims against the Klostermans arose over six years ago and were fully litigated and to some extent even appealed in *Klosterman I* and *II*, regardless of whether this Court employs the term estoppel, res judicata, or law of the case doctrine, the result is the same.

(Mar. 11, 2016 Decision at 9-10.) The Klauses filed the instant appeal.

IV. Assignments of Error

{¶ 12} In this second appeal, appellants assert the following three assignments of error:

> [I.] The trial court erred by *sua sponte* dismissing appellants Teresa and Frederick Klaus' claims against appellees Kevin and Karen Klosterman for a second time on remand pursuant to what it described this time as "law of the case."
>
> [II.] The trial court erred by *sua sponte* applying "law of the case" or "res judicata" or "estoppel" to claims of a party (Teresa Klaus) who was never involved in any prior litigation with either of the Klostermans or her husband.
>
> [III.] The trial court erred by taking judicial notice of proceedings in another case, Franklin County Common Pleas Court Case No. 05-CV-012889, when deciding to dismiss this case for a second time under the "law of the case" or "res judicata" or "estoppel" doctrines.

Because they are interrelated, we address the assignments of error together.

V. The Principles of Law of the Case, Res Judicata, and Estoppel

{¶ 13} We begin by summarizing the doctrines of law of the case, estoppel, and res judicata.

1. Law of the Case

{¶ 14} The doctrine of law of the case was summarized by the Supreme Court of Ohio in *Nolan*:

> [T]he [law of the case] doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 730, reversed on other grounds *New York Life Ins. Co.* v.. *Hosbrook* (1935), 130 Ohio St. 101.
>
> [T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. See *State, ex rel. Potain, v. Mathews* (1979), 59 Ohio St. 2d 29, 32.
>
> In pursuit of these goals, the doctrine functions to compel trial courts to follow the mandates of reviewing courts. * * * Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law. See, generally, *Thomas v. Viering* (App. 1934), 18 Ohio Law Abs. 343, 344; *Loyer v. Kessler* (App. 1925), 3 Ohio Law Abs. 396.
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> * * *
>
> [Furthermore], the law of the case is applicable to subsequent proceedings in the reviewing court as well as the trial court. Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court.

Id. at 3-4.

{¶ 15} In *Clymer*, we held:

> This court has previously held, however, that the [law of the case] doctrine is not limited to the explicit determinations of a reviewing court upon appeal * * *.

> Other jurisdictions have followed a similar determination regarding trial court rulings and the law of the case doctrine. "As it is most frequently applied, the law of the case encompasses a lower court's adherence to its own prior rulings, to the rulings of its superior court in the case, or to the rulings of another judge or court in the same case or a closely related case." *Aguinaga v. United Food & Commer. Workers Intl. Union* (D. Kan. 1994), 854 F. Supp. 757, 772.
>
> There is a "less common * * * aspect of the law of the case doctrine, under which courts may give preclusive effect to a ruling that could have been appealed, but has been abandoned by a failure to do so." *In re Doe Stripper Well Exemption Litig.* (D. Kan. 1993), 821 F. Supp. 1432, 1434. "We agree that under the law of the case doctrine as applied by this circuit it is error for a court upon retrial to reverse an identical evidentiary ruling made during the first trial, barring clear error or a change in circumstances." *United States v. Tham* (1991), 948 F.2d 1107, 1113. "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting Ref. & Mining Co.* (1950), 339 U.S. 186, 198, 94 L. Ed. 750, 70 S. Ct. 537.

2. Res Judicata/Estoppel

{¶ 16} The doctrines of res judicata and estoppel have been summarized in several cases. In *Natl. Amusements v. Springdale*, 53 Ohio St.3d 60, 62 (1990), the Supreme Court stated:

> It has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit." (Emphasis added.) *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388. "[W]here a party is called upon to make good his cause of action * * *, he must do so by all the proper means within his control, and if he fails in that respect * * *, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties." *Covington & Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus. The doctrine of *res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes." *Brown v. Felsen* (1979), 442 U.S. 127, 131. "Its enforcement is essential to the maintenance of

> social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals * * *." *Southern Pacific Rd. Co. v. United States* (1897), 168 U.S. 1, 49.

{¶ 17} In *Daniel v. Williams*, 10th Dist. No. 13AP-155, 2014-Ohio-273, ¶ 19, this court stated:

> " 'The *doctrine of res judicata* involves both [1] claim preclusion (historically called estoppel by judgment in Ohio) and [2] issue preclusion (traditionally known as collateral estoppel).' " *Saha v. Research Inst. at Nationwide Children's Hosp.*, 10th Dist. No. 12AP-590, 2013-Ohio-4203, ¶ 23, quoting *Grava* [*v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995). "Claim preclusion holds that a valid, final judgment on the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Dehlendorf* [*v. Ritchey*, 10th Dist. No. 12AP-87, 2012-Ohio-5193] at ¶ 13, citing *Grava* at syllabus. "Issue preclusion * * * provides that 'a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different.' " *Id.*, quoting *Fort Frye Teachers Assn. OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998). "While claim preclusion precludes relitigation of the same cause of action, issue preclusion precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action." *Id.*

{¶ 18} In *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 27, the Supreme Court stated:

> In Ohio, "[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 6. * * * "While the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." Id.

{¶ 19} In *State v. Harding*, 10th Dist. No. 13AP-362, 2014-Ohio-1187, ¶ 25, this court stated:

> In order to invoke res judicata (either claim or issue preclusion), a party must establish that the parties in the subsequent action are identical or in privity with those in the former action. [*State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, at ¶ 22; [*State ex rel. Schachter v. Ohio Pub. Employees Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704] at ¶ 32. Privity in the context of res judicata is an amorphous concept. *Schachter* at ¶ 33; *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 9. Generally, entities are in privity when the " 'relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.' " (Emphasis sic.) *Brown* [*v. Dayton*, 89 Ohio St.3d 245, 248 (2000)], quoting *Thompson v. Wing*, 70 Ohio St. 3d 176, 184 (1994).

{¶ 20} In *Harding*, we further held:

> " 'Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of the transaction that was the subject matter of a previous action.' " *Nickoli*, 124 Ohio St.3d 449, 2010-Ohio-606, at ¶ 21, quoting *Ft. Frye Teachers Assn.*, 81 Ohio St.3d 392 at 395. Under claim preclusion, a previous judgment is conclusive as to all claims that were or could have been litigated in the first action. *State ex rel. Schachter v. Ohio Public Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27. Thus, a plaintiff must present every ground for relief in the first action or be forever barred from asserting it. *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 2000-Ohio-148.

Id. at ¶ 24.

{¶ 21} In *Dehlendorf v. Ritchey*, 10th Dist. No. 12AP-87, 2012-Ohio-5193, ¶ 14, this court stated:

> In *Thompson v. Wing*, 70 Ohio St.3d 176 (1994), the Supreme Court of Ohio set forth three requirements for application of collateral estoppel or issue preclusion. "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a

> party in privity with a party to the prior action." *Id*. at 183, citing *Whitehead* at paragraph two of the syllabus.

VI. Analysis of Klauses' Claims in Complaint

{¶ 22} With these principles in mind, we analyze the trial court's findings, claim by claim. The complaint in this case was filed April 25, 2013.

1. Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation (Counts Two and Seven)

{¶ 23} With regard to appellants' claims against appellees for (1) breach of fiduciary duty, (2) fraud, and (3) negligent misrepresentation, we have analyzed the complaint and find that these claims are identical to the claims made against the Hrabcak defendants. On February 21, 2014, the court found these claims to be barred by the statute of limitations. This judgment was not appealed by appellants. The judgment also preceded appellants' motion for default judgment against appellees in which appellants raised the issue of appellees not raising the affirmative defense of statute of limitations.[1] Therefore, consistent with the trial court's February 21, 2014 judgment in this case, we find that, pursuant to the law of this case, the breach of fiduciary duty, fraud, and negligent misrepresentation claims are barred. Accordingly we overrule appellants' three assignments of error related to these claims.

2. Breach of Contract and Fiduciary Duty (Count Seven)

{¶ 24} With regard to appellants' claims against appellees for breach of contract and fiduciary duty, we have analyzed the complaint and find that these claims are identical to the claims made against the Knapp/Polaris Title defendants and pertain to the Rensch Road escrow agreement. On July 16, 2014, the trial court granted summary judgment in favor of the Knapp/Polaris Title defendants "[b]ecause there is no evidence of a contract between the parties and because the evidence demonstrates that Klaus authorized the alleged 'breach.' " (Decision and Entry at 6.) We affirmed this judgment on appeal in *Klaus*. Therefore, consistent with the trial court's July 16, 2014 judgment in

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[1] On remand, the trial court did not address the issue regarding failure to raise statute of limitations as an affirmative defense. Nevertheless, because the February 21, 2014 judgment was not appealed by appellants and the judgment also preceded appellants' motion for default judgment against appellees in which appellants raised the issue of appellees not raising the affirmative defense of statute of limitations, we do not find it was necessary to address the issue. We further note, we affirm the trial court's dismissal of only the (1) breach of fiduciary duty, (2) fraud, and (3) negligent misrepresentation, claims on the grounds of statute of limitations.

this case and our affirmance of the same in *Klaus*, we find that, pursuant to the law of this case, the breach of contract and fiduciary duty claims fail. Accordingly, we overrule appellants' three assignments of error related to these claims.

3. Breach of Contract and Duties of Good Faith and Fair Dealing (Count One)

{¶ 25} With regard to appellants' claim for breach of contract and duties of good faith and fair dealing, the complaint alleges appellees breached:

> [B]y pursuing payment on the [cognovit] note using a void judgment when he had already been paid in excess of what was owed.
>
> [B]y successfully pursuing and collecting more than he was entitled under the [cognovit] note [from 2004 through 2008].
>
> [By reneging on an agreement to reconcile] payments and to use escrow to maintain the funds pending the reconciliation after the closing on Rensch Road.

(Complaint at ¶ 29, 24.)

{¶ 26} With regard to the third allegation regarding breach of the Rensch Road escrow agreement, for the same reasons outlined above regarding the breach of contract and fiduciary duty claims (Count Seven), consistent with the trial court's July 16, 2014 judgment in this case and our affirmance of the same in *Klaus*, we find that, pursuant to the law of this case, the third allegation of the breach of contract and duties of good faith and fair dealing claims fail. Accordingly, we overrule appellants' three assignments of error related to this portion of these claims.

{¶ 27} With regard to the first and second allegations regarding breach of the cognovit note, we disagree with the trial court that the "claims against the Klostermans are the same as those raised against the other defendants for whom this Court previously granted summary judgment." (Mar. 11, 2016 Jgmt. Entry at 9.) In its February 21, 2014 decision granting summary judgment in favor of the Hrabcak defendants, the trial court observed that "only" counts two and three purport to state any claims against the Hrabcak defendants. Furthermore, in its July 16, 2014 decision granting summary judgment in favor of the Knapp/Polaris Title defendants, the trial court observed that "it is clear that 'Count One' is against defendant Kevin Klosterman

only." (July 16, 2014 Decision and Entry at 2.) Therefore, we agree with appellants that there can be no law of this case effect from the February 21 or July 16, 2014 decisions regarding this portion of the breach of contract and duties of good faith and fair dealing claims.

{¶ 28} This, however, does not end our discussion. We must consider whether res judicata or estoppel otherwise applied as determined by the trial court. At this point in time we look to the Klostermans' prior case. Appellants argue that the trial court erred when it relied on the record of another case, the Klostermans prior case, as grounds for dismissing their claims. Appellants assert (1) the court cannot take judicial notice of another case, (2) res judicata does not apply because Teresa Klaus was not even a party to the Klosterman case, (3) res judicata does not apply because the issues in the Klosterman case and the instant case were not the same, and (4) equitable estoppel does not apply. We first note that nowhere in its decision does the trial court indicate that it is taking judicial notice of the Klosterman case. Nor does the court indicate that it is applying the doctrine of equitable estoppel.[2] Therefore, we do not address these arguments. We will focus our discussion on whether the doctrine of res judicata applies to properly dismiss appellants' claims of breach of contract and good faith and fair dealing related to the cognovit note.

{¶ 29} The trial court dismissed the Klauses' claims in part:

> [B]ecause a thorough review of the record from Case No. 05-CV-012889 makes clear that the Klaus' claims against the Klostermans arose over six years ago and were fully litigated and to some extent even appealed in *Klosterman I* and *II*, regardless of whether this Court employs the term estoppel, res judicata, or the law of the case doctrine, the result is the same.

(Mar. 11, 2016 Jgmt. Entry at 9-10.)

{¶ 30} We disagree with the trial court that the first and second allegations were fully litigated and even appealed in *Klosterman I* and *II*. As pointed out by appellants, neither *Klosterman I* nor *II* addressed these claims. Furthermore, in *Klosterman II*, we determined that because case No. 05CV-12889 was voluntarily dismissed without

[2] We interpret the trial court's reference to the term "estoppel" as a reference to the principle of collateral estoppel incorporated into the doctrine of res judicata.

prejudice, pursuant to Civ.R. 41(A), it was as if no suit had ever been filed, and it rendered the "prior interlocutory ruling a nullity."[3] *Klosterman II* at ¶ 12. Therefore, to the extent that the trial court relied on case No. 05CV-12889[4] as grounds for the application of res judicata or collateral estoppel, it was error.[5] We find the first and second allegations of the breach of contract and duties of good faith and fair deal claims cannot be dismissed on the grounds of the law of the case, estoppel, or res judicata as the trial court has applied the same. Accordingly, we sustain appellants' three assignments of error related to these claims.

4. Unjust Enrichment, Money Had and Received and Quantum Meruit/Valebant (Count Three)

{¶ 31} With regard to appellants' claims for unjust enrichment, money had and received and quantum meruit/valebant, the complaint alleges:

> It would be unfair under the circumstances for the defendants to retain the benefits of the additional funds beyond those which were due to be paid under the note or under a bogus judgment. By taking an improper legal action to obtain payment using a void judgment, the defendants were enriched to the detriment of the plaintiffs. The

[3] As noted previously, in *Klosterman II* we determined that we still had jurisdiction to consider the collateral matter of attorney fees and expenses. We affirmed the trial court's denial of $162,849.98. To the extent these fees represent attorney fees and expenses, these fees have been fully litigated and res judicata prevents appellants and appellants' counsel from pursuing the same.

[4] In case No. 05CV-12889 Decision and Entry, filed January 21, 2010, the court held: "The Court agrees [that because defendant Klaus received value (release of the mortgage on the Grandview Property), in exchange for paying plaintiff from the closing proceeds on the Rensch Property, the vacated judgment pursuant to *Klosterman I* was not affected] and finds that [Klostermans] receipt of funds in a closing on an unrelated property is not a proper issue for this Court. It appears that Plaintiff and Defendant Klaus entered into a separate agreement whereby Plaintiff agreed to release the Certificate of Judgment (which at that time was a valid judgment) against Defendant Klaus in exchange for payment. The Certificate of Judgment was in fact released (See Exhibit E to Plaintiff's Memo.) and *Defendant Klaus has presented no evidence that Plaintiff is currently attempting to collect on the void cognovit judgment*." (Emphasis added.) However, because in *Klosterman II*, this court determined that this portion of the interlocutory order was a nullity, we cannot say these issues were fully litigated.

[5] We also note that in *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313 (10th Dist.1995), this court considered whether res judicata barred a complaint for failure to file a compulsory counterclaim in a prior action which was voluntarily dismissed by the plaintiff in the prior action. We held: "In such circumstances as exist in the instant case, Civ.R. 13(A) should not bar plaintiff's action. Once [defendant] voluntary dismissed her claim, there is no pending action which requires the compulsory submission of a counterclaim. Hence, plaintiff is not barred from asserting the claim in this action by virtue of Civ.R. 13(A). Furthermore, [defendant's] voluntary dismissal without prejudice was not a disposition of the case on the merits. *Costell v. Toledo Hosp.* (1988), 38 Ohio St.3d 221, 527 N.E.2d 858. Thus, the doctrines of *res judicata* and collateral estoppel would not bar a second action on the legal malpractice claims." *Id.* at 323.

> defendants have retained money and benefits which in justice and equity belong to the plaintiffs, and which they knew about and fully understood at the time, received from her between 2004 and 2009, and for which the defendants are liable to the plaintiffs in damages.

(Complaint at ¶ 37.)

{¶ 32} To the extent these claims relate to breach of the Rensch Road escrow agreement, for the same reasons outlined above regarding the third allegation of the claim for breach of contract and duties of good faith and fair dealing, we overrule appellants' three assignments of error related to this portion of these claims.

{¶ 33} To the extent these claims relate to breach of the cognovit note, for the same reasons outlined above regarding the first and second allegations of the claim for breach of contract and duties of good faith and fair dealing, we sustain appellants' three assignments of error related to this portion of these claims.

VII. Conclusion

{¶ 34} Accordingly, appellants' three assignments of error are overruled in part and sustained in part. We affirm in part and reverse in part the March 11, 2016 judgment dismissing the remaining claims against the Klostermans and remand to the Franklin County Court of Common Pleas in accordance with law and consistent with this decision.

Judgment affirmed in part
and reversed in part; cause remanded.

TYACK and LUPER SCHUSTER, JJ., concur.