NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 02/03/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GRANT H. GOODMAN and TERI B. GOODMAN, husband and wife, individually, as shareholders and as Guarantors-Sureties for GTI CAPITAL HOLDINGS, LLC, and G.H. GOODMAN INVEST. CO., LLC; GHG INC. (managing agent for STIRLING BRIDGE, LLC (a Delaware limited liability company)); and NORTHERN HIGHLANDS I and II (Arizona limited liability companies),	1 CA-CV 10-0154
Plaintiffs/Appellants,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
GREENBERG TRAURIG, LLP; QUARLES & BRADY, LLP,	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendants/Appellees.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-033330

The Honorable John Rea, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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B A R K E R, Judge

¶1 Grant and Teri Goodman and their business entities[1] (collectively, "Plaintiffs") filed a complaint against the law firms of Greenberg Traurig, LLP ("Greenberg") and Quarles & Brady, LLP ("Quarles") (collectively, "Defendants"). Greenberg and Quarles each filed separate motions to dismiss. The superior court granted the motions, dismissing all of Plaintiffs' claims with prejudice. This appeal followed. For the reasons set forth below, we affirm in part, reverse in part, and remand.

Facts and Procedural Background[2]

¶2 We describe Plaintiffs' prior litigation, which is extensive, to the extent it is relevant to our resolution of this appeal. We take judicial notice of all relevant pleadings,

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[1] GHG Inc., Stirling Bridge, LLC, Northern Highlands I, and Northern Highlands II are the business entities at issue.

[2] When reviewing a trial court's dismissal of a complaint for failure to state a claim, we accept the facts alleged in the complaint as true and affirm the dismissal only if the non-moving party "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

judgments, and appellate determinations, including those not available to the trial court at the time it entered judgment. *See* Ariz. R. Evid. 201; *State v. McGuire*, 124 Ariz. 64, 66, 601 P.2d 1348, 1349 (App. 1978).

¶3 In 2006, Plaintiffs filed an amended complaint against Quarles and former Quarles attorney John Clemency ("Clemency") alleging legal malpractice. The complaint arose from a loan transaction between Comerica Bank ("Comerica") and certain of the Goodman entities in September 2001, which ultimately led to receivership and bankruptcy proceedings in 2003. According to the complaint, Quarles represented Comerica in the loan transaction even though Plaintiffs were concurrent clients of Quarles. Plaintiffs further alleged that Quarles failed to adequately perfect certain of Plaintiffs' assets as security interests for the loan, made false representations to the state and bankruptcy courts that Comerica had perfected interests on Plaintiffs' intended collateral, attempted to liquidate Plaintiffs' assets, and concealed its conduct from Plaintiffs.

¶4 In October 2006, the superior court entered summary judgment in favor of Clemency. The court held that because Clemency represented Comerica in the loan transaction, he had no attorney-client relationship with Plaintiffs, and thus there was no basis for a legal malpractice claim against Clemency. In June 2007, the court entered summary judgment in favor of

Quarles. The court held that Plaintiffs had waived any potential conflict in a signed writing to Quarles as well as through their actions. This court affirmed the entry of summary judgment in favor of Clemency and Quarles in December 2009.

¶5 In March 2007, Plaintiffs filed an amended complaint against Greenberg, Comerica, and other defendants in the United States District Court for the District of Arizona. Quarles was not a party to this litigation. Plaintiffs alleged nine claims, including claims for legal malpractice and violations of federal securities laws, federal antitrust laws, and Plaintiffs' civil rights under 42 U.S.C § 1983. In December 2007, the District Court dismissed the case in its entirety with prejudice. The court held that Plaintiffs' complaint failed to state a federal cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) and therefore failed to establish federal subject matter jurisdiction over the remaining state law claims pursuant to Federal Rule of Civil Procedure 12(b)(1).

¶6 On December 15, 2008, Plaintiffs filed another lawsuit against Greenberg and Comerica in state court. In that complaint, Plaintiffs made factual allegations substantially similar to those made in the federal lawsuit and nearly identical to those alleged in the current lawsuit. The Plaintiffs brought claims for Arizona racketeering, Arizona securities fraud, civil rights violations under 42 U.S.C.

§ 1983, aiding and abetting fraud, and a claim under Arizona Rule of Civil Procedure 60(c)(3)(4)(5)(6). Regarding the final claim, the complaint appeared to allege that Plaintiffs were entitled to relief from all judgments against them because the judgments had been obtained by fraud upon the court. Comerica and Greenberg filed motions to dismiss, which the superior court granted. In its minute entry, the court stated that claim and issue preclusion barred the majority of Plaintiffs' claims against the defendants.

¶7 On December 31, 2008 (sixteen days after Plaintiffs filed their complaint against Greenberg and Comerica in the same court) Plaintiffs filed the complaint that forms the basis for this appeal. In their factual allegations, Plaintiffs included the facts that gave rise to the 2006 suit against Quarles and alleged virtually identical factual allegations to those asserted against Greenberg in the 2008 lawsuit. Plaintiffs alleged that both Quarles and Greenberg: (1) represented Comerica adversely to Plaintiffs while still representing Plaintiffs; (2) withheld client files from Plaintiffs; (3) liquidated (through sale and transfer) Plaintiffs' assets to concurrent clients; (4) withheld a memo in the receivership hearing that certified that Plaintiffs had no defaults in their loan; (5) committed perjury and suborned perjury in federal bankruptcy court; (6) made false representations to state and

federal courts (specifically, that Defendants used altered financial documents in judicial proceedings that fraudulently reduced Plaintiffs' assets and that they filed perjured proof of claims against Plaintiffs); (7) concealed or destroyed Plaintiffs' client emails and client files; (8) received stolen data from Plaintiffs' computer servers; (9) intentionally eliminated dispositive evidence of Defendants' fraud; (10) tampered with bankruptcy estate fiduciaries as witnesses and "expert" advisers; (11) bribed bankruptcy estate fiduciaries to secure bankruptcy settlement agreement favorable to Defendants; (12) knowingly sponsored their client's nondisclosure, misrepresentation, and perjury; (13) forged title signatures and submitted the forgeries to the Arizona Department of Motor Vehicles; (14) employed federal and court officers to garnish Plaintiffs' wages, retirement and savings; (15) discouraged competition for legal services by operation of a "shadow cartel"; (16) misused the judicial system by issuing subpoenas and employing state officers to collect on settled claims and to issue contempt order applications; (17) supplanted contractual obligations; and (18) performed the above acts under color of state title by involving state and judicial officers.

¶8 Under these allegations, Plaintiffs alleged the following claims, styled:

(I) Arizona Racketeering ("AzRac") - A.R.S. §§ 13-2314.04(A); 13-2310

(II) Consumer Fraud ("CFA") - A.R.S. § 44-1522(A)

(III) Civil Rights Violations 42 U.S.C. § 1983

(IV) Aiding-and-Abetting Fraud

(V) Breach of Contract

(VI) Antitrust - A.R.S. § 44-1401 *et seq.*

(VII) Breach of Fiduciary Duty

(VIII) Constructive Trust

(IX) Intentional Concealment/Misrepresentation

¶9 Defendants each filed separate motions to dismiss in June 2009. In December 2009, the superior court granted the two motions. The court dismissed all nine claims against both Defendants on the basis of claim preclusion. The court also dismissed counts three, six, seven, and nine against Quarles on separate grounds.

¶10 Plaintiffs appealed the court's rulings and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

Discussion

1. Judicial Notice of Record

¶11 Plaintiffs argue that the superior court erred in not notifying the parties that it was converting Defendants' motions to dismiss into motions for summary judgment. According to

Plaintiffs, once the superior court considered pleadings and rulings of former actions, it had converted the motions to motions for summary judgment and was obligated to notify the parties and allow them to submit additional evidence. We conclude that the superior court did not err in failing to notify the parties of its conversion because the court did not convert the motions. The court's ruling clearly states: "The Defendants' Motions to Dismiss are granted . . . ."

¶12 Moreover, the superior court did not err in failing to convert the motions to dismiss into motions for summary judgment. It is generally true that in reviewing a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure, the court accepts all material allegations of the complaint as true. *Logan v. Forever Living Prods. Int'l, Inc.*, 203 Ariz. 191, 192, ¶ 2, 52 P.3d 760, 761 (2002). However, it is also true that in determining the sufficiency of the complaint, the court may take judicial notice of its own and other records, including for actions involving similar parties and issues and of pleadings therein. *See Regan v. First Nat'l Bank*, 55 Ariz. 320, 327, 101 P.2d 214, 217 (1940); *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 13, 226 P.3d 1046, 1050 (App. 2010). Therefore, the court did not err in considering the

pleadings and rulings of the parties' prior judicial proceedings.

¶13 Additionally, even if the court did err in not converting the motions, the error was harmless. Plaintiffs argue that they should have been permitted to enter into evidence a CD containing documentary evidence of the truth of the factual allegations in the complaint. But by treating Defendants' motions as motions to dismiss, the court was already required to assume as true all the allegations in the complaint. *Logan*, 203 Ariz. at 192, ¶ 2, 52 P.3d at 761; *see also State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008) (stating that we presume the trial court knew and correctly applied the law). Thus, even if the court did err, the error was harmless.

2. Dismissal of Claims

¶14 Plaintiffs argue that the superior court improperly dismissed their claims against both Defendants. We review a trial court's decision on a motion to dismiss for an abuse of discretion but review claim preclusion de novo. *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 180, ¶ 16, 181 P.3d 219, 227 (App. 2008); *Phoenix Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 240, 934 P.2d 801, 804 (App. 1997). We address initially the claims asserted against Greenberg and then turn to those asserted against Quarles.

a. Claims Against Greenberg

¶15 Plaintiffs argue that the superior court erred in dismissing all nine of its claims against Greenberg on the basis of claim preclusion. We disagree. In determining whether claim preclusion bars a second suit we look to the jurisdiction that issued the judgment. *Howell v. Hodap*, 221 Ariz. 543, 546, ¶ 17, 212 P.3d 881, 884 (App. 2009). Greenberg asserts that the 2007 federal litigation in which Plaintiffs' complaints were dismissed with prejudice results in claim preclusion that bars Plaintiffs' claims here. In assessing this argument, our analysis is controlled by the federal law pertaining to claim preclusion. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69, ¶ 13, 127 P.3d 882, 887 (2006) ("Federal law dictates the preclusive effect of a federal judgment.").

¶16 Claim preclusion applies, under Ninth Circuit jurisprudence, "when the earlier suit (1) involved the same claim or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (internal quotation marks omitted). In recently discussing this standard, we noted:

> Importantly, Ninth Circuit jurisprudence emphasizes that differences in the specific legal theory pled in the subsequent suit are

> irrelevant so long as the claim "could have been raised in the prior action." *Owens*, 244 F.3d at 713 (quoting *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)). The rule is as follows:
>
> > Res judicata bars relitigation of all grounds of recovery that were asserted, or *could have been asserted*, in a previous action between the parties, where the previous action was resolved on the merits. *It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather the relevant inquiry is whether they could have been brought*.
>
> *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998) (emphasis added). The key is whether the subsequent claims arise out of the same nucleus of facts. *Tahoe-Sierra*, 322 F.3d at 1078 ("Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action.").

Howell, 221 Ariz. at 547, ¶ 20, 212 P.2d. at 885.

¶17 In their 2007 federal complaint against Greenberg, Plaintiffs' claims arise from the following alleged transactions: (1) the 2001 loan transaction between Comerica and Plaintiffs; (2) the liquidation of GTI's assets in 2004; (3) the withholding of a memorandum regarding Plaintiffs' credit status from judicial proceedings; (4) the commission and subornation of perjury in federal bankruptcy court; (5) the use of altered

financial documents in judicial proceedings; (6) the filing of perjured proofs of claim; (7) concealment and destruction of Plaintiffs' client files; and (8) the receipt of stolen computer data. Based on these transactions, Plaintiffs alleged seven federal claims and two state law claims. The federal court held that the Plaintiffs' complaint failed to state a federal cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6), and it declined to exercise supplemental jurisdiction over the state law claims pursuant to Federal Rule of Civil Procedure 12(b)(1). The federal court stated:

> Plaintiffs have repeated numerous allegations against all of the Defendants that have been litigated or are continuing to be litigated at least once and generally numerous times at the state court level: (1) breach of express or implied terms and covenants of the loans and improperly declared defaults; (2) breach of oral promises; (3) improper use of the bankruptcy/receiver process; (4) improper appointment of the bankruptcy examiner; conspiracy to sell assets below market price; (5) fraud and destruction of evidence; (6) failure to perfect a security interest in certain assets; (7) forged certificates of title; (8) improperly attached funds; and (9) intentional destruction of Plaintiffs' business interests.
>
> These claim[s] are ancillary state law based claims that this Court lacks jurisdiction to address because federal jurisdiction is completely lacking. These claims will be dismissed rather than remanded to state court, because the principles of res judicata and collateral

> estoppel appear to bar the repeated litigation of these claims in state courts.

¶18 It is clear to us that Plaintiffs' allegations in this matter arise out of the same nucleus of operative facts as those in the 2007 federal litigation. Solely by way of example, describing the conduct of the lawyers in the federal litigation, Plaintiffs refer to:

> material misrepresentations, intentional misrepresentations, intentional and/or fraudulent concealment, intentional spoliation of evidence, and [a] scheme or artifice to defraud . . . . The actionable conduct commenced in 2001. The conduct is ongoing through this filing. Plaintiffs began to unearth the conduct, or confirm its significance, primarily in the second and third quarters of 2006.

In the litigation before us, Plaintiffs refer to the same conduct, and assert the pattern is ongoing, just as they did in the federal litigation. For example:

> However, as partially discovered in 2006, more fully developed in 2007, and as recently as November 2008, the plaintiffs had been under an orchestrated financial siege from the concerted efforts of defendants to acquire the assets, through a series of interrelated schemes and artifices to defraud dissolving into a sustained pattern of unlawful activity, against the clients, the plaintiffs here.

¶19 Based on the similarities, the federal law of claim preclusion applies. Plaintiffs' claims against Greenberg are

barred. The trial court's entry of summary judgment in this regard is affirmed.

b. Claims against Quarles

¶20 Plaintiffs argue that the superior court erred in dismissing all nine of their claims against Quarles under the doctrine of claim preclusion. Significantly, however, Plaintiffs do not argue that the court erred in dismissing counts two (consumer fraud), three (42 U.S.C. § 1983), six (antitrust), and seven (breach of fiduciary duty) against Quarles on grounds of failure to state a claim and applicable statutes of limitation. Accordingly, we affirm the judgment of dismissal as to those counts and need not discuss how the doctrine of claim preclusion applies to them. The remaining counts at issue are one (racketeering), four (aiding and abetting), five (breach of contract), eight (constructive trust), and nine (intentional concealment/misrepresentation).

¶21 Quarles asserts that claim preclusion applies to the remaining counts based upon counts asserted, then abandoned, in Plaintiffs' First Amended Complaint in CV 2005-003271. Because CV 2005-003271 ended in a final judgment in an Arizona state court, we apply the Arizona standard for claim preclusion. *See In re Gen. Adjudication*, 212 Ariz. at 69, ¶ 13, 127 P.3d at 887. Arizona's standard differs from the Ninth Circuit's standard in that it follows the "same evidence" test from the Restatement

(First) of Judgments § 61 (1942): "[T]he plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action." Application of Arizona's standard may, depending on the circumstances, produce a substantially different result than the federal test. *Infra* ¶ 16.

¶22 Quarles relies on our cases that state that claim preclusion applies "not only upon facts actually litigated but also upon those points which might have been litigated." *Pettit v. Pettit*, 218 Ariz. 529, 533, ¶ 10, 189 P.3d 1102, 1106 (2008) (quoting *Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987)); *Heinig v. Hudman*, 177 Ariz. 66, 71, 867 P.2d 110, 115 (App. 1993). However, the doctrine of claim preclusion only applies to a "judgment 'on the merits.'" *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). Moreover, in *Fischer v. Hammons*, our supreme court held the following:

> [W]here the second action, although between the same parties, is on a different cause of action, the judgment is not conclusive on all matters which might have been litigated in the former action, but only as to such points or questions as were actually in issue and adjudicated thereon.

32 Ariz. 423, 431, 259 P. 676, 679 (1927) (internal quotations and citations omitted).

¶23 In this case, the counts that Quarles asserts give rise to claim preclusion are those which Plaintiffs abandoned in a voluntarily dismissed First Amended Complaint in CV 2005-003271. Quarles stipulated to the filing of the Second Amended Complaint that effectively dismissed without prejudice the counts upon which it now relies without permitting a judgment on the merits. Quarles does not assert that the count that remained in the Second Amended Complaint – which was decided upon the merits – entitles it to claim preclusion. In *Airfreight Express Ltd. v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 158 P.3d 232 (App. 2008), we rejected an argument similar to what Quarles makes here.

¶24 In *Airfreight*, the plaintiff's complaint was dismissed without prejudice. *Id.* at 106, ¶ 7, 158 P.3d at 235. The defendants later asserted that the dismissal without prejudice, and the use of the same arguments as a defense, entitled them to utilize claim preclusion. *Id.* at 106-07, ¶ 8, 158 P.3d at 235-36. We disagreed. *Id.* at 108, ¶ 13, 158 P.3d at 237. We stated that "[a] dismissal without prejudice, however, is not an adjudication on the merits and does not bar a second action to the doctrine of claim preclusion." *Id.* Although *Airfreight* is factually distinct from the circumstances in this case, its reasoning is instructive. Here, the parties' agreement to abandon claims without addressing them essentially functioned as

a dismissal without prejudice. Accordingly, we reject Quarles' argument.

¶25 As mentioned, Quarles does not assert that the remaining legal malpractice claim that was adjudicated on the merits in CV 2005-003271 (nor any other adjudicated claim) entitled the trial court to apply claim preclusion. As Quarles' theory is somewhat different from the trial court's reasoning, we consider the trial court's ruling.

¶26 In its minute entry the trial court stated:

> A review of only two of the prior cases, CV 2005-003272 and CV 2008-031668, conclusively shows that the Plaintiff's claims in this case arise *from a common nucleus of operative facts*. The vast majority of the Complaint in this case is taken verbatim from CV 2008-031668. It is true that the nine claims for relief in this case are somewhat different from the specific legal theories pursued in the previous cases. However, constructing new legal theories from the same facts does not avoid the application of claim preclusion.

(Emphasis added.) The trial court's statement, however, does not consider that Arizona's standard differs from the federal standard. *See Phoenix Newspapers, Inc.*, 188 Ariz. at 240-42, 934 P.2d at 804-06. As we discussed in *Phoenix Newspapers*, Arizona does not follow the modern trend, which clearly favors the transactional test used in the Ninth Circuit. *Id.*

> The transactional test prevents what virtually all courts agree a plaintiff should not be able to do: revive essentially

> the same cause of action under a new legal theory. *See Restatement, supra* at cmt. c; *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). For example, having failed under a contract theory, a plaintiff cannot bring the same cause as a tort claim. *Dowd v. Society of St. Columbans*, 861 F.2d 761, 763 (1st Cir. 1988).
>
> That is precisely what the Newspapers seek to do here. Having failed to prevail on one theory, they assert another in this action. However, underlying both theories is the same occurrence: the defendants' denial of media access to prisoners. If they failed to exercise an opportunity to litigate that theory in the first action, the Newspapers should not be able to burden the system and the defendant with another action concerning the same events. To allow the Newspapers to bring a second action based on the same occurrence involved in the first subverts the basic purpose of the res judicata doctrine of barring the splitting of claims.
>
> However, existing Arizona law does not bar the claim. Under the same evidence test, for example, an action on an open or stated account is not barred by a prior action on a promissory note, even though both actions are based on the same debt. *Wilson v. Bramblett, supra*. Needless to say, we are not free to ignore or alter the law as enunciated by our supreme court. Arizona Supreme Court decisions also bar us from following the second Restatement because it conflicts with Arizona case law. *See Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 546, 611 P.2d 547, 550 (1980) ("[W]e follow the Restatement only in the absence of Arizona authority to the contrary.").

Id. at 241-42, 934 P.2d at 805-06.

¶27 We assume this difference in the Arizona standard is the reason that Quarles did not assert that the legal malpractice claim that was adjudicated in CV 2005-003271 entitled it to claim preclusion as to the remaining counts. Reliance on the voluntarily abandoned claims similarly does not create a bar under the doctrine of claim preclusion.

3. Fraud or Forgery

¶28 Plaintiffs assert that earlier judgments were obtained through fraud or forgery and thus should not be given preclusive effect under claim preclusion. Although Plaintiffs are correct in their statement of the law, the issue of whether this rule applies to the parties' prior litigation has already been resolved by this court against Plaintiffs in Plaintiffs' 2008 lawsuit against Greenberg and Comerica. Accordingly, under issue preclusion, Plaintiffs may not re-litigate the issue here.

Conclusion

For the reasons set forth above, the superior court's ruling is affirmed as to all counts against Greenberg and counts two, three, six, seven, and nine against Quarles. The ruling is reversed as to counts one, four, five, and eight against Quarles. We remand this case for proceedings consistent with this decision.

/s/
DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
MICHAEL J. BROWN, Judge