IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

M. STANLEY SLOAN, a single person,		**No. 28444-1-III**
	)	
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
HORIZON CREDIT UNION, Successor to Mountain View Credit Union,	)	**UNPUBLISHED OPINION**
	)	
	)	
Respondent.	)	
	)	

Kulik, C.J. — In June 1992, M. Stanley Sloan entered into a loan contract secured by a first mortgage on his home. When Mr. Sloan defaulted on the loan, the home was sold in a nonjudicial foreclosure sale. In 2005, Mr. Sloan, proceeding pro se, filed suit against Mountain View Credit Union—the predecessor to Horizon Credit Union—alleging fraud, negligence, and outrage. The trial court granted summary judgment in favor of Mountain View, dismissing the three tort claims and stating that Mr. Sloan could not proceed with a breach of contract claim against Mountain View as a matter of law. We affirmed the dismissal of the three tort actions, concluding that Mr. Sloan waived the breach of contract claim and that in any event, he failed to produce

evidence of a prima facie case of breach of contract. *Sloan v. Robinson*, noted at 2008 WL 2623967 (*Sloan* I). The Washington Supreme Court denied review.

In 2009, Mr. Sloan filed this action alleging a breach of contract based on Horizon's failure to mail a notice of the foreclosure to the proper address. (*Sloan* II). The trial court granted Horizon's motion for summary judgment, concluding the breach of contract claim was barred by res judicata. The court also found a violation of CR 11 and imposed sanctions in the amount of $14,950 against Mr. Sloan and his attorney. Mr. Sloan appeals, arguing: (1) res judicata does not apply because there was no adjudication on the merits, (2) the 2009 lawsuit does not constitute claim splitting, (3) application of the rule of retroactivity allows Mr. Sloan to proceed with the 2009 lawsuit, (4) the priority of action rule is inapplicable, and (5) there was no violation of CR 11.

We affirm the court's dismissal and reverse the imposition of CR 11 sanctions.

FACTS

Loan Contract. On June 15, 1992, Mr. Sloan entered into a loan contract for $42,785.68 with U.R.M. Credit Union. U.R.M. became Mountain View Credit Union, which then merged with Horizon Credit Union. The loan contract provided that the note was governed by the laws of Washington with venue in Spokane County, Washington. The security offered was a first mortgage on the property located at 865 East Crystal Bay

Road, Post Falls, Idaho.

The deed of trust provided for nonjudicial foreclosure in the event of an uncured debt. Additional loans were made to Mr. Sloan in 1993 and 1996. These loans were also secured by a deed of trust. In the loan documents, Mr. Sloan provided his most recent address in writing as 6007 East 12th Avenue, Spokane, Washington 99212.

In 2002, Mr. Sloan defaulted on several loan payments. On October 31, notices of default and foreclosure were issued by Jon Nees, attorney for the trust deed trustee. Mr. Nees sent default and foreclosure notices by certified mail to two locations: (1) the Idaho property, and (2) the home of Mr. Sloan's deceased parents at 12403 East 3rd Avenue. Mr. Sloan testified that he never received notice of the foreclosure and that if he had received notice he would have cured the default. On March 11, 2003, the Post Falls property was sold in a nonjudicial foreclosure sale for $131,000.00 on a loan balance of $7,871.55, plus $6,000.00 in foreclosure expenses.

The applicable Idaho foreclosure statute, Idaho Code 45-1506, required default and foreclosure notices to be sent to Mr. Sloan's "last known address." Clerk's Papers (CP) at 127. Mr. Sloan concedes that Horizon complied with the statutory notice requirements. The loan contract itself provided that, "Notices will be mailed to you at the most recent address you have given the credit union in writing." CP at 132. The address

provided to Horizon by Mr. Sloan in writing was 6007 East 12th Avenue, Spokane, Washington 99212. This address appeared on loan documents Mr. Sloan signed in 1993 and 1996.

2005 Lawsuit—*Sloan* I. In 2005, Mr. Sloan, proceeding pro se, filed a lawsuit against Mountain View listing the causes of action as fraud, negligence, and outrage. Mr. Sloan alleged that Mountain View owed him "a duty of care to provide actual – versus constructive – notice of the foreclosure proceedings." CP at 110.

The trial court dismissed *Sloan* I on summary judgment. In his brief opposing Mountain View's motion for summary judgment, Mr. Sloan explained that he commenced *Sloan* I, alleging fraud, negligence and outrage "by virtue of the predecessor failing to comply *with contractual and/or statutory notice* requirements attending non-judicial foreclosure on residential real property." CP at 223 (emphasis added).

On appeal, Mr. Sloan claims that during the proceedings in *Sloan* I, he moved to amend his complaint to add a cause of action for breach of contract. However, his support for this is a reference to his reply memorandum before the trial court where he states that the court denied his motion to amend.

Mr. Sloan did produce a third amended complaint for breach of contract dated August 7, 2006. But this date was two months after the court granted summary judgment.

The trial court concluded that Mr. Sloan could not proceed with a breach of contract claim as a matter of law. In making its decision, the court relied on *Udall v. T.D. Escrow Services, Inc.*, 132 Wn. App. 290, 130 P.3d 908 (2006) (*Udall* I), *rev'd*, 159 Wn.2d 903, 154 P.3d 882 (2007) (*Udall* II).[1] The trial court stated that "[*i*]*f that is a claim in this case*, it fails as a matter of law." CP at 91 (emphasis added).

The court also denied Mr. Sloan's motion for reconsideration. On August 7, Mr. Sloan moved the trial court for an order to show cause why the court should not vacate the summary judgment order and the order denying reconsideration, *and* grant Mr. Sloan's motion to amend his complaint to allege breach of contract. In February 2007, the trial court denied Mr. Sloan's motion to vacate the summary judgment order.

The dismissal on summary judgment was appealed to this court. In *Sloan* I, we affirmed the dismissal of the fraud, negligence, and outrage claims. We considered the issue of whether the trial court erred when it denied Mr. Sloan's motion to amend. We then concluded that: (1) Mr. Sloan waived this assignment of error because it was merely stated, not argued or briefed, and (2) the record was insufficient to resolve this issue because the record did not contain an order denying the motion to amend. Also, we noted

[1] *Udall* I held that the common law of contracts did not apply to nonjudicial foreclosure sales under Washington's deeds of trust act, RCW 61.24.050. *Udall* I, 132 Wn. App. at 302.

that the trial court *considered* the breach of contract claim and dismissed it as a matter of law. We restated our conclusion that Mr. Sloan had waived this issue and that the record was not sufficient to permit review.

We also discussed Mr. Sloan's assertion "that Mountain View breached the contract between them because [Mr. Sloan] did not receive a notice of foreclosure at his last known address." *Sloan* I, 2008 WL 2623967, at *5. The record on summary judgment showed that Mr. Sloan "specifically declared" that his last known address was 12403 East 3rd Avenue. *Id.* At summary judgment, we determined that Mountain View failed to send notice to the most recent address that Mr. Sloan had provided. And we concluded that Mr. Sloan failed to produce evidence of a prima facie case of breach of contract claim or any of the three tort claims.

The Supreme Court denied Mr. Sloan's petition for discretionary review of *Sloan* I on March 4, 2009.

The appeal of *Udall* I was decided by the Washington Supreme Court on March 29, 2007. *Udall* II, 159 Wn.2d 903. Significantly, *Udall* II was decided solely on statutory grounds without mentioning the common law breach of contract claim. *Id.* at 916-17.

<u>*2009 Lawsuit—Sloan* II.</u> On March 11, 2009, Mr. Sloan filed a lawsuit against

Horizon alleging that Horizon's failure to mail notice of the foreclosure to Mr. Sloan at 6007 East 12th Avenue, Spokane, Washington, constituted a breach of contract resulting in substantial damages.

Horizon moved for summary judgment, asserting the defense of res judicata. Horizon also sought sanctions under CR 11. Mr. Sloan filed a motion for summary judgment, arguing that Horizon had breached the contract by failing to send the required notices. The trial court concluded that Mr. Sloan's breach of contract claim was barred by res judicata. In its order of dismissal, the trial court stated:

> That the dismissal is based on res judicata and priority of action because this current cause represents claim splitting and because this cause is the identical cause of action, involving the same parties and quality parties and involving the same subject matter as [*Sloan* I], which culminated in a final judgment on the merits.

CP at 247.

The court awarded Horizon attorney fees of $14,950.00 under CR 11. The court determined that "[t]he CR 11 sanctions are being imposed because the filing and signing of the Summons and Complaint in the above cause is baseless." CP at 322. Mr. Sloan's motion for reconsideration was denied on August 18, 2009. This appeal followed.

ANALYSIS

An order of summary judgment is reviewed de novo. This court engages in the

same inquiry as the trial court and views the facts in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

Res Judicata. "Res judicata ensures the finality of decisions." *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). "Res judicata, or claim preclusion, prohibits the relitigation of claims and *issues that were litigated, or could have been litigated*, in a prior action." *Id.* (emphasis added). In contrast, collateral estoppel bars the relitigation of an issue after the party has had a full and fair opportunity to present its case. *Id.* at 69.

Application of the res judicata doctrine may be sought when: (1) the issue decided in the prior adjudication is identical to the one presented in the subsequent action, (2) the prior adjudication ended in a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and (4) the application of the doctrine does not work an injustice. *Id.* The doctrine applies when the prior judgment and the subsequent judgment share an identity as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of

persons for or against whom the claim is made. *Id.* at 67. Under the principles of res judicata, each judgment is binding as to the parties and those persons in privity to the parties.

The issue here is whether *Sloan* I constituted a final judgment on the merits. *See Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). The doctrine of res judicata applies to summary judgments. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Importantly, the "on the merits" requirement does not require the litigation of every issue. *Ryan v. Diafos*, 110 Wn. App. 758, 764, 37 P.3d 304 (2001). In *Pederson*, we concluded that language from a Georgia decision—*CenTrust Mortgage Corp. v. Smith & Jenkins, PC*, 220 Ga. App. 394, 397, 469 S.E.2d 466 (1996)—best defined the phrase "on the merits." Quoting *CenTrust Mortgage*, *Pederson* stated:

> "In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It is sufficient that the status of the action was such that *the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases*."

Pederson, 103 Wn. App. at 70 (emphasis added) (quoting *CenTrust Mort.*, 220 Ga. App. at 397).

Mr. Sloan asserts that res judicata is inapplicable because *Sloan* I did not

constitute an adjudication on the merits. He insists that *Sloan* I consisted solely of tort claims and did not include a breach of contract claim. Mr. Sloan asserts that he attempted to amend his complaint to include this claim, but that the trial court barred him from initiating this litigation before the court granted Horizon's motion for summary judgment. Simply stated, Mr. Sloan contends that no order or judgment was or could been entered concerning the breach of contract claim as part of *Sloan* I.

Mr. Sloan's assertions are based largely on his belief that the phrase "judgment on the merits" requires adjudication of that particular issue, not adjudication of the lawsuit as a whole. This view is mistaken. Res judicata may apply even if the claim in question is not part of the prior lawsuit. It is sufficient that the parties might have had their lawsuits disposed of if they had properly presented and managed their respective lawsuits. *Ryan*, 110 Wn. App. at 764. The only requirement for "judgment on the merits" is that the prior proceeding culminated in a final judgment. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997).

Mr. Sloan asserts that his motion to amend was not part of the summary judgment order entered in *Sloan* I and that any resolution of this motion did not constitute an adjudication on the merits. In making this assertion, Mr. Sloan misunderstands the application of the res judicata doctrine. The question of whether the breach of contract

claim technically was or was not a part of the summary judgment order is not dispositive here. Instead, we examine the record to determine whether Mr. Sloan's breach of contract claim was litigated in *Sloan* I, or whether this claim should have been litigated as part of *Sloan* I. Even if we assume that the motion to amend the complaint was not part of the court's order on summary judgment, the breach of contract claim was discussed by the trial court and the appellate court. In *Sloan* I, we noted that "Mr. Sloan argued that Mountain View breached the contract between them because he did not receive a notice of foreclosure at his last known address." *Sloan* I, 2008 WL 2623967, at *5. Examining the record here, Mr. Sloan could have, or did have, his breach of contract claim resolved as part of *Sloan* I.

Mr. Sloan next argues that he did not attempt to raise the breach of contract claim in *Sloan* I. This assertion is without merit. As noted above, the application of res judicata does not require that the matter must have been litigated. Res judicata also considers whether the claim should have been litigated. More importantly, Mr. Sloan argued some form of the breach of contract theory before both the trial court and this court in *Sloan* I.

Mr. Sloan relies on *Leija v. Materne Brothers, Inc*., 34 Wn. App. 825, 664 P.2d 527 (1983) and *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967) to support his

belief that res judicata is inapplicable because the summary judgment did not include the contract claim. In *Leija*, the court refused to apply res judicata because there was a voluntary dismissal and there was no judgment on the merits in the prior litigation. *Leija*, 34 Wn. App. at 828. Here, there was no voluntary dismissal. The court in *Leland* also did not apply res judicata.

Here, both parties moved for summary judgment; the breach of contract claim was so interwoven with the tort claims in *Sloan* I that it was considered by the trial court and Division Three. Even if we assume that the breach of contract claim was not included in the action, it was a claim that could or should have been litigated as part of the case.

Mr. Sloan contends the trial court erred when it concluded that *Sloan* II constituted claim splitting. Here, the court properly found that *Sloan* II constituted claim splitting. Claim splitting is explained in *Kelly-Hansen*:

> "Res judicata traditionally is divided into two closely related doctrines, 'merger' and 'bar.' They differ only in that merger applies when a claimant has prevailed in the earlier action and bar applies when he has lost. When a claimant wins a judgment, all possible grounds for the cause of action are said to be merged into that judgment and are not available for further litigation. If a party loses the first suit, he is said to be barred by the adverse judgment from ever raising the same cause of action again, even if he can present new grounds for recovery. . . . Claim-splitting . . . is prohibited by both merger and bar."

Kelly-Hansen, 87 Wn. App. at 328 (quoting Jack H. Friedenthal et al., Civil Procedure §

14.1, at 607 (1985)).

Lastly, Mr. Sloan argues that the application of res judicata to the facts here would be unfair. He contends that this unfairness results from the dismissal of *Sloan* I because the trial court's ruling barred him from initiating a breach of contract claim to challenge a deed of trust foreclosure. This assertion is without merit. Mr. Sloan maintained that he had a breach of contract claim in superior court, the Court of Appeals, and, presumably, in the Washington Supreme Court. Mr. Sloan's claim is now precluded by res judicata.

Rule of Retroactivity. As explained in *Robinson v. City of Seattle*, 119 Wn.2d 34, 77, 830 P.2d 318 (1992), the rule of retroactivity provides:

> [O]nce this court has applied a rule retroactively to the parties in the case announcing a new rule, we will apply the new rule to all others not barred by procedural requirements, such as the statute of limitation or *res judicata*.

(Emphasis added).

Mr. Sloan asserts that he can now bring his contract claim against Horizon because of changes in the law made after *Sloan* I was dismissed. This view is mistaken. The res judicata effect of final decisions already rendered is not affected by subsequent judicial decisions giving new interpretations to existing law. *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 823, 576 P.2d 62 (1978).

In *Columbia Rentals*, a group of landowners had the boundaries of their ocean

front property judicially established while the second group of landowners did not. Six years later, the Washington Supreme Court held that the group that had not established boundaries was entitled to a more advantageous boundary description. The first group then sought to take advantage of the more favorable judicial determination. The Washington Supreme Court dismissed this second round of lawsuits based on res judicata. The court explained: "If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation." *Id.*

Udall I held that the common law of contracts did not apply to nonjudicial foreclosure sales under Washington's deeds of trust act, RCW 61.24.050. *Udall* I, 132 Wn. App. at 302. In contrast, *Udall* II was decided solely on statutory grounds, without mentioning the common law breach of contract action. *Udall* II, 159 Wn.2d at 916-17. Mr. Sloan now argues that *Udall* II allows a breach of contract claim in a real estate foreclosure challenge. Even assuming that *Udall* II changed the law, the issue here must be decided on whether res judicata applies. Here, res judicata applies and the rule of retroactivity does not.

Priority of Action Rule. The priority of action rule provides that the first forum to obtain jurisdiction over a case retains exclusive authority over the case to the exclusion of

other coordinate courts. *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990). The doctrine is intended to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and process. *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991) (quoting *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)). Jurisdiction lasts, subject only to appellate authority, "'until the matter is finally and completely disposed of.'" *Am. Mobile*, 115 Wn.2d at 316 (quoting *State ex rel. Greenberger v. Superior Court*, 134 Wash. 400, 401, 235 P. 957 (1925)). The doctrine applies if the two cases at issue involve identical (1) subject matter, (2) parties, and (3) relief. *Id.* at 317.

Horizon argues that *Sloan* II constitutes an attempt to obtain appellate review by a trial court over our decision in *Sloan* I. The priority of action rule focuses on the question of jurisdiction. For example, in *Atlantic Casualty Insurance Co. v. Oregon Mutual Insurance Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (2007), the court concluded that one superior court may not overrule another at the same time. The priority of action rule does not apply here because two courts are not attempting to adjudicate these cases at the same time, and the jurisdiction of the first superior court ended when *Sloan* I was appealed. The priority of action rule does not apply.

CR 11 Sanctions. CR 11 sanctions may be imposed if: (1) the action is not well

grounded in fact, (2) the action is not warranted by existing law, and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action. *Lockhart v. Greive*, 66 Wn. App. 735, 743-44, 834 P.2d 64 (1992). It is a matter within the sound discretion of the court to determine whether a violation of CR 11 has occurred. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 110, 780 P.2d 853 (1989). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

An action lacks a factual or reasonable basis if it is both baseless and signed without reasonable inquiry. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). A filing is baseless if it is: (1) not well grounded in fact, or (2) not warranted by existing law or lacks a good faith argument for a change in existing law. *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994). The court must apply an objective standard to determine "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Bryant*, 119 Wn.2d at 220.

Mr. Sloan maintains that the CR 11 sanctions are improper. Mr. Sloan challenges all of the court's findings, stating or implying that: (1) he contended that the foreclosure

sale was void or that the buyer was not a bona fide purchaser; (2) he contended Horizon should pay damages for unlawfully selling his house without legal (as opposed to contractual) notice; (3) *Sloan* I included a claim for breach of contract; (4) in *Sloan* I, we affirmed the trial court and devoted a section to "Mr. Sloan's requested 'breach of contract' claim;"[2] (5) the trial court considered his breach of contract claim; (6) *Sloan* I involved the same property, the same parties, and the same legal theory; (7) his counsel failed to conduct a reasonable inquiry before filing *Sloan* II; and (8) his counsel argued Mr. Sloan's breach of contract claim before the Washington Supreme Court and lost.

Primarily, Mr. Sloan asserts that there was no violation of CR 11 because *Sloan* II is grounded in fact and is warranted by existing law. He also contends: (1) Horizon breached the contractual notice provision; (2) he was not allowed to bring his breach of contract claim in *Sloan* I; and (3) *Udall* I was reversed by *Udall* II, which should now be applied to allow the breach of contract claim to go forward in *Sloan* II.

"An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). Here, the two lawsuits are not

[2] CP at 321.

identical and a determination had to be made as to whether the breach of contract claim *should* have been included in *Sloan* I. As a result, we cannot conclude that Mr. Sloan's second lawsuit was frivolous.

Therefore, we determine that this appeal has debatable issues and is not so devoid of merit that there is no possibility of reversal. Thus, we decline to award attorney fees on appeal. We affirm the trial court's dismissal, and we reverse the imposition of CR 11 sanctions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.