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NO. 34960-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

ROBERT E. BENOIT,

Appellant

vs.

SHARON CARLSON

Respondent.

ORIGINAL

RESPONDENT'S OPENING BRIEF

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TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 5

 A. MR. BENOIT FAILED TO ENJOIN OR RESTRICT THE FORFEITURE OF HIS RIGHTS UNDER THE REAL ESTATE CONTRACT AND IS PRECLUDED FROM FILING A BREACH OF CONTRACT ACTION FOR MONETARY DAMAGES PURSUANT TO CHAPTER 61.30 RCW..... 5

 1. The Plain Language of Chapter 61.30 RCW Clearly Requires a Purchaser to Enjoin or Restrict A Foreclosure or Forfeit All Rights Under the Contract..... 6

 2. Mr. Benoit Waived His Right to Contest the Underlying Contract By Failing to Utilize Pre-Forfeiture Remedies under RCW 61.30.110..... 9

 B. THE TRIAL COURT’S ORDER GRANTING MS. CARLSON’S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE MR. BENOIT’S BREACH OF CONTRACT CLAIMS ARE PRECLUDED UNDER RES JUDICATA. 14

 1. Mr. Benoit’s Claims are Precluded By Res Judicata Because A “Final Judgment on the Merits” Was Entered in His Initial Action..... 16

 2. There is Concurrence of Identity in the Subject Matter Involved In Mr. Benoit’s Initial Action and His Subsequent Action. 18

3.	There is Concurrence of Identity in the Causes of Action Involved in Mr. Benoit's Initial Action and His Subsequent Action.	21
C.	REQUEST FOR ATTORNEY'S FEES AND EXPENSES INCURRED ON APPEAL PURSUANT TO RAP 18.1.	23
IV.	CONCLUSION	24

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Bordeaux v. Ingersoll Rand Co.</i> , 71 Wn.2d 392, 395, 429 P.2d 207 (1967).....	18
<i>CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.</i> , 220 Ga.App. 394, 397, 469 S.E.2d 466, 469 (1996)	20
<i>CHD, Inc. v. Boyles</i> , 138 Wn. App. 131, 157 P.3d 415 (2007).	12-15
<i>Council House, Inc. v. Hawk</i> , 136 Wn. App. 153, 157, 147 P.3d 1305 (2006).	5
<i>Hayes v. City of Seattle</i> , 111 Wn.2d 706, 712, 934 P.2d 1179 (1997).....	22
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wn.2d 853, 865, 93 P.3d 108 (2005).....	19, 21
<i>Knuth v. Beneficial Washington, Inc.</i> , 107 Wn. App. 727, 732, 31 P.3d 694 (2001).....	25
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 763, 887 P.2d 898 (1995).....	18, 21
<i>Maib v. Maryland Cas. Co.</i> , 17 Wn.2d 47, 51, 135 P.2d 71 (1943).	19
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).....	17
<i>National Elec. Contr. Ass'n v. Riveland</i> , 138 Wn.2d 9, 19, 978 P.2d 481 (1999).....	5
<i>Pederson v. Potter</i> , 103 Wn. App. 62, 11 P.3d 833 (2000)	20
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).....	17
<i>Sayward v. Thayer</i> , 9 Wash. 22, 24, 36 P. 137 (1894)	21
<i>State Dep't of Transp. v. State Employees' Ins. Bd.</i> , 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).....	6
<i>State v. Sommerville</i> , 111 Wn.2d 524, 531, 760 P.2d 932 (1988)	6
<u>Statutes</u>	
Chapter 61.12 RCW.....	11, 12

Chapter 61.24 RCW.....	11
Chapter 61.30 RCW.....	10, 25
RCW 4.84.330	28
RCW 61.24.130	13, 14
RCW 61.30.010(4).....	7
RCW 61.30.020(1).....	6, 9, 10
RCW 61.30.070(1).....	8, 15
RCW 61.30.070(1)(f).....	8
RCW 61.30.070(1)(i).....	8
RCW 61.30.100(2).....	7, 9
RCW 61.30.100(2)(a)	16, 29
RCW 61.30.110	10, 16, 29
RCW 61.30.110(1).....	8
RCW 61.30.110(2).....	8
RCW 61.30.110(3).....	26
RCW 61.30.140	9
RCW 61.30.140(4).....	26
<u>Rules</u>	
CR 56(c);.....	17
RAP 18.1.....	28
RAP 18.1(a)	27
RAP 18.1(b).....	27
<u>Other Authorities</u>	
Linda S. Hume, <u>The Washington Real Estate Contract Forfeiture Act</u> , 61 Wash. L. Rev. 803, 804 (1986)	12
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805, 812–13 (1985).....	22
Thomas Leo McKeirnan, <u>Preserving Real Estate Contract Financing in Washington: Resisting the Pressure to Eliminate Forfeiture</u> , 70 Wash. L. Rev. 227, 228 (1995).	11

I. STATEMENT OF THE ISSUES

- 1. Whether a Purchaser of Real Estate Who Fails to Enjoin or Restrict the Forfeiture of Rights to a Real Estate Contract is Precluded from Later Filing a Breach of Contract Action for Monetary Damages Pursuant to Chapter 61.30 RCW.**
- 2. Whether the Order Signed By the Honorable Judge Culpepper on November 4th, 2005 Dismissing Mr. Benoit's Equitable Claims to Enjoin Foreclosure of the Subject Property for Failure to Post a \$40,000.00 Security Bond Constitutes a "Final Judgment on the Merits" for Purposes of Res Judicata?**
- 3. Whether Mr. Benoit's Claims for Equitable Relief Filed under Cause 05-2-08170-3 Involved the Same Subject Matter as the Breach of Contract Action Filed under Cause 05-2-1422507 for the Purposes of Res Judicata?**
- 4. Whether Mr. Benoit's Claims for Equitable Relief Filed under Cause 05-2-08170-3 Concerned the Same Causes of Action as the Lawsuit for Breach of Contract Action Filed under Cause 05-2-1422507 for the Purposes of Res Judicata?**

II. STATEMENT OF THE CASE

Sharon Carlson and Robert Benoit entered into a real estate purchase contract on June 4, 1999, for the purchase of real property located at 5205 Sumner Heights Drive East, Edgewood, Washington ("subject property"). CP 10-16.

On February 15, 2005, Sharon Carlson recorded a notice of intent to forfeit the real estate contract under Pierce County Auditor's file number 200502150735. CP 176-182.

On June 1, 2005, Ms. Carlson recorded a declaration of forfeiture under Pierce County Auditor number 200506010935. CP 187–189.

On May 25, 2005, Mr. Benoit filed a pro se complaint to strike Ms. Carlson's notice of intent to forfeit under Pierce County Superior Court Cause No. 05-2-08170-3. CP 77–81. Mr. Benoit amended his complaint on July 7, 2005 after retaining counsel. CP 88–91. The amended complaint sought to set aside the notice of intent to forfeit and the declaration of forfeiture, and to reinstate the real estate contract. CP 88–91.

On July 29, 2005, Commissioner David H. Johnson signed an order requiring Mr. Benoit to post a \$40,000.00 bond within ten days, in order to proceed with the equitable action to enjoin the foreclosure. CP 112. When Mr. Benoit was unable to comply with the order and obtain the \$40,000.00 bond, his claims under his original and his amended complaint were dismissed with prejudice on September 20, 2005. CP 124–125.

On October 20, 2005, Ms. Carlson's attorney filed a motion to clarify the court's order of September 20, 2005. CP 138. On October 27, 2005, Mr. Benoit's attorney filed a motion for permission to amend the complaint a second time to add a breach of contract claims. CP 140–153.

At the November 4, 2005 hearing, the Honorable Ronald E. Culpepper clarified the September order of dismissal. The court's clarification stated:

The previous order of dismissal entered on September 20, 2005 was intended and does hereby dismiss claims of plaintiff including the original complaint and the amended complaint filed by the Plaintiff [Mr. Benoit]. That all claims of the Plaintiff were dismissed with prejudice and this order clarifies the same. That plaintiff's motion to amend the amended complaint is denied, but it is not prejudiced from starting a new lawsuit for breach of contract.

CP 155–156.

On November 30, 2005, Mr. Benoit filed another lawsuit against Ms. Carlson alleging a breach of the real estate contract under Pierce County Superior Court Cause No. 05-2-14225-7. CP 4–16. Ms. Carlson filed an answer, affirmative defenses, and additional counterclaims against Mr. Benoit for waste and contamination of the subject property. CP 26–33.

On April 7, 2006, Ms. Carlson filed a motion for summary judgment to dismiss all of Mr. Benoit's claims, "as they are barred under the doctrine of Collateral Estoppel and/or Res Judicata and/or CR 12 (b)(6), failure to state a claim upon which relief can be granted." CP 196–197. Additionally, Ms. Carlson sought summary judgment on her waste counterclaim. CP 268–270.

On May 12, 2006, the Honorable Frederick W. Fleming, after considering oral argument from both parties, granted Ms. Carlson's motion for summary judgment dismissing Mr. Benoit's claims. In his oral ruling Judge Fleming stated:

The Court: I think it's res judicata that your client didn't perfect the cause of action the way they were supposed to. And I'm going to grant defendant's Summary Judgment and dismiss the claim. In reference to the waste issue, I think there is factual issues both as to liability and as to damages.

Mr. Gray: And in the basis—the basis—I just want to—he didn't perfect his claim under the statute, correct?

The Court: Under the statute.

(5/12/06 Tr., pp. 16–17).

The Honorable Judge Fleming followed his oral ruling by signing an order dismissing Mr. Benoit's breach of contract claims, and denying Ms. Carlson's motion for summary judgment as to her waste counterclaims. The order also contained Judge Fleming's interlineation that:

Plaintiff's claims were dismissed by res judicata because plaintiff failed to perfect his claims in the prior action (05-2-08170-3) pursuant to RCW 61.30 et seq.
CP 269.

Mr. Benoit filed an appeal of Judge Fleming's order on June 8, 2006. CP 273–277. Ms. Carlson voluntarily dismissed her waste counterclaims without prejudice on July 7, 2006. CP 280–281.

III. ARGUMENT

A. **MR. BENOIT FAILED TO ENJOIN OR RESTRICT THE FORFEITURE OF HIS RIGHTS UNDER THE REAL ESTATE CONTRACT AND IS PRECLUDED FROM FILING A BREACH OF CONTRACT ACTION FOR MONETARY DAMAGES PURSUANT TO CHAPTER 61.30 RCW.**

On questions of statutory interpretation, the appellate court conducts a de novo review. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 157, 147 P.3d 1305 (2006). "The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Council House, Inc.*, 136 Wn. App. at 157 (quoting *National Elec. Contr. Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). To determine legislative intent, the Court begins with the statute's plain language and ordinary meaning. The Court examines each provision in relation to other provisions and seek a consistent construction of the whole. *Council House, Inc.*, 136 Wn. App. at 157 (citing *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988)). The Court will examine sources beyond the statute and apply the rules of statutory construction only if the statute is ambiguous. *State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

1. **The Plain Language of Chapter 61.30 RCW Clearly Requires a Purchaser to Enjoin or Restrict A Foreclosure or Forfeit All Rights Under the Contract.**

The plain language of the Real Estate Contract Forfeiture Act (“RECFA”) clearly indicates the rights and remedies of both sellers and purchasers in forfeiting real estate contracts. The RECFA statutes provide the sole manner for forfeiting a purchaser’s rights under a real estate contract. RCW 61.20.020(1).

A forfeiture under the statute cancels the purchaser’s contractual rights under a real estate contract. In fact, this is part of the statutory definition of “forfeit” or “forfeiture:”

to cancel the purchaser's rights under a real estate contract and to terminate all right, title, and interest in the property of the purchaser and of persons claiming by or through the purchaser, **all to the extent provided in this chapter**, because of a breach of one or more of the purchaser's obligations under the contract. A judicial foreclosure of a real estate contract as a mortgage shall not be considered a forfeiture under this chapter.
RCW 61.30.010(4) (emphasis added).

The effect of a forfeiture on the purchaser’s rights is further defined in RCW 61.30.100(2), which provides:

(2) Except as otherwise provided in this chapter or the contract or other agreement with the seller, **forfeiture of a contract under this chapter shall have the following effects:**

(a) **The purchaser, and all persons claiming through the purchaser** or whose interests are otherwise subordinate

to the seller's interest in the property **who were given the required notices pursuant to this chapter, shall have no further rights in the contract or the property and no person shall have any right, by statute or otherwise, to redeem the property;**

(b) All sums previously paid under the contract by or on behalf of the purchaser shall belong to and be retained by the seller or other person to whom paid; and

(c) All of the purchaser's rights in all improvements made to the property and in unharvested crops and timber thereon at the time the declaration of forfeiture is recorded shall be forfeited to the seller.

RCW 61.30.100(2) (emphasis added).

The RECFA statutes offer the purchaser various forms of protection before a seller may obtain a forfeiture of the purchaser's rights under the real estate contract. For instance, the purchaser must receive a notice of intent to forfeit pursuant to RCW 61.30.070(1). The statute provides a list of items and information that the notice must contain. For example, the notice must inform the purchaser of the effect a forfeiture would have on the purchaser's rights, and must inform the purchaser of their right to contest the forfeiture or extend the time for a cure by filing a summons and complaint. RCW 61.30.070(1)(f) & (i).

Purchasers are also protected from forfeiture in another way because the statute provides a clear explanation of how a purchaser may restrain or enjoin the forfeiture under RCW 61.30.110. The statute states that "the forfeiture may be restrained or enjoined or the time for cure may

be extended by court order only as provided in this section.” RCW 61.30.110(1). The procedure for enjoining or restraining the forfeiture, i.e., filing and serving a summons and complaint before the declaration of forfeiture is recorded, recording a lis pendens in the county where the property is located, is detailed in RCW 61.30.110(2). A purchaser is given an additional remedy under RCW 61.30.140 if the declaration of forfeiture is recorded. The purchaser has an additional period of time in which to set aside the forfeiture.

The plain language and the ordinary meaning of the Real Estate Contract Forfeiture Act clearly provides a purchaser with a procedure for enjoining, restraining, delaying or setting aside a forfeiture of their rights. If a purchaser allows a forfeiture to occur, the RECFA is clear that the purchaser’s rights in the contract are cancelled, and their right, title, and interest in the property is terminated. The RECFA statutes do not allow a purchaser to sleep on their statutory rights, to allow them to be forfeited, and then permit them to bring a breach of contract claim on a contract in which their rights have been cancelled.

Under the plain language of the statutes there can be no conflict between RCW 61.30.020(1) and RCW 61.30.100(2) as Appellant suggests. The language of RCW 61.30.020(1) states:

(1) A purchaser's rights under a real estate contract shall not be forfeited except as provided in this chapter. Forfeiture shall be accomplished by giving and recording the required notices as specified in this chapter. This chapter shall not be construed as prohibiting or limiting any remedy which is not governed or restricted by this chapter and which is otherwise available to the seller or the purchaser. At the seller's option, a real estate contract may be foreclosed in the manner and subject to the law applicable to the foreclosure of a mortgage in this state. RCW 61.30.020(1).

This language does not permit Mr. Benoit to make a claim for breach of contract after Ms. Carlson has already accomplished the forfeiture, when the forfeiture cancels Mr. Benoit's contractual rights as a matter of law. However, the statutory language of RCW 61.30.020(1) does permit Mr. Benoit to bring any breach of contract claim at the same time he seeks to enjoin or restrain the forfeiture—a time before his contractual rights are canceled.

2. Mr. Benoit Waived His Right to Contest the Underlying Contract By Failing to Utilize Pre-Forfeiture Remedies under RCW 61.30.110.

If the Court were to determine that the RECFA is ambiguous, which it should not because the plain language of the statute is clear on the rights and remedies available to the parties, the Court's interpretation would be aided by looking to external sources. The Court should look at

the legislative history of the RECFA and the similarity in purpose between Chapter 61.30 RCW and Chapters 61.24, and 61.12 RCW.

A real estate contract serves as an alternative to the traditional real property security devices used in coordination with financing real estate purchases. Traditionally, most real estate was financed through a mortgage or a deed of trust, but the real estate contract is the most widely used alternative. Thomas Leo McKeirnan, Preserving Real Estate Contract Financing in Washington: Resisting the Pressure to Eliminate Forfeiture, 70 Wash. L. Rev. 227, 228 (1995). Because of the similarities in purpose among the mortgage, deed of trust, and the real estate contract, application of the remedies offered by these security devices should operate in a similar manner.

The Real Estate Contract Foreclosure Act was drafted and enacted with the intention of making it consistent with the remedies already available under the Deed of Trust Act, Chapter 61.24 RCW and the mortgage foreclosure statutes, Chapter 61.12 RCW. The drafting committee of the Washington State Bar Association had several objectives in drafting the Real Estate Contract Forfeiture Act:

[1] to make the forfeiture procedures for real estate contracts consistent with existing mortgage foreclosure and deed of trust statutes; [2] to increase the reliability of public records; [3] to balance the rights of the seller and purchaser in a way that would prevent the worse abuses; [4] to make

Furthermore, to allow Mr. Benoit to bring a breach of contract action after his rights in the contract have been cancelled and his right to the property terminated in accordance with RCW 61.30.100(2)(a), would undermine the objectives of the RECFA. The statute provides a clear procedure for the seller to obtain a forfeiture, with strict notice requirements and a period for cure that serve as protection of the purchaser's interests. However, in order to balance the protections and remedies available to the purchaser under real estate contracts, the legislature has provided sellers with a means to obtain a conclusive and final end to a dispute. Allowing Mr. Benoit, as a purchaser pursuant to a real estate contract, who failed to utilize the statutory remedies to obtain relief from forfeiture to now bring a breach of contract claim would undermine that certainty of relief to which a seller is entitled.

B. THE TRIAL COURT'S ORDER GRANTING MS. CARLSON'S MOTION FOR SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE MR. BENOIT'S BREACH OF CONTRACT CLAIMS ARE PRECLUDED UNDER RES JUDICATA.

When reviewing a summary judgment order, this Court should engage in the same inquiry as the trial court. *See Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). A summary judgment order will be affirmed when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Mountain Park Homeowners*, 125

Wn.2d at 341. All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party; all questions of law are reviewed de novo. *Mountain Park Homeowners*, 125 Wn.2d at 341. Questions of fact may be determined as a matter of law only when reasonable minds could reach but one conclusion from them. *See Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

In this case, the Honorable Frederick Fleming's order granting Ms. Carlson's motion for summary judgment dismissing Mr. Benoit's claims should be affirmed because his breach of contract claims are precluded under res judicata. Res judicata refers to the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). It is designed to prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quoting *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207) (1967)) (internal quotations omitted).

Mr. Benoit was given his day in court, and was provided with an opportunity to present all of his claims against Ms. Carlson that related to the real estate contract between the parties. Res judicata should apply and prevent Mr. Benoit from harassing Ms. Carlson through the courts, with a cause of action that should have been litigated during his initial action.

1. Mr. Benoit's Claims are Precluded By Res Judicata Because A "Final Judgment on the Merits" Was Entered in His Initial Action.

The threshold requirement of res judicata is a final judgment on the merits in the prior suit. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2005). A dismissal 'with prejudice' is equivalent to an adjudication upon the merits and will operate as a bar to a future action. *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 51, 135 P.2d 71 (1943).

In the present case, Mr. Benoit filed a pro se action to strike the notice of intent to forfeit. CP 77–81. Mr. Benoit filed an amended complaint alleging that he was current with payments and Ms. Carlson had breached the real estate contract on July 7, 2005. CP 89. On September, 20, 2005, Mr. Benoit's amended complaint was dismissed with prejudice by court order. CP 124, Appendix E. This was clarified in Judge Culpepper's November 4, 2005 Order, which states:

ORDERED, ADJUDGED AND DECREED that the previous order of dismissal entered on September 20, 2005 was intended and does hereby dismiss claims of the Plaintiff including the original complaint and the amended complaint filed by the Plaintiff. That all claims of the Plaintiff were dismissed with prejudice and this order clarifies the same.

CP 155, Appendix F.

Furthermore, Appellant's argument regarding what basis the court had in dismissing Mr. Benoit's complaint and amended complaint is irrelevant to the determination of whether a final judgment on the merits

occurred in a prior case. Washington courts have adopted the following definition of “on the merits:”

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 v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000) (quoting *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 220 Ga.App. 394, 397, 469 S.E.2d 466, 469 (1996)).

Therefore, it does not matter whether Mr. Benoit received a full trial, or had his complaint and amended complaint dismissed with prejudice because he failed to post a \$40,000.00 bond—in either event, a final judgment on the merits occurred in the prior suit.

This position is further supported by the general doctrine that the plea of *res judicata* applies “not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, **but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.**” *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2005) (quoting *Sayward v. Thayer*, 9 Wash. 22, 24, 36 P. 137 (1894)) (emphasis added).

2. There is Concurrence of Identity in the Subject Matter Involved In Mr. Benoit's Initial Action and His Subsequent Action.

The doctrine of res judicata applies when a prior judgment has concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, and (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Mr. Benoit concedes that there is concurrence of identity in the persons and parties, and the quality of the persons for or against whom the claim is made. Appellant's Opening Brief, p. 16.

In this case there is also concurrence in identity in the subject matter involved in Mr. Benoit's initial action brought under Pierce County Cause No. 05-2-08170-3 in May, 2005 (and as amended in July, 2005) and his subsequent action brought under Pierce County Cause No. 05-2-14225-7 in November, 2005.

As Appellant correctly points out "when courts examine subject matter 'the critical factors seem to be the nature of the claim or cause of action and the nature of the parties.'" *Hayes v. City of Seattle*, 111 Wn.2d 706, 712, 934 P.2d 1179 (1997) (quoting Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 812-13 (1985)). In the present case, the subject matter of each of Mr. Benoit's actions relate to his rights under the real estate contract, his interest, right, and title to the subject property, and a dispute over who actually breached the real estate contract.

Specifically, Mr. Benoit alleges in each complaint that he is current on all payments, is current on all real estate taxes, disputes Ms. Carlson's right to proceed with a forfeiture, and alleges that Ms. Carlson breached the real estate contract. For example, in the original complaint Mr. Benoit states:

- 4.) ... Plaintiff is current on all payments pursuant to their agreement.
- 5.) ... Defendants Carlson's [sic] have recorded a notice of intent to forfeit...claiming falsely that there was a failure to pay monthly payments on the real estate contract and other defaults.
- 6.) Plaintiff contends...he has all of the monthly payments and taxes current.

CP 77-81.

Mr. Benoit's amended complaint makes similar allegations involving his rights under the contract, and which party in fact breached the contract. It states, in part:

5. At all times material herein the Plaintiff was current on all payments pursuant to the contract.
6. Defendants, Carlson, recorded a notice of intent to forfeit...claiming falsely that there was a failure to make monthly payments on the real estate contract and other defaults.
- ...
8. Plaintiff contends ...he had all of the monthly payments current. Plaintiff also states that all taxes currently due are also current, and were current prior to the recording of the declaration of forfeiture.
- ...
11. Prior to the recording of the declaration of forfeiture , Defendants refused to give Plaintiff an exact cure and/or payoff figure. Said failure constitutes breach of Defendants' contractual duty of good faith and fair dealing,

and constitutes default of the real estate contract between the parties.

...

13. The actions of the Defendants as outlined in Paragraphs 6 through 12 above constitutes a default of the real estate contract between the parties.

CP 89.

Finally, the complaint from Mr. Benoit's second cause of action contains nearly identical language as his earlier amended complaint alleging being current on payments, and alleging that Ms. Carlson breached the contract. It states in pertinent part:

5. Defendant, Carlson, recorded a notice of intent to forfeit...falsely claiming that there was a failure to make monthly payments on the real estate contract...

6. Defendant recorded a declaration of forfeiture...falsely claiming that the contract had been forfeited.

7. Prior to the time Defendant filed her declaration of forfeiture; Plaintiff sought a payoff figure to completely pay off the contract. Defendant refused to give said payoff figure in a timely manner; thereby, denying Plaintiff its [sic] right to pay off the contract prior to the declaration of forfeiture being filed.

8. The actions of the Defendant as set forth above constitutes breach of contract and breach of the duty of good faith and fair dealing.

...

10. The actions of the Defendant set forth above in Paragraphs 5 through 9 constitutes breach of contract and breach of Defendant's duty of good faith and fair dealing.

CP 6-7.

It is evident from Mr. Benoit's pleadings that the subject matter of each complaint was his right, title and interest to the subject property, and his rights under the real estate contract—in that he disputed that he

breached by failing to make all required payments, while also alleging that Ms. Carlson breached by failing to provide payoff figures. Therefore, there is concurrence of identity in the subject matter of these two actions and the trial court was correct to bar Mr. Benoit's subsequent action because of res judicata.

3. There is Concurrence of Identity in the Causes of Action Involved in Mr. Benoit's Initial Action and His Subsequent Action.

To determine whether or not the causes of action are the same, courts examine the following criteria: (1) whether the second action would impair the rights or interests established in the prior judgment; (2) whether the two actions deal substantially with the same evidence; (3) whether the two suits involve an alleged infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Knuth v. Beneficial Washington, Inc.*, 107 Wn. App. 727, 732, 31 P.3d 694 (2001).

For substantially the same reasons stated above, there is concurrence in the identity of the causes of action involved in Mr. Benoit's initial action and his subsequent action. First, allowing Mr. Benoit's second action would impair the rights or interests established in the prior judgment. Ms. Carlson followed the statutory procedure laid out in the Real Estate Contract Forfeiture Act, Chapter 61.30 RCW, and is entitled to the certainty of the remedy it provides. Mr. Benoit attempted to follow his statutory remedy under the RECFA, but failed to enjoin or set aside the forfeiture. Therefore, to allow Mr. Benoit to try again and

effectively set aside the forfeiture by allowing him to seek recovery of any alleged equity in the property is a direct impairment of the right Ms. Carlson is entitled to after compliance with the statute and successful dismissal of Mr. Benoit's initial action with prejudice.

Second, there is concurrence in the identity of the causes of action because Mr. Benoit's two actions would have involved substantially the same evidence. In order to permanently enjoin a forfeiture action, a purchaser must show "there is no default," or "the purchaser has a claim against the seller which releases, discharges, or excuses the default claimed in the notice of intent to forfeit, including by offset, or that there exists any material noncompliance with this chapter." RCW 61.30.110(3). Similarly, in an action to set aside a forfeiture, the purchaser must establish that "the seller was not entitled to forfeit the contract." RCW 61.30.140(4). This is the same evidence that Mr. Benoit would be required to show to establish that Ms. Carlson breached the real estate contract, i.e., that she failed to comply with the statute, or was not entitled to forfeiture.

Third, Mr. Benoit's two actions involve the infringement of the same rights he claims under the real estate contract with Ms. Carlson which also shows concurrence of identity in the causes of action. As previously stated above, Mr. Benoit's complaints allege that his rights under the real estate contract have been infringed upon in an almost identical manner.

Finally, Mr. Benoit's suits arise out of the same transactional nucleus of facts. Both suits rely on allegations that Ms. Carlson breached the real estate contract and wrongly sought to forfeit the real estate contract. Therefore, there is concurrence of identity in the causes of action of these two actions and the trial court was correct to bar Mr. Benoit's subsequent action because of res judicata.

C. **REQUEST FOR ATTORNEY'S FEES AND EXPENSES INCURRED ON APPEAL PURSUANT TO RAP 18.1.**

Respondent, Sharon Carlson, respectfully requests that this Court award her attorney's fees, expenses and costs incurred in the defense of this appeal pursuant to RAP 18.1(a), (b). This request for attorney's fees is authorized by a attorney's fee provision in the real estate contract between the parties signed June 4, 1999, and later recorded on June 7, 1999 under Pierce County Auditor's file No. 9906071183. The contract states in pertinent part:

Attorneys' fees and costs:

In the event of any breach of this contract, the party responsible for the breach agrees to pay reasonable attorney's fees and costs, including costs of notice of service and title searches, incurred by the other party. the [sic] prevailing party in any suit instituted arising out of this contract shall be entitled to receive reasonable attorneys' fees and costs incurred in such suit or proceeding.

CP 150.

Furthermore, contractual provisions for attorneys' fees are statutorily authorized pursuant to RCW 4.84.330, which states:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Therefore, pursuant to the real estate contract, RCW 4.84.330, and RAP 18.1, Ms. Carlson respectfully requests that the Respondent be awarded all of her attorney's fees, costs and expenses incurred in the defense of this appeal.

IV. CONCLUSION

Based upon the foregoing, Ms. Carlson respectfully requests that this Court affirm the trial court's order granting summary judgment and dismissing Mr. Benoit's breach of contract claims related to the real estate contract with Ms. Carlson.

Mr. Benoit failed to comply with the remedies afforded him under the Real Estate Contract Forfeiture Act, and is therefore precluded from bringing a second breach of contract action. Mr. Benoit was provided with the required statutory notices regarding the forfeiture of his rights as a purchaser in the real estate contract. Although Mr. Benoit brought an action to stop the foreclosure before the declaration of forfeiture was recorded, he ultimately failed to restrain or enjoin the forfeiture of those rights through the statutory process provided for in RCW 61.30.110. As a result of the subsequent forfeiture, Mr. Benoit's rights under the real estate contract were canceled and any right, interest, or title he had in the property were terminated pursuant to RCW 61.30.100(2)(a).

Furthermore, Judge Fleming properly granted Ms. Carlson's motion for summary judgment dismissing Mr. Benoit's second cause of action because it was precluded by res judicata. There was a final judgment on the merits in a prior action, and the two suits involved a concurrence of identity in (1) subject matter, (2) cause of action, and (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.

DATED this ____ day of August, 2007.

DAVIES PEARSON, P.C.


BRIAN M. KING, WSB #29197
Attorney for Respondent

CERTIFICATE OF SERVICE

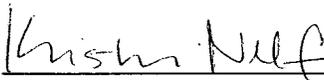
On August 24, 2007, a copy of Respondent's Opening Brief
was served on:

Thomas S. Olmstead
Attorney at Law
20319 Bond Rd NE
Poulsbo, WA 98370-9013

07 AUG 24 11:19 AM
BY [Signature]
STANDARD MAIL
FIRST CLASS PERMIT NO. 1200
TACOMA, WA 98402

by placing it in an envelope, addressed as indicated, then sealed it and deposited it with sufficient postage fully prepaid thereon in a receptacle of the United States Postal Service within Pierce County, Washington, before the hour of midnight.

Signed at Tacoma, Washington on 24th day of August, 2007.


KRISTIN NEFF
Legal Assistant to Brian M. King

APPENDIX A

APPENDIX B