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SUPREME COURT
STATE OF WASHINGTON
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No. 97651-1

SUPREME COURT
OF THE STATE OF WASHINGTON

SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Petitioner,

v.

N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof,

Respondents.

ANSWER TO SVN CORNERSTONE, LLC'S PETITION FOR REVIEW

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A. INTRODUCTION

The Petitioner requests that this Court overturn the Court of Appeals' decision that the applicability of res judicata is a question for an arbitration panel when res judicata is asserted as a defense to a claim properly pending before the arbitration panel and the currently pending claim accrued after a stipulated order of dismissal was entered as a result of a negotiated settlement agreement between the parties — not as a result of a trial or contested motions.

B. IDENTITY OF RESPONDENTS

N. 807 Incorporated d/b/a Berkshire Hathaway HomeServices First Look Real Estate, Kenneth and Michelle Lewis, and Henry Seipp (collectively "Berkshire Hathaway") ask this Court to deny review of the decision of the Court of Appeals terminating review designated in Part II of SVN Cornerstone, LLC's Petition for Discretionary Review.

C. ISSUES PRESENTED FOR REVIEW

1. Does a stipulated order of dismissal constitute a final judgment on the merits for the purposes of res judicata when the lawsuit was not resolved by a trial or contested motions and the stipulated order of dismissal was executed pursuant to the express terms of an out of court settlement agreement negotiated by the parties which contains a one-sided release

wherein Respondents did not waive or release any claims against the Petitioner?

2. Does a court have the obligation to retain jurisdiction over the issue of whether the defense of res judicata bars claims properly asserted before an arbitration panel when a prior stipulated order of dismissal, executed pursuant to the express terms of an out of court settlement agreement negotiated by the parties which contains a one-sided release wherein Respondents did not waive or release any claims against the Petitioner, was entered prior to the claims pending before the arbitration panel accrued?

D. STATEMENT OF THE CASE

On or about September 20, 2017, Seipp filed an Arbitration Complaint with the Commercial Brokers Association ("CBA") against Cornerstone, pro se, and without any consultation from legal counsel. (CP 21-30; 172-268). He brought his claim for commission before CBA because all of the parties to the present action are members of CBA. Id. The CBA bylaws explicitly provide that, "*[i]t is the duty of the members of CBA (and each so agrees) to submit all controversies involving commissions between or among them to binding arbitration by CBA pursuant to its then current arbitration rules and policies, rather than to bring a suit to law.*" Id. CBA's Arbitration Rules provide that, "*[a] complaint for arbitration shall be barred unless received by CBA within three (3) months of whichever of the following is applicable: (i) closing of the sale; (ii) the due date of the commission or other payment; or*

(iii) discovery of the claim by the member, where it is concealed (whether intentionally or not) by the other member." Id.

As set forth in the Amended Arbitration Complaint, Seipp is currently seeking to recover for commission lost, as a result of the actions of Cornerstone, from the sale of a large condominium complex owned by Diamond Rock Construction, Inc. ("Diamond Rock") that closed on August 28, 2017. (CP 172-268; 727; 941-42). Cornerstone previously filed suit against Berkshire Hathaway in April of 2016 (Spokane County Superior Court Case No. 16-2-01638-8) seeking to obtain a commission for the sale of a different multi-family property, the Timber Court Apartments. (CP 172-268). As a result of Cornerstone's attempt to take the commission Berkshire Hathaway and Seipp earned through litigation, Diamond Rock and its governor, Dennis Crapo, chose not to list its condominium complex with Seipp because they feared that Cornerstone would embroil them in litigation as Cornerstone had done to the seller of the Timber Court Apartments. (CP 172-268; CP 413-417).

Looking back, shortly after Henry Seipp left Cornerstone in April 2016 to work for Berkshire Hathaway, Cornerstone filed suit against Berkshire Hathaway and Mr. Seipp claiming that it was

entitled to commission for the Timber Court Apartments deal that Berkshire Hathaway closed for a seller who had an exclusive listing agreement with Berkshire Hathaway, not Cornerstone. (CP 172-268). The gravamen of the complaint was entitlement to the commission; however, Cornerstone also claimed that Berkshire Hathaway and Mr. Seipp had breached Mr. Seipp's independent contractor agreement, engaged in tortious interference, converted its property, violated the Uniform Trade Secrets Act, and breached Mr. Seipp's purported fiduciary duties to Cornerstone. Id. Seipp then moved to dismiss Cornerstone's Complaint because the gravamen of the complaint was a dispute over commission and as a CBA member, Cornerstone was required to submit that dispute to binding CBA arbitration. Id. On July 26, 2016, the Spokane County Superior Court denied Berkshire Hathaway's Motion to Dismiss. Id. Berkshire Hathaway filed a Notice of Appeal on August 18, 2016, appealing the trial court's denial of its Motion to Dismiss. Id.

The Court of Appeals explicitly directed "*the trial court to compel arbitration of all of Cornerstone's claims for relief that seek to determine or recover commissions, or commissions or fees lost as a result of the acts of the defendants, it is conceivable that some claims for relief will not be arbitrable—for example, a request for*

an injunction against use of trade secrets or for the court-ordered return of Cornerstone's property would not be. In making the determination, the court must bear in mind that Washington courts apply a strong presumption in favor of arbitrability, and doubts should be resolved in favor of coverage." SVN Cornerstone LLC v. N. 807 Incorporated, 199 Wn. App. 1010, *6 (May 23, 2017)(quoting Council of County & City Emps. v. Spokane County, 32 Wn. App. 422, 424-25 (1982)(internal quotations and citations omitted).

Months later, on July 31, 2017, the parties to the present litigation entered into a Settlement Agreement & Release ("Settlement Agreement"). (CP 172-268). Seipp specifically negotiated a one-way release wherein only Cornerstone released its claims against Seipp and Berkshire Hathaway. Id. Neither Berkshire Hathaway nor Seipp released any of their claims against Cornerstone. Id. The only release in the agreement is found on pages 2 and 3 of the Settlement Agreement. Id. That release provides:

> *Except for conditions precedent set forth in Paragraph 1 of this Agreement and the rights and claims under or expressly granted in or preserved by this Agreement, Cornerstone and its respective successors and assigns hereby full, finally, and forever releases, acquits, and discharges Berkshire Hathaway, Mr. and Mrs. Lewis and*

Mr. Seipp and their successors and assigns, of and from, any claims, causes of action, suits, debts, liens, obligations, liabilities, demands, losses, costs, expenses (including attorneys' fees), and damages of any kind, character or nature whatsoever, known or unknown, fixed or contingent that Cornerstone may have or claim to have now or which may hereafter arise out of, or be connected with, the Spokane County Case or the I.C. Agreement.

Id.

After the Settlement Agreement was executed on July 31, 2017, Cornerstone dismissed its lawsuit against Berkshire Hathaway on August 22, 2017. Id. About a week later, the sale of Mr. Crapo's large condominium complex closed on August 28, 2017. (CP 172-268; 727; 941-42). In January of 2017, Mr. Seipp spoke with Diamond Rock about listing its duplex portfolio valued at $32,000,000. Id. Mr. Crapo told Mr. Seipp that Diamond Rock wanted to list the duplex portfolio with Berkshire Hathaway, but could not because it feared it would become embroiled in a dispute over the commission with Cornerstone as Cornerstone had done with the seller of the Timber Court Apartments in 2016. Id. Had Cornerstone filed an arbitration complaint over the commission dispute, rather than a lawsuit, as required by the CBA arbitration bylaws, Mr. Crapo would have listed the duplex portfolio with Seipp. Id. Seipp was not certain that Diamond Rock would not list

the property with him until the deal closed on August 28, 2017. (CP 172-268; 727; 941-42).

As a pro se litigant, Seipp did his best to explain how Cornerstone harmed Berkshire Hathaway in the Arbitration Complaint; however, Mr. Seipp has no legal training. (CP 172-268). On November 16, 2017, Mr. Ries, then counsel for Cornerstone, called Mr. Kovarik, Seipp and Berkshire Hathaway's attorney in the 2016 lawsuit, to ask about the Arbitration Complaint and to make him aware of Cornerstone's issues with the Arbitration Complaint. (CP 144-162). Before Seipp could remedy those issues and get his Amended Arbitration Complaint out, Cornerstone filed a lawsuit against Seipp, knowing that he was proceeding pro se and had just been advised of its dispute over the request for punitive damages and attorney fees on November 27, 2017. (CP 172-268).

Less than 10 days after Cornerstone filed suit, Cornerstone was served with the Amended Arbitration Complaint that removed the request for an award of punitive damages and attorney fees and costs. Id. On December 11, 2017, Mr. Seipp emailed Mr. Ries, Cornerstone's former counsel, asking him why he would not dismiss Cornerstone's lawsuit as he had amended the Arbitration Complaint as Mr. Ries requested. Id. Mr. Ries never responded. Id.

Likewise, Berkshire Hathaway never received a response from Cornerstone. Id.

On January 5, 2018, Cornerstone moved for summary judgment, asking that the trial court find Seipp liable for breach of the Settlement Agreement, that Seipp's arbitration claims are barred by the doctrine of res judicata, that Seipp's claims are barred because they were compulsory counterclaims, and to enjoin him from pursuing CBA arbitration over commission on the Diamond Rock sale that did not close until August 28, 2017. (CP 46-77). Notably, Cornerstone entirely failed to address the fact that Mr. Seipp promptly amended the arbitration complaint, removing his request for attorney fees and costs, and punitive damages. Id. Rather, it proceeded as if Seipp was still seeking to recover attorney's fees and costs and punitive damages from Cornerstone. Id.

Cornerstone prayed for damages, attorney fees and costs, and injunctive relief preventing Berkshire Hathaway from "*arbitrating claims that were dismissed from the Lawsuit* . . ." (CP 3-30). However, Berkshire Hathaway did not assert any claims in the prior lawsuit. (CP 144-171). Rather, the parties entered into a Settlement Agreement wherein Cornerstone released its claims

against Berkshire Hathaway, and Cornerstone's lawsuit against Berkshire Hathaway was dismissed with prejudice. (CP 4-30). Furthermore, Cornerstone's release was one-sided; Berkshire Hathaway did not release any claims against Cornerstone. Id. Cornerstone later amended its complaint to incorporate its requests for relief in the form of a declaratory judgment asking the trial court to bar Seipp's claims pursuant to its compulsory counterclaim argument and res judicata argument. (CP 473-499).

The trial court entered findings of fact and conclusions of law denying Cornerstone's request for injunctive relief. (CP 1185-1190). The trial court granted Cornerstone's Motion for Summary Judgment solely on Cornerstone's breach of contract claim finding that Seipp's request for attorney fees and costs contained in the original Arbitration Complaint was a breach of the Settlement Agreement and that Cornerstone was entitled to reasonable attorney fees and costs pursuant to the Settlement Agreement. (1194-1197).

On January 12, 2018, Seipp moved to dismiss Cornerstone's Amended Complaint, for failure to state a claim pursuant to Civil Rule 12(b)(6). (CP 121-142). Due to the lack of factual and legal basis for Cornerstone's request that the trial court bar Seipp's

arbitration complaint pursuant to the doctrine of res judicata, and that the claims were compulsory counterclaims that should have been brought in the first lawsuit, the trial court granted Seipp's Motion to Dismiss Cornerstone's complaint. (CP 1198-1201).

Thereafter, Cornerstone timely filed the present appeal on April 17, 2018, appealing the trial court's Order Partially Granting Plaintiff SVN Cornerstone, LLC's Motion for Summary Judgment, entered on March 23, 2018, Order Granting Defendant's Motion to Dismiss, entered on March 23, 2018, and Order Denying Plaintiff's Request for Injunctive Relief, entered on March 23, 2018. (CP 1323-1339). On August 20, 2019, the Court of Appeals issued its opinion which was published in part. (Appendix A to the Petition for Discretionary Review, filed September 13, 2019). The Court of Appeals determined that *"[b]ecause Cornerstone's arguments regarding res judicata and compulsory counterclaims are defenses to the merits of Seipp's arbitration complaint, they must be decided in arbitration, not by a court."* Id.

E. SUMMARY OF ARGUMENT

Cornerstone's affirmative defense of res judicata falls within the scope of the arbitration clause of the CBA Bylaws which requires all disputes over commission to be submitted to CBA arbitration

because res judicata is a defense to Mr. Seipp's claim for commission. Res judicata is not an issue reserved for the court in this case because the stipulated order of dismissal was executed pursuant to the express terms of an out of court settlement agreement negotiated by the parties which contains a one-sided release wherein Mr. Seipp did not waive or release any claims against Cornerstone. The order of dismissal did not arise from a resolution through trial or contested motions. And, Mr. Seipp's claim to commission accrued after the order of dismissal was executed.

F. ARGUMENT

Cornerstone's petition should be denied because Cornerstone fails to establish any one of the four considerations, which would provide for discretionary review under RAP 13.4(b).

1. The Decision of the Court of Appeals is Not in Conflict with a Decision of the Supreme Court; Therefore, Review Should be Denied.

Contrary to Cornerstone's position, the decision of the Court of Appeals is not in conflict with Hisle v. Todd Pacific Shipyards, Corp., 151 Wn.2d 853, 93 P.3d 108 (2004) because Hisle held that res judicata does not apply where the identity of the of the subject

matter does not exist. Hisle, 151 Wn.2d at 865. In direct contradiction to Cornerstone's argument, Hisle supports Mr. Seipp's position as the prior litigation and the pending arbitration complaint do not contain the same subject matter.

Cornerstone relies on footnote 10 of the Hisle decision to support its assertion that "*the trial court determined that the doctrine of res judicata barred Hisle's claim.*" (Petition for Discretionary Review, p. 8). Yet, Cornerstone inexplicably fails to mention the ultimate holding of this Court in Hisle, arguing that Hisle "*specifically held that an order of dismissal is a final judgment on the merits for res judicata purposes.*" The footnote does not reflect this Court's holding on the issue of res judicata. Instead, this Court held that, "*[b]ecause we find that identity of subject matter does not exist, and because the res judicata test is a conjunctive one requiring satisfaction of all four elements, we do not analyze the other res judicata elements.*" Hisle, 151 Wn.2d at 866. Cornerstone's blatant attempt to reinvent the holding of this Court is frivolous at best and an intentional misrepresentation of the holding of Hisle with respect to res judicata at worst in an effort to establish grounds for the present petition under RAP 13.4(b).

Footnote 10 cites to Maib v. Md. Cas. Co., 17 Wn.2d 47, 52, 135 P.2d 71 (1943) wherein this Court explained the difference between a dismissal "*with prejudice*" and a dismissal "*without prejudice.*" Maib, 17 Wn.2d at 52. Maib explained dismissal "*with prejudice is equivalent to an adjudication upon the merits and will operate as a bar to a future action.*" Id. And that, "*dismissal without prejudice*" means "*no more than that the existing rights of the parties, whatever they might be, were not affected by the dismissal; those rights were as open to settlement by negotiations or legal controversy as if judgment of dismissal had not been entered.*" Id.

The definitions of "*with prejudice*" and "*without prejudice*" are black letter law that do not contradict Hisle nor do these definitions dictate the outcome of this case. Here, the stipulated order of dismissal was executed pursuant to the terms of a negotiated settlement agreement. The prior lawsuit that was dismissed did not arise out of the same transaction or occurrence at issue in the pending arbitration complaint for commission. In fact, the transaction giving rise to the arbitration complaint at issue, the sale of Diamond Rock's condominium complex, did not occur until after the settlement agreement and stipulated order of dismissal

had been executed and entered. Therefore, the decision of the Court of Appeals is not arguably in conflict with Hisle, and Cornerstone's Petition for Review should be denied.

2. The Decision of the Court of Appeals is Not in Conflict with a Published Decision of the Court of Appeals; Therefore, Review Should be Denied.

Contrary to Cornerstone's position, the decision of the Court of Appeals is not in conflict with Pederson v. Potter, 103 Wn. App. 62, 11 P.3d 833 (2000) because Pederson held that a confession of judgment was a final judgment on the merits when plaintiffs knew of their potential claims against defendants and plaintiffs knowingly released those claims and signed the confession of judgment. The plaintiffs in Pederson had the opportunity to be heard on their claims and knowingly chose not to do so. Pederson, 103 Wn. App. at 71.

In Pederson, plaintiffs executed a settlement agreement with defendants that allowed defendants to file a confession of judgment if the plaintiffs failed to make payments required by the settlement agreement. Id. at 66. When the plaintiffs failed to pay, defendants filed the confession of judgment. Id. at 66-67. Thereafter, the plaintiffs filed suit against the defendants based upon the dispute that gave rise to the settlement agreement. Id. at 67. The defendants

moved to dismiss the lawsuit arguing res judicata barred the lawsuit. Id. The Court of Appeals ruled in favor of the defendants because the plaintiffs settled their dispute with the defendants and signed the confession of judgment with knowledge of the potential claims ultimately raised in their lawsuit. Id. at 71. In addition, the Pederson court found that the four elements of res judicata[1] were met because the individuals were the same, the claims were all over the same right – who owes who under a sale agreement, the subject matter was the same, and the individuals were in the same position. Id. at 71-73.

Here, Mr. Seipp's claim against Cornerstone had not accrued at the time he executed the settlement agreement or at the time the stipulated order of dismissal was entered. Pursuant to the terms of the underlying settlement agreement, only Cornerstone released its claims against Respondents; thus, the stipulated order of dismissal is not a final judgment on the merits as to Mr. Seipp's current claim to commission that accrued after the stipulated order of dismissal was entered. Therefore, the decision of the Court of Appeals is not

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[1] *"Application of the doctrine requires identity between a prior judgment and a subsequent action 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. Res judicata also requires a final judgment on the merits."* Pederson, 103 Wn. App. at 67 (internal citations omitted).

in conflict with Pederson and Cornerstone's Petition for Review should be denied.

3. The Petition Does Not Involve an Issue of Substantial Public Interest; Therefore, Review Should be Denied.

Contrary to Cornerstone's position, the decision of the Court of Appeals does not involve a substantial public interest that should be determined by the Supreme Court because the decision of the Court of Appeals did not take away or in any way impair the trial court's ability to defend its own judgments. Instead, the Court of Appeals ruled that the facts of this case establish that res judicata is a defense to the claim asserted in arbitration which falls squarely within the scope of the arbitration agreement. Therefore, any defenses to the claim must be submitted at arbitration.

Washington State has a strong public policy favoring arbitration of disputes. See e.g., Adler v. Fred Lind Manor, 153 Wn.2d 331, 365, 103 P.3d 773 (2004). "*[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the language itself of an allegation of waiver, delay, or like defense to arbitrability.*" Heights at Issaquah Ridge v. Burton Landscape Group, Inc., 148 Wn. App. 400, 406, 200 P.3d 254 (2009) (quoting

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 400 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). While the presumption is that the court issuing a decision is best equipped to determine what was considered and decided; however, when the court merely confirms a decision, the trial court is not uniquely qualified to ascertain its scope and preclusive effect. Chiron Corp v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1134 (9th Cir. 2000)(agreeing with the 2nd Circuit that "*a res judicata defense is a component of the merits of the dispute and is thus an arbitrable issue.*")

Furthermore, the facts of this case also establish that the claim currently pending in arbitration did not accrue until after the stipulated order of dismissal was entered. The decision of the Court of Appeals explicitly acknowledged the court's role in discerning the scope of their prior judgments. Because of this role, the Court of Appeals asserted that when a res judicata objection is based on a prior court judgment from the same jurisdiction, application of res judicata is a question for the trial court. But, when, as here, that judgment is not on the merits and was not resolved by the court, the applicability of the equitable defense of res judicata is a question for the arbitration panel.

Cornerstone fails to cite to a single Washington case that shows the decision of the Court of Appeals is against a substantial policy interest. The Court of Appeals' decision acknowledged both the strong public policy in favor of arbitration of disputes and the importance of the finality of judgments on the merits. Consequently, because the decision of the Court of Appeals is in line with Washington's strong policy in favor of arbitration and the decision acknowledges that the issues before the arbitration panel were not and could not have been previously adjudicated, Cornerstone's petition for discretionary review should be denied.

4. Respondents are Entitled to Attorney Fees and Costs Pursuant to RAP 18.1 and 18.9.

Respondents are entitled to an award of the attorney fees and costs they incurred in responding to Cornerstone's frivolous appeal pursuant to RAP 18.1 and 18.9. Cornerstone misrepresents the holding of Hisle. As set forth above, Hisle did not hold that all orders of dismissal with prejudice are final judgments on the merits. This Court merely included a footnote in the Hisle decision that cited to a prior decision of this court that provided the black letter definitions of "*with prejudice*" and "*without prejudice*". In addition, Pederson is entirely distinguishable from the facts of this

case. Cornerstone's continued assertion that a confession of judgment is the same as the stipulated order of dismissal is frivolous in this instance. Cornerstone knows the dispute in Pederson was all over a single transaction – the sale of a business – and that the commission dispute at issue in Mr. Seipp's currently pending arbitration complaint did not accrue until after the stipulation and order of dismissal were entered. And, Cornerstone is wholly unable to articulate how the decision of the Court of Appeals involves an issue of substantial public interest that warrants this Court's intervention. Consequently, Respondents are entitled to an award of the attorney fees and costs they incurred in answering Cornerstone's frivolous petition.

G. CONCLUSION

Pursuant to the foregoing, Cornerstone's Petition for Discretionary Review should be denied.

DATED this 14th day of October 2019.

PISKEL YAHNE KOVARIK, PLLC

WHITNY L. NORTON, WSBA #46485
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October 2019, a true and correct copy of the foregoing document was served by hand delivery to:

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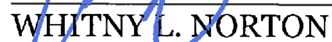

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