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COURT OF APPEALS, DIVISION ONE
IN THE STATE OF WASHINGTON

65867-1

Robert S. Bryan and Jim MacPherson, on behalf of himself and all
others similarly situated, Respondents,

v.

CMCS Management, Inc., and Jay Campbell, d/b/a Parkside Spine
Care, Appellant.

BRIEF OF APPELLANT

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INTRODUCTION

This action arises from unsolicited faxes defendant CMCS Management, Inc. (“CMCS”)¹ allegedly caused or arranged to be sent to Plaintiffs on behalf of defendant / appellant Dr. Jay Campbell and Dr. Ray Sue. The faxes at issue were also the subject of an earlier class action, *Shorett et al. v. CMCS Management, Inc., Ray Sue, d/b/a University Chiropractic and Eric Hansen, d/b/a Eastside Life Chiropractic, King Co.*, cause number 07-2-23062-9. Plaintiffs in this case were members of the *Shorett* class. In *Shorett*, the plaintiff class brought claims virtually identical to those at issue here, and named Dr. Sue as a defendant.

The *Shorett* class action settled in 2009. Plaintiffs and the other *Shorett* class members executed a Settlement Order and Release, whereby class members agreed to be forever barred from instituting, maintaining, or prosecuting any claim concerning any unsolicited facsimile advertisements naming any of the *Shorett* defendants, including Dr. Sue. This release also extinguished liability against nonparties for claims concerning these same faxes.

¹ Plaintiffs have voluntarily dismissed their claims against CMCS Management. Clerk’s Papers (“CP”) at 163-65.

Despite this settlement and release, Plaintiffs brought the instant action; suing Dr. Campbell for faxes bearing his name and Dr. Sue's name. Significantly, the faxes at issue in this case were sent in 2006, well *before* the *Shorett* faxes were sent in 2007 and *prior* to commencement of the *Shorett* litigation in 2008.

In 2008, when Plaintiffs and the other *Shorett* class members filed suit in *Shorett*, they named Dr. Sue as a defendant and asserted claims for *any* and *all* faxes bearing Dr. Sue's name. Because the faxes at issue in this case bear Dr. Sue's name, and were sent *prior* to the commencement of *Shorett*, they were necessarily also at issue in *Shorett*.

Therefore, this action is barred by the express terms of the *Shorett* settlement. Because Plaintiffs and the other *Shorett* class members are forever barred from bringing any claim concerning faxes bearing the name of Dr. Sue (or any other *Shorett* defendant), their present action against Dr. Campbell for faxes that bear Dr. Sue's name is prohibited.

On this record, and on the basis of the *Shorett* settlement, Dr. Campbell moved for summary judgment. The trial court denied Dr. Campbell's motion for summary judgment and his subsequent motion for reconsideration. However, the trial court

did certify the issue presented for immediate appeal under RAP 2.3(b)(4).

This Court accepted Dr. Campbell's motion for discretionary review based on the controlling questions of whether the *Shorett* settlement and / or re judicata bars Plaintiffs' claims. Because Plaintiffs' claims against Dr. Campbell are barred by the *Shorett* settlement, and because the elements of res judicata are met, the trial court's order denying Dr. Campbell's motion for summary judgment should be reversed.

ASSIGNMENTS OF ERROR

Should the trial court's orders denying Dr. Jay Campbell's motions for summary judgment and reconsideration be reversed because Plaintiffs' action is barred by the *Shorett* settlement and by res judicata.

STATEMENT OF THE CASE

Appellant Jay Campbell is a chiropractor doing business as Parkside Spine Care. Respondents Robert Bryan and Jim MacPherson ("Plaintiffs") are lawyers. They allege that Dr. Campbell, with the assistance of defendant CMCS, faxed unsolicited advertisements to them in violation of state and federal statutes. The allegations state in part:

¶ 7. Defendant Jay Campbell d/b/a Parkside Spine Care, does business in Snohomish County, Washington. Said Defendant has, *with the assistance of Defendant CMCS Management, Inc. sent unsolicited faxes* into King County, Washington, and by virtue of the facts alleged herein does business in King County, Washington.

¶ 17. Upon information and belief, *Defendant CMCS Management, Inc. provided the fax numbers used to transmit the subject facsimiles, including Plaintiffs' fax numbers.*

CP at 5, 7 (Emphasis supplied). The faxes at issue were received by Plaintiffs in 2006. CP at 7. Both faxes bear Dr. Campbell's name and the name of Dr. Raymond Sue, d/b/a University Chiropractic. CP at 16-19.

The faxes allegedly sent to Plaintiffs were also at issue in a prior class action filed in 2008. That case settled, and the court dismissed all claims brought therein. The prior case was *Shorett et al. v. CMCS Management, Inc., Ray Sue, d/b/a University Chiropractic and Eric Hansen, d/b/a Eastside Life Chiropractic, King Co.*, cause number 07-2-23062-9, filed in the Superior Court for King County. In *Shorett*, the named plaintiffs brought claims virtually identical to those brought here for unsolicited faxes sent in 2007. The claims were asserted against Dr. Sue and another chiropractor, and against CMCS Management, also a defendant

named here. See CP at 5, 7, 67-68, 70. Plaintiffs in *Shorett* were represented by Rob Williamson, the same attorney representing Plaintiffs in this action.

The *Shorett* court certified a class defined as follows:

All persons who received a facsimile similar to Exhibit A to the Settlement Agreement, or substantially similar thereto, at any time in the past through the entry of the order granting preliminary approval of the settlement. It is intended that anyone who received a facsimile in a form substantially similar to Exhibit A which includes any of the following names shall be considered a class member: Dr. Raymond Sue, d/b/a University Chiropractic and Dr. David Hansen, Eastside Life Chiropractic.

CP at 45.

Plaintiffs in this action have stipulated that the faxes at issue in *Shorett* are “substantially similar” to the faxes at issue here. CP 167. Both the faxes at issue here, and at issue in *Shorett*, identify Dr. Sue (or his clinic, University Chiropractic) as one of the senders of the fax. CP at 16-19, 79-82.

Therefore, according to the terms of the *Shorett* class definition quoted above, Plaintiffs in this action were members of the *Shorett* class. This is because the faxes at issue in this case are substantially similar to those at issue in *Shorett*. Both the *Shorett*

faxes, and the faxes here, include the name Dr. Raymond Sue, d/b/a University Chiropractic.

The *Shorett* court dismissed with prejudice all claims brought by the class members based on any faxes allegedly sent or caused to be sent by any of the *Shorett* case defendants:

This Court hereby dismisses with prejudice all claims with respect to unsolicited facsimile advertisements allegedly sent or caused to be sent by Defendants [including Dr. Sue, d/b/a University Chiropractic, and / or CMCS], as against all persons and entities who are members of the Plaintiff Settlement Class. No Class Members have executed valid exclusions.

CP at 46. The court also held that members of the *Shorett* settlement class were “forever barred from instituting, maintaining, or prosecuting any claim concerning unsolicited facsimile advertisements sent by Defendants . . .” CP at 46.

On this factual record, Dr. Campbell brought a motion for summary judgment and argued that because Plaintiffs, as members of the settlement class in *Shorett*, were barred by the terms of the Settlement Order and Final Judgment from asserting “any claim concerning” faxes bearing Dr. Sue’s name, their complaint against Dr. Campbell is prohibited by the terms of the *Shorett* Settlement Order and Final Judgment.

The trial court denied Dr. Campbell's motion for summary judgment and his motion for reconsideration.

Dr. Campbell then moved in the trial court for RAP 2.3(b)(4) certification of the court's orders denying Dr. Campbell's motions for summary judgment and reconsideration. On August 20, 2010, pursuant to RAP 2.3.(b)(4), the trial court certified the following controlling question of law for review by this Court:

When claims brought by plaintiffs in a previous class action regarding unsolicited faxes were dismissed with prejudice pursuant to a settlement, and those settlement class members were forever barred from instituting, maintaining, or prosecuting any additional claim concerning the faxes, can members of that settlement class bring another lawsuit against a new defendant who was not named in the other case regarding the same faxes at issue in the other case?

CP at 232-233. On December 9, 2010 this Court accepted the trial court's RAP 2.3(b)(4) certification. Dr. Campbell's appeal of the trial court's orders denying his motions for summary judgment and reconsideration now follows.

ARGUMENT

A. The proper standard of review in this case is de novo.

"The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction

with a summary judgment motion.” *Cornish Coll. of the Arts v. 1000 Virginia Ltd.*, 242 P.3d 1, 8 (Wash. Ct. App. 2010) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (internal quotations omitted)).

B. Plaintiffs’ action is barred by plain language of the *Shorett* Settlement Order and Final Judgment.

1. Plaintiffs are members of the Shorett class.

The *Shorett* court certified the settlement class to include any person who received a fax on which the name Dr. Raymond Sue, d/b/a University Chiropractic appeared. CP at 45. Pursuant to the court’s order, any person who received a fax *substantially similar* to a fax bearing Dr. Sue’s name, is also a member of the *Shorett* class. CP at 45.

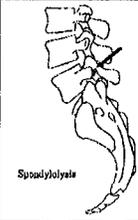
Compare the faxes at issue in this action:

11/19/05 10:56 AM Dr. Sue 110641291 p. 1

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Trauma Series #2

Note: As a service to the legal community, you will be receiving on monthly basis information on terms regularly seen in medical reports. Please save these, as you will need to refer to them on a regular basis, when reviewing medical documentation.

Spondylolysis



This is the medical term used to describe the presence of a "defect" or fracture in the posterior arch of the vertebra (see figure, arrow). It occurs at the lumbo-sacral junction (L5/S1) in about 85% of cases. The remainder occurs at the L4/5 level or above, and in about 20% of cases the defect is on one side.

Spondylolysis is not a congenital condition and has never been identified in a newborn infant, or a child who has not started to walk. Defects can develop as a stress fracture in individuals predisposed to the condition, due to the shape or orientation of the bones at the base of your spine.

There is an increased incidence in people who take part in certain physical, sporting activities or are post-traumatic. To diagnose spondylolysis and ascertain if this is a recent injury, x-rays and a bone scan are indicated to conclusively diagnose your client.

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2006-11-7 11:05 AM Dr. Sue -> 1204762856 1

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--	---

To be removed from the list, kindly call 1-888-647-7902

With, the faxes at issue in *Shorett*:

FEB-07-2007 MED 01:56 PM 200 Hayward Group
02/07/07 01:56:40PM

FAX NO. 2094471523

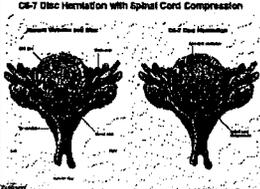
P. 02

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Herniation of the nucleus pulposus (HNP) through an annular defect causes focal protrusion of disk material beyond the margins of the adjacent vertebral end plate. (Any directional displacement of the disc is a herniation).

CG-7 Disc Herniation with Spinal Cord Compression



In layman's terms, a disc herniation occurs when the inside of the intervertebral disc (nucleus pulposus) tears its way through the outer portion of the disc (annulus fibrosus) and into the space where the delicate neural structures reside. This can only be caused from trauma.

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2007 12:29 DR ERIC HANSEN

PAGE2

The faxes in this case are substantially similar to those at issue in *Shorett*. Both sets of faxes include the name of Dr. Sue, d/b/a University-Chiropractic. Likewise, Plaintiffs allege CMCS caused or arranged both sets of faxes to be sent. Accordingly, under the terms of the Settlement Order and Final Judgment, because both sets of faxes contain Dr. Sue's name and are substantially similar, Plaintiffs are members of the *Shorett* class.

2. Because the *Shorett* Order and Final Judgment covers the faxes in this case, Plaintiffs' action is barred.

The *Shorett* Settlement Order and Final Judgment bars members of the settlement class from bringing *any* claim with respect to faxes sent by, or caused to be sent by, the *Shorett* defendants, including Dr. Sue and CMCS. CP at 46.

Not only do the two faxes at issue in this case bear Dr. Sue's name, but CMCS caused or arranged both faxes to be sent. Because the faxes in this case were caused or arranged to be sent by *Shorett* defendants, Plaintiffs, along with their other *Shorett* class members, are barred from bringing *any* claim with respect to these faxes. Therefore, under the terms of the *Shorett* order, Plaintiffs, as class members, cannot bring an action against Dr. Campbell for faxes which also bear Dr. Sue's name and that CMCS caused or arranged to be sent.

C. Washington law recognizes that a full and unlimited release of all claims by a plaintiff releases claims against parties not named in the release.

Washington case law supports the plain language reading of the *Shorett* order as a release of all claims against Dr. Campbell for faxes bearing Dr. Sue's name. Washington case law recognizes the merit in enforcing settlements that, by their terms, put an end

to all claims arising from a transaction or event. For example, in *Metropolitan Life Ins. Co. v. Ritz*, 70 Wn.2d 317, 422 P.2d 780 (1967), Mr. and Mrs. Ritz, who were injured in a car accident, agreed to reimburse their health insurer, Metropolitan, for medical expenses paid by Metropolitan upon a recovery from the tortfeasor. After they settled “all claims” against the tortfeasor, the Ritz’s refused to repay Metropolitan, who was not a party to the settlement, arguing that the release of “all claims” did not affect Metropolitan’s subrogation rights, and that Metropolitan should have pursued subrogation rather than seeking reimbursement from its insureds. The court disagreed, holding that a release of “all claims” is a release of “*all claims*.”

Defendants [Ritz] knew that plaintiff [Metropolitan] was entitled either to reimbursement from defendants or to be subrogated to defendants' claim for medical expenses against the tort-feasor. Yet, with that knowledge, they negotiated a settlement, under advice of competent counsel, with the tort-feasor and executed a full and final general release. This, in effect, deprived plaintiff of all rights of subrogation. Defendants insist that they did not intend to settle ‘medical expenses,’ and argued that they did not do so, yet theirs was an unconditional general release of *all claims*. Now they have repudiated any liability under their reimbursement agreement. The trial court was justified in granting [Metropolitan] summary judgment . . .

Id. at 321 (Italics in original). The same conclusion follows here. The *Shorett* court's prohibition on class members from bringing "any claims" concerning the faxes at issue extends to claims against Dr. Campbell, even though he was not a party to the Settlement Order and Final Judgment.

This result matches Washington's statutory scheme regarding contribution. Under Washington law, a party to a settlement acquires a right of contribution only by extinguishing the liability of a person who is not a party to the settlement agreement. RCW 4.22.040(2) states that:

Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement . . .

This language is predicated upon the ability of a settling defendant to extinguish the liability of a non-party to the lawsuit, which is exactly what the *Shorett* defendants did. In so doing, they preserved for themselves the right to seek contribution from Dr. Campbell, by obtaining an order extinguishing his liability to the *Shorett* plaintiffs.

Thus, both *Metropolitan Life Ins. Co.*, and RCW 4.22.040, support the conclusion that the *Shorett* settlement should be given

the effect of its plain language, such that it extinguished Dr. Campbell's liability to any *Shorett* class member arising from any fax covered by that Settlement Order and Final Judgment. By rejecting this argument and denying Dr. Campbell's motions for summary judgment and reconsideration, the trial court's rulings are contrary to Washington authority.

1. Under the plain language of the *Shorett* settlement, the class members extinguished the liability of any person arising from the faxes at issue in that case, including persons not party to the lawsuit.

The type of language that “extinguishes” the liability of a person not party to an agreement is well settled in Washington, and the *Shorett* settlement contains such language. In *Pietz v. Indermuehle*, 89 Wn.App. 503, 949 P.2d 449 (1988), Pietz sought contribution from other members of his joint venture after he settled claims asserted against him by a third party related to the joint venture. The settlement agreement with the third party provided that the third party, Berry, gave Pietz a general release of all claims. *Id.* at 517-18. Having obtained this release, Pietz sued Fordham, an individual member of the joint venture, for contribution, claiming that he had extinguished Fordham's liability through this release language, even though neither

Fordham nor the joint venture was named in the release. The court had little trouble concluding that the broad release obtained by Pietz extinguished Fordham's liability arising from the matters at issue. "Given the all-inclusive nature of this clause, we find that the settlement agreement between Berry and Pietz extinguished any common liability arising from dealings between Berry and the remaining members of the [joint venture]." *Id.* at 518.

Like *Pietz*, here the *Shorett* settlement documents preclude the Shorett plaintiff from asserting "any claim" arising out of the faxes at issue. Paragraph 8 of the *Shorett* Settlement Order and Final Judgment sets forth the rights of the class members to pursue any other party for any claim arising from the faxes at issue:

Members of the Plaintiff Settlement Class who have not timely excluded themselves shall be deemed to **(a) be forever barred from instituting, maintaining, or prosecuting any claim concerning unsolicited facsimile advertisements sent by Defendants**, including but not limited to any alleged violations of the Washington Unsolicited Telefacsimile Statute, the Washington Consumer Protection and the Telephone Consumer Protection Act, and/or any other applicable state and federal statutes, laws, rules or regulations; **and (b) have released and discharged Defendants**, and their insurance carriers, including each and all of their direct and indirect

parents, subsidiaries, affiliates **and related entities** and each and all of their current and former officers, directors, owners, shareholders, managers, employees, agents, attorneys, vendors, successors, predecessors-in-interest, and assigns from any and all liability with respect to all claims described in the Settlement Agreement.

CP at pp. 46-47 (Emphasis supplied).

Sections (a) and (b) of paragraph 8 provide different rights to the *Shorett* defendants.

The interpretation or construction of findings, conclusions and judgments presents a question of law for the court. ... The general rules of construction applicable to statutes, contracts and other writings are used with respect to findings, conclusions and judgment. These rules include the rule that the intention of the court is to be determined from all parts of the instrument, and that the judgment must be read in its entirety and *must be construed as a whole so as to give effect to every word and part, if possible.*

Callan v. Callan, 2 Wn.App. 446, 448-49, 468 P.2d 456 (1970)

(Emphasis supplied). Therefore, under part (a), the class members are “forever barred” from bringing “any claim concerning the unsolicited facsimile advertisements sent by Defendants . . .”

Under part (b), the defendants and all related entities are released from liability.

These two sections must be read to provide different rights. Part (a) extinguished the class members’ claims against anyone

arising from the faxes, part (b) gave a release to the defendants. If part (a) were read as limited to the defendants in the *Shorett* case, then the two sections would be redundant. In order “to give effect to every word and part,” the language of part (a) must be read to mean what it says: all claims “concerning” these faxes are barred as against any potentially responsible party; thereby giving the *Shorett* defendants contribution rights as against all other potentially responsible parties, and barring the *Shorett* plaintiffs from bringing successive actions.

Case law addressing unsolicited faxes supports this conclusion. In *Jacobs v. Venali, Inc.*, 596 F.Supp.2d 906 (D. Md. 2009), the plaintiffs filed two actions involving the same unsolicited faxes. The court held that the plaintiffs’ second suit was barred by the settlement agreement and release they executed with one of the defendant companies during the first suit, and by res judicata.

From June 2002 through September 2005 the *Jacobs* plaintiffs received over 700 unsolicited faxes. They first brought suit (“*Jacobs I*”) for 31 of those 700 some faxes received, naming three corporations and the president of one of the corporations as defendants. Eventually, Vision Lab, one of the corporate defendants, agreed to settle *Jacobs I*. The parties entered into a

settlement agreement, release and waiver for any and all claims asserted or that could have been asserted in the action. *Jacobs I* was consequently dismissed with prejudice as to Vision Lab. The case was later dismissed as to the remaining defendants, apparently as a result of the settlement. *Id.* at 909.

Jacobs II was filed several years later and involved the same plaintiffs and lawyer as *Jacobs I*, but different defendants. Unlike *Jacobs I*, this second suit focused on all of the unsolicited faxes received by the plaintiffs. The defendants moved for dismissal pursuant to civil rule 12(b)(6), on the grounds that *Jacobs II* was barred by the release clause of the *Jacobs I* settlement agreement and by res judicata. *Id.* at 910. The plaintiffs countered:

[B]ecause [*Jacobs II*] involves approximately 700 unsolicited advertisements that are separate from 31 faxes at the center of the *Jacobs I* action, and because at least some of these 700 advertisements were transmitted after *Jacobs I* was filed, it is a separate action involving claims that could not have been asserted in *Jacobs I*, and is therefore beyond the reach of the Vision Lab release.

Id. at 912. The court rejected this argument.

The court held that the release executed in *Jacobs I* barred the plaintiffs' new claims. Because the plaintiffs knew about the existence of the 700 advertisements well before the release was

negotiated, the claims arising from the advertisements could have been litigated in *Jacobs I*. *Id.* Said the court:

[I]t would contravene public policy to read [the *Jacobs I*] release as binding plaintiffs not to sue on advertisements 1 through 31, but leaving them free to sue on advertisements 32 through 732. Such a reading would allow plaintiffs to sign a settlement agreement in the present suit, complete with a new release, and then file suit again based on a new set of as-yet-undisclosed advertisements they received.

Id. at 912 n. 8.

Like *Jacobs*, the release in *Shorett* is expansive in its scope. Both the *Jacobs* release and the *Shorett* settlement bar any further claims arising from faxes that were the subject of the respective settlements. The attempt by Plaintiffs to now sue Dr. Campbell for claims for which they have already settled and received compensation is, to use the language of the *Jacobs* court, in “contravention” of public policy. Plaintiffs are bound by, and should be held accountable to, the plain language of the *Shorett* agreement. Under the agreement, they are forever barred from instituting, maintaining, or prosecuting any claim concerning unsolicited facsimile advertisements sent by Dr. Sue. CP at 46. As such, the instant action is barred.

2. Because Plaintiffs' claims are barred, only the *Shorett* defendants now have a contribution right against Dr. Campbell.

The broad language in the *Shorett* Settlement Order and Final Judgment gave the settling defendants contribution rights against all those persons whose “liability... has been extinguished by the settlement.” RCW 4.22.040(2). Dr. Campbell is such a person. By forever barring Plaintiffs from bringing any claims based on the faxes at issue, the defendants in *Shorett* retained the right to seek contribution from Dr. Campbell, and hold this right today.²

The definition of “Released Claims” in the *Shorett* settlement agreement verifies this contribution right. In that provision, the defendants released contribution claims *only as between themselves*, and not as to any third party, such as Dr. Campbell. CP at 89-91.³ In contrast, the *Shorett* plaintiff class released all claims of any kind arising from the faxes, with no

² At the same time, Dr. Campbell is prohibited, in this action, from seeking contribution from the defendants in *Shorett*, no matter how culpable they may have been in the matters at issue. RCW 4.22.060(2).

³ “Upon final approval of this Settlement and entry of Judgment dismissing the Action, the Defendants fully, finally, and forever settle, release, relinquish and discharge any and all Claims any of the Defendants pled or could have pled *against any other Defendant* including, but not limited to, claims for contractual indemnity, common law or equitable indemnity, contribution and breach of contract.” (Italics added).

reservation of any kind.⁴ Therefore, because the plain language of the agreement extinguished all liability of other potentially responsible parties, the *Shorett* defendants now possess a contribution right against Dr. Campbell, and only those defendants may properly bring an action against him.

D. Res judicata also bars this action.

As a matter of law, res judicata precludes this action. “The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again.” *Ensley v. Pitcher*, 152 Wn.App. 891, 899, 222 P.3d 99 (2009) (quoting *Marino Prop. Co. v. Port Comm’rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quotations omitted)).

Although res judicata is applicable only when a final judgment has been rendered, *see id.* at 900-01, an issue need not

⁴ “The ‘Released Claims’ are all claims, causes of action, or liabilities that have been or could have been pled in this Action which any and all Class Members had or may have had as of the date of the filing of the Motion for Preliminary Approval of this Settlement, including without limitation, any claim or liability based upon any violation of any federal or state statute or federal or state regulation, any claim in equity or at common law, whether known or unknown, suspected or unsuspected, threatened or unasserted, actual or contingent, liquidated or unliquidated, that arises from, is related to, is alleged or could have been alleged to arise from or relate to, the subject facsimiles.” CP at 90.

be fully litigated to be barred under the doctrine. Res judicata effect is given to settlement orders. *Pederson v. Potter*, 103 Wn.App. 62, 70, 11 P.3d 833 (2000) (internal citation omitted).

Under the doctrine, res judicata is appropriate “where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” *Ensley*, 152 Wn.App. at 902 (quoting *Landry v. Luscher*, 95 Wn.App. 779, 783, 976 P.2d 1274 (1999) (internal quotations omitted)). Whether the doctrine bars an action is a question of law. *Id.* at 899 (citing *Kuhlman v. Thomas*, 78 Wn.App. 115, 120, 897 P.2d 365 (1995)).

1. Plaintiffs have conceded that Dr. Campbell is in privity with CMCS.

“Different defendants in separate suits are the same party for *res judicata* purposes as long as they are in privity.” *Id.* at 902 (citing *Kuhlman*, 78 Wn.App. at 121). In *Kuhlman*, the court explained that a principal-agent relationship can ground a claim preclusion defense, and articulated the rule that:

Where a plaintiff has sued parties in serial litigation over the same transaction; where plaintiff chose the original forum and had the opportunity to raise all of its claims relating to the disputed transaction in the

first action; where there was a ‘special relationship’ between the defendants in each action, if not complete identity of the parties; and where although the prior action was concluded, the plaintiff’s later suit continued to seek essentially similar relief – the courts have denied the plaintiff a second bite at the apple.

78 Wn.App. at 121.

Here, not only have Plaintiffs sued CMCS and Drs. Sue and Campbell “in serial litigation over the same transaction”, *id.*, but Plaintiffs themselves lay out how Dr. Campbell and CMCS are in privity as principal and agent:

1. The chiropractors, like Campbell presumably, are approached by CMCS, often by a fax . . .

. . .

3. Faxes are sent out on a routine basis to personal injury lawyers whose names are in fact generated by CMCS, not the chiropractors.

4. The newsletters bear the name of the chiropractors who sign up for the marketing program and, it turns out, do not list just one chiropractor but two and sometimes four, usually unknown to the subscribing chiropractor.

Declaration of Rob Williamson in Support of Plaintiffs’ Motion to Continue Summary Judgment Motion at pp. 4-5 (attached to Plaintiffs’ Answer to Motion for Discretionary Review, Appendix).

The facts, as stipulated to in Mr. Williamson's declaration, establish how CMCS acted as Dr. Campbell's agent. CMCS arranged for faxes bearing the names of Drs. Campbell and Sue to be sent on Dr. Campbell's behalf. It is undisputed that CMCS also caused or arranged for substantially similar faxes bearing Dr. Sue's name to be sent in *Shorett*. Because CMCS caused the faxes to be sent in both *Shorett* and this case, and because CMCS acted as an agent for Dr. Campbell and Dr. Sue, Campbell and CMCS are in privity with each other. For the purpose of a *res judicata* analysis, they are the same party. *Kuhlman*, 78 Wn.App. at 121.

Consequently, the "quality of persons" element is also satisfied. *Ensley*, 152 Wn.App. at 905. This element "requires a determination of which parties in the second suit are bound by the judgment in the first suit." *Id.* Because Plaintiffs are also *Shorett* class members, they are bound by the order and final judgment in that case. Under the terms of that order, this action is barred.

2. Because Plaintiffs' action involves identical causes of action and subject matter as in *Shorett*, res judicata applies.

Shorett and this case involve substantially similar faxes that each bear Dr. Sue's name and that CMCS caused or arranged to be

sent. The two actions therefore “arise out of the same transactional nucleus of facts.” *Kuhlman*, 78 Wn.App. at 123. *Kuhlman* sets forth the following criteria to determine whether causes of action are identical:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 122 (citing *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)).

Under this criteria, if Plaintiffs are permitted to bring this action, (1) the rights and interests of the *Shorett* defendants will be impaired because Plaintiffs will have violated the settlement order and judgment; (2) substantially the same evidence is presented in both actions, *e.g.*, faxes each bearing Dr. Sue’s name; and (3) the cases involve infringement of the same rights, *e.g.*, the complaints in *Shorett* and this case allege identical violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, and the Washington Unsolicited Fax Law, RCW 80.36.540. Thus, the factual records in this action and *Shorett* satisfy the criteria

relied upon by *Kuhlman* to determine whether causes of action are identical.

Likewise, because the claims and ultimate issues of liability in *Shorett* and this case are identical, the subject matter of both is identical. *Ensley*, 152 Wn.App. at 904-05; *see also Kuhlman*, 78 Wn.App. at 124 (claims can involve identical subject matter even if differently stated); *and Jacobs*, 596 F.Supp.2d at 914 (because the roughly 700 advertisements at issue were related to those that were also at issue in the prior litigation, res judicata barred the instant action).

Consequently, on this record the elements of res judicata are met. *Shorett* and this action arise from the same transactional nucleus of fact, involve identical parties, the same causes of action, and identical subject matter. Under res judicata, this action is barred.

3. Plaintiffs' action is also expressly barred by the rule against claim splitting and by RCW 80.36.540.

Plaintiffs' action is also precluded by Washington's rule against claim splitting. Within the ambit of res judicata is the rule that "[a] claimant may not split a single cause of action or claim. Such a practice would lead to duplicitous suits and force a

defendant to incur the cost and effort of defending multiple suits.”

Landry, 95 Wn.App. at 782 (citing *Sprague v. Adams*, 139 Wash. 510, 247 P. 960 (1926); *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 4 Wn.App. 49, 50-51, 480 P.2d 226 (1917)).

The *Landry* court explained:

An injured party is limited to one lawsuit for property and /or personal injury damage resulting from a single tort alleged against the wrongdoer. *Sprague*, 139 Wash. at 519-20, 247 P. 960. This is in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim. *Pretz v. Lamont*, 6 Kan.App.2d 31, 34-35, 626 P.2d 806 24 A.L.R.4th 638 (1981).

Id.

The record in this case makes clear that Plaintiffs have engaged in claim splitting. At issue in both this action and in *Shorett* is a single tort: faxes bearing Dr. Sue’s name that CMCS allegedly caused to be sent. No new claims have been asserted by Plaintiffs distinguishing this lawsuit from *Shorett*. To the contrary, it is apparent that Plaintiffs have brought the instant action for the “residue” of the same claim they brought in *Shorett*. Despite having been compensated in *Shorett* for the faxes sent by Dr. Sue, they now seek additional compensation from Dr.

Campbell for these same faxes. This is precisely the sort of claim splitting prohibited by the court in *Landry*.

Finally, based upon the plain language of RCW 80.36.540, nothing in the statute indicates an intention to lift Washington's bar against claim splitting. To the contrary, the statute prevents a plaintiff from recovering multiple times for a single claim. The statute states in relevant part: "Damages to the recipient of telefacsimile messages in violation of this section are five hundred dollars or actual damages, whichever is greater." RCW 80.36.540(5).

As applied to this case, Plaintiffs have already been compensated through the *Shorett* settlement for damages arising from faxes that name both Dr. Sue and Dr. Campbell. They cannot now recover a *second* time for these same faxes. The language of the statute makes clear that Plaintiffs are *only* entitled to the greater of five hundred dollars or actual damages for the faxes bearing Dr. Sue's name. Because no new faxes are at issue and Plaintiffs have already recovered for their damages through *Shorett*, the statute does not provide for any additional recovery for these same faxes.

CONCLUSION

For the foregoing reasons, Dr. Campbell respectfully requests that this Court reverse the trial court's orders denying his motions for summary judgment and reconsideration. As a matter of law, Plaintiffs' claims against Dr. Campbell are barred by the *Shorett* settlement and by res judicata. As such, the trial court erred by not granting Dr. Campbell's motion for summary judgment and dismissing Plaintiffs' action with prejudice.

DATED this 1st day of March, 2011.

HELSELL FETTERMAN LLP

By



Andrew J. Kinstler, WSBA No. 12703
David B. Brown, WSBA No. 40913
Attorneys for Defendant / Appellant

CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman, LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Bryan v. CMCS Management, et al., I did on the date listed below, (1) cause to be filed with this Court a Brief of Appellant; and (2) to be delivered via email and U.S. Mail to Rob Williamson, 187 Parfitt Way SW, Suite 250, Bainbridge Island, WA 98110-2539, who are counsel of record of Respondent.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: March 2, 2011


KYNA GONZALEZ

APPENDIX

EXCERPTS FROM SELECTED STATUTES	1
ILLUSTRATIVE TIMELINE DETAILING <i>SHORETT</i> AND <i>BRYAN</i> LITIGATION	3

SELECTED STATUTES

RCW 4.22.040. RIGHT OF CONTRIBUTION – INDEMNITY.

...

(2) Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.

...

RCW 4.22.060. EFFECT OF SETTLEMENT AGREEMENT.

...

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

...

RCW 80.36.540. TELEFACSIMILE MESSAGES – UNSOLICITED
TRANSMISSION – PENALTIES.

...

(5) The unsolicited transmission of telefacsimile messages promoting goods or services for purchase by the recipient is a matter affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. The transmission of unsolicited telefacsimile messages is not reasonable in relation to the development and preservation of business. A violation of this section is an unfair or deceptive act in trade or commerce for the purpose of applying the consumer protection act, chapter 19.86 RCW. Damages to the recipient of telefacsimile messages in violation of this section are five hundred dollars or actual damages, whichever is greater.

...

ILLUSTRATIVE TIMELINE

- Nov. 2006 - Sue/Campbell faxes sent to Bryan and MacPherson. Clerk's Papers ("CP") at 7.
- Feb. and July 2007 - Sue/Hansen faxes sent to Shorett and Powell. CP at 69-70.
- 2008 - *Shorett and Powell v. Sue/Hansen/CMCS* Complaint filed. CP at 66.
- June 8, 2009 - *Shorett v. Sue/Hansen/CMCS* settlement agreement, final order in October 2009. CP at 45-47.

Class:

All persons who received a facsimile similar to Exhibit A [App. p. 77] to the Settlement Agreement, or substantially similar thereto, at any time in the past through the entry of the order granting preliminary approval of the settlement. It is intended that anyone who received a facsimile in a form substantially similar to Exhibit A which includes any of the following names shall be considered a class member: Dr. Raymond Sue, d/b/a University Chiropractic and Dr. David Hansen, Eastside Life Chiropractic.

Settlement Order, excerpt:

Members of the Plaintiff Settlement Class who have not timely excluded themselves shall be deemed to (a) be forever barred from instituting, maintaining, or prosecuting any claim concerning unsolicited facsimile advertisements sent by Defendants . . .

- Mr. Bryan made a claim and was paid in the *Shorett* case. CP at 55.
- October 2009 - *Bryan v. Campbell* Complaint filed.
(MacPherson added in 2010.) The faxes at issue were sent in 2006, are “substantially similar” to the *Shorett* faxes and include Dr. Sue’s name. CP at 167.

Timeline prepared by Andrew J. Kinstler
Helsell Fetterman LLP
Attorneys for Defendant / Appellant