

71037-1

71037-1

NO. 71037-1-I

WASHINGTON STATE COURT OF APPEALS
DIVISION I

MERLE PINNEY and AMANDA PINNEY,
and the marital community composed thereof,

Appellants,

vs.

BELFOR USA GROUP, INC., dba BELFOR RESTORATION and/or
BELFOR PROPERTY RESTORATION, a foreign corporation;
ROBERT GALL and JANE DOE GALL, and the marital community
composed thereof; and JERRY MARTIN and JANE DOE MARTIN,
and the marital community composed thereof,

Respondents.

APPEAL FROM THE
SUPERIOR COURT FOR SNOHOMISH COUNTY
THE HONORABLE MILLIE M. JUDGE

APPELLANTS' OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 11 PM 1:24

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I. INTRODUCTION

This appeal arises from two defendants in two lawsuits disclaiming any agency relationship between themselves, and blaming the other for the plaintiffs' damages – right up until the second defendant filed a motion for summary judgment on the eve of trial in the second case, seeking dismissal by way of *res judicata*.

When the plaintiffs sued the first defendant, they did not have a sufficient factual or legal basis to include the second defendant. During discovery, the plaintiff obtained strong evidence of the second defendant's liability, but could not add the defendant to the first suit because of a scheduling order. The plaintiff then settled with the first defendant and filed a new lawsuit against the second defendant. The court in the second lawsuit then dismissed the new suit with prejudice, on the second defendant's argument that it should have been a party to the first suit, under the doctoring of collateral estoppel.

This is a catch-22 for the plaintiffs, who remain uncompensated for nearly \$100,000 in damages.

This appeal arises from the second trial court's dismissal of the action on summary judgment, by erroneously interpreting and applying the judicial doctrine of *res judicata*.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Belfor's motion for summary judgment, dismissing all of the Pinneys' claims with prejudice, in light of numerous factual disputes.
2. The trial court erred in finding that the Pinneys' claims against American Family, and the plaintiffs' claims against Belfor, involved the same *subject matter* for purposes of applying the doctrine of *res judicata*.
3. The trial court erred in finding that the *causes of action* alleged by the Pinneys against Belfor, were the same as those claims already litigated against American Family, for purposes of applying the doctrine of *res judicata*.
4. The trial court erred in finding that the employees of American Family and the employees of Belfor were the *same persons or parties*, for purposes of applying the doctrine of *res judicata*.
5. The trial court erred in finding that the same quality of persons in the employees of American Family, and the employees of Belfor, for purposes of applying the doctrine of *res judicata*.

6. The trial court erred in entertaining Belfor's motion for summary judgment based on *res judicata* on the eve of trial, and after all discovery was completed.
7. The trial court erred in failing to conclude that Belfor waived any claim under *res judicata* during the course of the litigation.
8. The trial court erred by denying the Pinneys the right to have their day in court.

III. ISSUES

1. Is the doctrine of *res judicata* an affirmative defense which must be pled in a defendant's answer under Civil Rule 8(c)?
2. Did Belfor waive its right to assert *res judicata* in a motion for summary judgment filed on the eve of trial, after it failed to plead the affirmative defense, or take any other action in the litigation to assert a *res judicata* defense?
3. Could the Pinneys have named Belfor as a defendant in their suit against American Family without being sanctioned under CR 11?
4. Were the Pinneys deprived of important discovery regarding the relationship between Belfor and American Family (even though both parties disclaimed any agency relationship),

which prejudiced their ability to respond to Belfor's CR 56 motion based on *res judicata*?

5. Were new facts discovered in the Pinneys' action against American Family, which provided support for new claims against Belfor, which were unknown to the Pinneys when they filed their suit against American Family?
6. Did the Pinneys act with due diligence to preserve their claims for their uncompensated losses against Belfor, when they discovered Belfor's liability to them during discovery in their suit against American Family?
7. Did the Pinneys' claims against Belfor involve a different subject matter than that in their suit against American Family, for purposes of applying the doctrine of *res judicata*?
8. Were the causes of action alleged by the Pinneys against Belfor, the same as those alleged in the plaintiffs' prior suit against American Family, for purposes of applying the doctrine of *res judicata*?
9. Did the Belfor suit involve the same persons or parties as the American Family suit, for purposes of applying the doctrine of *res judicata*?

10. Did the Belfor suit involve the same quality of persons as the American Family suit, for purposes of applying the doctrine of *res judicata*?
11. Did Belfor prove all four disjunctive elements of the doctrine of *res judicata*, for purposes of prevailing in its motion for summary judgment?
12. Were the Pinneys unfairly denied the opportunity to have their day in court?

IV. APPELLANTS' STATEMENT OF THE CASE

The home owned by the appellants, Merle and Amanda Pinney, sustained serious smoke damage in May of 2010 after their wood stove malfunctioned when no one was home.¹ For twelve hours the stove vented smoke directly into the house. The Pinneys promptly reported the claim to their insurance carrier, American Family, which confirmed coverage for the losses.

The Pinneys then moved in with relatives, who lived twenty miles away, for three months that were required to restore their home. The Pinneys were unaware that their policy provided

¹ The facts in the introduction to this brief are taken from the complaint (CP 178-182); the declaration of Amanda Pinney (CP 371-377); the declaration of the Pinneys' expert John Warner (CP 378-391); and the Pinneys' complaint against American Family (CP 55-84); the Pinneys' opposition to Belfor's motion for summary judgment in the trial court (CP 271-286) and the evidence with the accompanying sixteen (16) exhibits (287-370).

coverage for additional living expenses up to \$10,000 per month. The Pinneys were never told that their "Gold Star Special Deluxe Form" homeowner's policy covered the expense of additional living expenses during the repairs. The Pinneys also paid for new clothes and other necessities on their own, because they were not told that their policy covered this, too. The Pinneys repeatedly complained that American Family was not responsive to questions and concerns about their claim while they were out of their home during the entire summer of 2010.

The Pinneys contracted with the respondent, Belfor, to restore their home and its contents. Belfor was "approved" or "certified" by American Family for this work, but there was no other legal connection between American Family and Belfor. Disputes arose during claim between the Pinneys and American Family regarding the "additional living expense" claims, delay, and other matters. Disputes also arose between the Pinneys and Belfor---but those were quickly resolved between the Pinneys and Belfor. When American Family finally closed the Pinneys' insurance claim,

the Pinneys still had approximately \$73,699 in documented but uncompensated losses.²

The Pinneys brought suit against American Family after it closed the claim, and alleged the violation of three statutes and two-dozen regulations unique to insurance claims. The complaint was thirty (30) pages in length. (CP 55-84). During the course of discovery in that action, the plaintiffs learned that American Family denied any agency relationship with Belfor³ and particularly specific “guarantees” which Belfor made to return the Pinneys’ clothing and textile goods “neutral and fresh.”⁴ Laboratory tests performed five months after the damage occurred proved that the clothing and textile goods indeed smelled---but mostly of cleaning solvents used to neutralize the smoke odor. (CP 327-329).

When this discovery was obtained on October 19, 2011, the deadline for amending the complaint in the American Family action had already passed. (CP 115 – 117). In *dicta* denying in part and granting in part American Family’s motion for summary judgment,

² These included unreimbursed additional living expenses and smoke-damaged clothing and other textile goods. An accounting of the damaged clothing and textile goods appears in the record at CP 311-325.

³ CP 343-344

⁴ See deposition testimony of Kent Beddoe at CP 350-351; 343-352.

Judge Marsha Pechman suggested that an agency relationship between American Family and Belfor.⁵ However, both of those parties expressly denied the relationship. This is the only “evidence” provided by Belfor that an agency relationship existed between it and American Family. And the same, purported agency relationship was rejected by Judge Pechman in every other instance where Belfor caused damage to the Pinneys home or property. Judge Pechman refused to hold American Family liable.

The plaintiffs settled their claims with American Family, expressly reserving the right to bring a subsequent action against Belfor. A five (5) page complaint was filed soon thereafter, naming Belfor and two of its managers as defendants. The complaint was 1/6 the length of the American Family complaint and alleged a single cause of action: violation of Washington’s Consumer Protection Act.

In the subsequent litigation against Belfor, its manager, Jerry Martin, admitted that he personally guaranteed Belfor’s work (CP 207) and that he intended for the Pinneys to rely on his guarantee (CP 208). Mr. Martin also admitted that he did not have any

⁵ CP 430 - 439.

authority to make the guarantee on behalf of American Family (CP 208).

On the eve of trial, however, Belfor moved for summary judgment seeking the dismissal of the Pinneys' Consumer Protection Act claim against it. Alternatively Belfor claimed that the Pinneys' action against it was merely a "re-litigation" of the American Family suit and should be dismissed under the doctrine of *res judicata*. (CP504-516). The Pinneys filed an extensive response to Belfor's motion (CP 271-286, with sixteen (16) exhibits. (CP 287 – 370).

The court denied Belfor's motion to dismiss the Pinneys' Consumer Protection Act claim, but granted its motion to dismiss on *res judicata*. In order to prevail on its *res judicata* claim, Belfor had to prove that the Pinneys' previous suit against American Family involved the *same* subject matter; *identical* causes of action; the *same* parties; and the *same* "quality of persons" against whom both suits were filed. (See discussion of authorities, *infra*). The trial court erroneously concluded after brief argument, that Belfor proved all four elements of this test, and then dismissed the Pinneys' suit with prejudice on September 3, 2013. The Pinneys'

motion for reconsideration was denied on September 25, 2013. This timely appeal followed.

The Pinneys respectfully assert that they have been unfairly misled by a Catch-22 implicit collaboration between American Family and Belfor, which left the Pinneys with approximately \$73,699 in uncompensated losses from their smoke-damage claim. The Pinneys therefore request that the Court of Appeals reverse the trial court and remand this case for trial.

V. LAW AND ARGUMENT

A. All facts must be viewed in favor of the plaintiffs as the non-moving party.

Appellate review of a summary judgment proceeding is review *de novo*. Folsom v. Burger King, 135 Wn. 2d 658, 663, 958 P.2d 301 (1998). In assessing a motion for summary judgment, a reviewing court must view the facts in a light most favorable to the non-moving party. In this instance, that is the Pinneys. Homeowners Association v. Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of the non-moving party. Tabak v. State, 73 Wn. App. 691, 870 P.2d 1014 (1994). Dismissal of a lawsuit under CR 56 is sustainable only if there are no genuine issues of material fact. Homeowners, *supra* at 154. The party resisting summary

judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn. App. 137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996).

The burden lies with the moving party to show the absence of material facts as to the various claims. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn.App 814, 764 P.2d 1007 (1988). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v. Yakima County, 79 Wn. App. 770, 904 P.2d 1183 (1995).

B. The Doctrine of *Res Judicata*

In applying the doctrine, each cause must be examined to see whether, in comparing the prior to the present action, there is an identity of: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Meder v. CCME Corp., 7 Wn. App. 801, 502 P.2d 1252 (1972); Lilygren v. Rogers, 1 Wn.App. 6, 459 P.2d 44 (1969); Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967); Carroll v. Bastian, 66 Wn.2d 546, 403 P.2d

896 (1965); Symington v. Hudson, 40 Wn.2d 331, 243 P.2d 484 (1952); Burke Motor Co. v. Lillie, 39 Wn.2d 918, 239 P.2d 854 (1952); Walsh v. Wolff, 32 Wn.2d 285, 201 P.2d 215 (1949); Johnson v. National Bank of Commerce, 152 Wn. 47, 277 P. 79 (1929); Northern Pac. Ry. v. Snohomish County, 101 Wn. 686, 172 P. 878 (1918); .

C. Affirmative defenses must be pled in an answer under CR 8(c) and CR 12(b), or it is waived.

Belfor filed its answer to the Pinneys' complaint on July 2, 2012 and asserted seven affirmative defenses. CP 517-522. However, Belfor did not assert an affirmative defense predicated on *res judicata*, nor did it claim that an unnamed party (American Family) was liable for the plaintiffs' damages. This was especially telling because Belfor knew of the American Family action and that it settled. Still, Belfor did not claim that the Pinneys' action against American Family impaired the Pinneys' claim against Belfor in any way.⁶

Civil Rule 8(c) sets forth twenty separate affirmative defenses and provides:

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord

⁶ The only possible exception might be an affirmative defense by Belfor which claimed that the American Family release might include Belfor. It did not.

and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(Emphasis added).

At least three of the affirmative defenses enumerated in CR 8(c) could have been asserted by Belfor at any time in the litigation, if it had concern about the Pinneys' prior action against American Family, and its effect on the Belfor litigation: estoppel, fault of a non-party, and/or res judicata. A defendant is expressly required to plead such affirmative defenses or risk a plaintiff's claim of waiver. Farmers Insurance Company of Washington v. Miller, 87 Wn. 2d 70, 549 P.2d 9 (1976), CR 8 (c). Belfor did not assert any of these affirmative defenses in its original answer, or at any other time before filing its motion for summary judgment on the eve of the trial.

Assuming *arguendo* that Belfor really believed that American Family was liable for the harm claimed by the Pinneys in

both of their suits, then Belfor was also required to comply with CR

12(h)(3)(i), which provides:

Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any party claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

Belfor did not affirmatively plead that any non-party, including American Family, was liable for the damages claimed by the plaintiffs in their suit against Belfor.

Civil Rule 12(b) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required . .

(Emphasis added).

Even a cursory review of Belfor's answer to the Pinneys' complaint reveals that it failed to allege any of these things. These were direct violations of compulsory Civil Rules which prejudiced the Pinneys and prevented the recovery of the damages for their uncompensated claims.

D. Belfor waived its right to assert the affirmative defense of *res judicata*.

There is a waiver of certain defenses under the civil rules if they are not affirmatively pled in an answer pursuant to CR 8, or included in a motion made pursuant to CR 12(b). 3A L. Orland, Wash. Prac., supra at 33-34; 5 A. Wright & C. Miller, supra at § 1394.

A party can also waive an affirmative defense by its conduct, even if the affirmative defense is pled in the answer to the complaint. See King v. Snohomish County, 146 Wn.2d 420,47 P.3d 563 (2002)(defendant provided evasive answers to the plaintiffs interrogatories about its intention of asserting the affirmative defense at issue; engaged in years of litigation before asserting it; failed to raise it during depositions; and waited to assert it in a dispositive motion after the statute of limitations had run, thus foreclosing the plaintiff's option to refile).

The Court stated that "the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" King, at

424 (quoting, Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000) and CR 1).

The Court in King also stated that the doctrine of waiver is "designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." *Id.* (citing, Lybbert, at 40).

Further support on the issue of waiver can be found in Raymond v. Fleming, 24 Wn. App. 112, 600 P.2d 614 (1979). In Raymond, the court stated that: "A defendant's conduct through his counsel, however, may be 'sufficiently dilatory or inconsistent with the later assertion of one of these defenses to justify declaring a waiver.'" *Id.*, at 115 (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure*, Sec. 1344, at 526 (1969)). Here, Belfor's conduct never suggested that it would assert an affirmative defense based on *res judicata*, or any other affirmative defense.

Without notice of Belfor's purported affirmative defenses, the Pinneys did not have the opportunity to conduct any discovery on the company's purported affirmative defenses. The plaintiffs would have likely prevailed in Belfor's summary judgment if they could prove that the two lawsuits did not involve the same subject matter;

that they were not identical causes of action; that they did not involve the same parties; and that they did not involve the same "quality of persons for or against whom the claim is made." Hilse v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 865-66, 93 P.3d 108 (2004) (quoting Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)). *Res judicata* "does not bar claims arising out of different causes of action" or operate "to deny the litigant his or her day in court." *Id.* (quoting Shoeman v. N. Y. Life Ins. Co., 106 Wn.2d 855, 859, 726 P.2d 1 (1986)).

E. The Pinneys lacked any factual or legal basis for adding Belfor to the American Family action without violating CR 11.

The Pinneys did not have any factual basis to add Belfor to the American Family suit when it was filed on January 10, 2011.⁷ During the course of discovery, however, the Pinneys discovered several facts which implicated Belfor and its employees in the uncompensated losses sustained by the Pinneys. For example, the Pinneys learned that the personal guarantee was made by Jerry Martin on behalf of Belfor, and not on behalf of American Family. (CP 343 – 352). The Pinneys also learned that American Family

⁷ The Pinneys first filed the requisite 20-day notice with the Office of the Insurance Commissioner of their intent to assert a claim against American Family under RCW 48.30.010.

disavowed the guarantee made by Martin on behalf of Belfor. (CP 350-351). And finally, the Pinneys learned the results of laboratory tests which clearly indicated that their clothes and textile goods were neither “neutral” nor “fresh.” (CP 327-329).

The federal court issued an order shortly after the case was removed to federal court, which included several deadlines. CP 115. One of those deadlines prohibited the addition of any new party after June 6, 2011---even though the discovery cutoff did not occur until November 18, 2011, more than five months later. This is precisely when the Pinneys discovered that it was Belfor that was primarily liable for their losses, and not American Family. By then, the Pinneys could not add Belfor to their suit against American Family.

F. The Pinneys were deprived of important discovery regarding the precise relationship between American Family and Belfor, especially since they disclaimed an agency relationship which Belfor asserted for the first time in its *res judicata* motion.

American Family never claimed that it was engaged in any kind of agency relationship with Belfor. In fact, American Family

disavowed liability for Belfor's conduct in the Pinney claim.⁸

In its answer to the Pinneys' complaint, Belfor did not claim that it was the agent of American Family, or that American Family was somehow liable for the damages asserted by the Pinneys. In fact, Belfor admitted that it contracted with the Pinneys to repair their home and contents, and that the contract between the parties "fully defined the terms and conditions of their contract." See par. 2.6 at CP 519. This was misleading at best and deceptive at worst, when viewed in light of Belfor's *res judicata* motion on the eve of trial.

G. The doctrine of *res judicata* does not bar a different cause of action.

Res judicata, or claim preclusion, is a judicially-created doctrine based on the principle 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." Marino Prop. Co. v. Port Comm'rs, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). This is different from the doctrine of collateral estoppel, or *issue* preclusion, which

⁸ See deposition testimony of Kent Beddoe at CP 343-352.

"prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted..." *Res judicata* prevents only "a second assertion of the same *claim* or *cause of action*" in a subsequent proceeding. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (*emphasis added*). Thus, *res judicata* "does not bar claims arising out of *different causes of action*" or operate "to deny the litigant his or her day in court." *Id.* (quoting Shoeman v. N. Y. Life Ins. Co., 106 Wn.2d 855, 859, 726 P.2d 1 (1986)).

H. The plaintiffs' claims against Belfor involved a different subject matter than their suit against American Family, for purposes of applying the doctrine of collateral estoppel.

All that is necessary to prove this argument is to compare the Pinneys' thirty-page complaint against American Family and their five-page complaint against Belfor. The claims made against American Family are based almost exclusively on the *quasi-fiduciary* relationship between an insurer and their insured. This single claim against Belfor is based almost exclusively on a breached guarantee by a contractor to its customer.

- I. **The causes of action alleged against Belfor were different than those alleged in the plaintiffs' prior suit against American Family, for purposes of applying the doctrine of collateral estoppel.**

Claims Asserted Against American Family In The Federal Case

The most comprehensive summary of the facts and law supporting the Pinneys' claims against American Family in the record of this case, can be found at CP 474 - 496. The Pinneys filed an opposition to two different motions for summary judgment filed in District Court, to dismiss the Pinneys' contractual and extra-contractual claims. The Pinneys' 23-page opposition to those motions was filed on January 3, 2012, about six weeks after the discovery cut-off. In their opposition, the Pinneys alleged their specific claims against American Family:

1. American Family acted in bad faith during the handling of the Pinneys' claim (CP 489-490);
2. American Family violated WAC 284-30-350(1) by failing to disclose policy provisions to the Pinneys (CP 491);
3. American Family violated WAC 284-30-330(2) by failing to act promptly (CP 491-492);
4. American Family violated WAC 284-30-330(3) by failing to implement standards for prompt investigation (CP 492);
5. American Family violated WAC 284-30-330(4) by refusing claims without a reasonable investigation (*id.*);

6. American Family violated WAC 284-30-330(5) by failing to affirm or deny coverage (CP 492-493);
7. American Family violated WAC 284-30-330(6) by failing to effectuate prompt settlements (CP 493);
8. American Family violated WAC 284-30-330(9) by making claim payments without indicating the coverage under which the payment is made (*id.*);
9. American Family violated WAC 284-30-330(12) by delaying settlement claims to influence settlements (CP 493-494);
10. American Family violated WAC 284-30-330(13) by failing to provide reasonable explanations for the denial of a claim (CP 494);
11. American Family violated WAC 284-30-330(16) by failing to adopt standards for processing payments (*id.*);
12. American Family violated the Insurance Fair Conduct Act (CP 494-495); and
13. American Family was liable for the Pinneys' extra-contractual claims on the claim that American Family was an agent for Belfor, with respect to its guarantee that the Pinneys' goods would be returned to them "neutral and fresh." (CP 496).

It is important to note that an insurer's violation of a Washington Administrative Code provision related to claims handling, is very frequently a *per se* violation of the Consumer Protection Act. See, Keller v. Allstate Ins. Co., 81 Wn.App. 624,

629, 915 P.2d 1140 (1996); Evergreen Intern. Inc. v. American Cas. Co. of Reading, Pa., 52 Wn.App. 548,761 P.2d 964 (1988). Any violation of the such a WAC provision is therefore a likely violation of CPA, which the Pinneys also pled in their suit against American Family.

In the same opposition to American Family's motions for summary judgment, the Pinneys itemized approximately ninety (90) bulleted facts in support of their causes of action (CP 477-486), consisting of testimony and documents obtained in discovery. The Pinneys also provided thirteen (13) opinions and conclusions from their insurance expert Gary Williams, regarding the regulations and statutes that American Family violated during the course of the Pinney claim. (CP 487-489).

Claims Asserted Against Belfor

In contrast to all of the specific claims above, the Pinneys asserted *just one cause of action against Belfor in the subsequent action*: violations of the Consumer Protection Act. And it was based primarily on one, single event: Belfor's undisputed "guarantee" that it would return the Pinneys' clothing and textile goods "neutral and fresh." This never happened and \$73,699 worth of damaged goods had to be discarded.

The two actions were obviously not the same. The only common claim made against both American Family and Belfor, was that they both violated the Consumer Protection Act. However, the CPA claims against American Family arose from its violations of numerous WACS, whereas the CPA claims made against Belfor arose from a completely separate claim: deceptive and unfair conduct in the failure to honor their guarantee. The Pinneys believe that Belfor guaranteed to them in order to deceptively and unfairly obtain their reliance and prevent them from taking other action before the claim was closed. This is precisely what happened. The Pinneys believed Jerry Martin when he told them that their clothes would indeed be returned to them “neutral and fresh.”

J. The defendants in the Belfor suit were not the same persons or parties as the defendants in the plaintiffs’ prior suit against American Family.

In the Belfor action, the plaintiffs named three defendants: Belfor, Robert Gall, and Jerry Martin. In the American Family action, American Family was the sole defendant.⁹

K. The defendants in the Belfor suit were not of the “same quality” as the defendants in the American Family suit,

⁹ Its claim representative, Kent Beddoe, was dismissed on summary judgment.

for purposes of applying the doctrine of collateral estoppel.

During the American Family litigation, American Family's claim representative in the Belfor claim specifically denied an agency relationship between American Family and Belfor. (CP 343-352). And in the Belfor litigation, its manager Jerry Martin specifically denied an agency relationship between Belfor and American Family.

However, in its motion for summary judgment, Belfor urged the trial court (for the first time) to find that American Family and Belfor were of the "same quality" solely on the basis of *dicta* in an order in the prior action against American Family. Belfor's lawyers asserted:

. . . it was established by the District Court, in evaluating the same underlying facts, that Belfor acted as American Family's agent or servant in remediating the smoke damage in the Pinneys' home. Indeed, the Pinneys themselves urged the District Court to reach this conclusion. Accordingly, Belfor and American Family acted in privity, for purposes of applying *res judicata* in this case.

Defendants' Motion for Summary Judgment at pps. 6-7. (CP 509-510).

The order referred to by Belfor was Judge Pechman's Orders on Defendants' Motions for Summary Judgment. CP 430-

439. However in her later Order Confirming Appraisal Award (CP 460-463), Judge Pechman specifically disallowed claims for damages caused by Belfor, such as carpet flooded by the negligence of Belfor's employees. (CP 462).

L. The plaintiffs have been unfairly denied their opportunity to have their day in court.

Despite acting with reasonably diligence ever since their home was smoke damaged in May of 2010, the Pinneys still have not had an opportunity to have their day in court to recover their uncompensated damages. They could not have known when they filed their suit against American Family, what the laboratory test results were for their textile goods. They could not have known that both American Family and Belfor would deny any agency or privity for purposes of Belfor's work on the Pinneys' home and personal property. And they could not have known that American Family would disclaim liability for the guarantee made by Belfor.

Res judicata is not intended to deny a party its day in court. Meder v. CCME Corp., 7 Wn. App. 801, 502 P.2d 1252 (1972), *citing* Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967). The Meder court held at 804:

The doctrine of *res judicata* is based on public policy. Its purpose is to relieve the court from the

burden of twice trying the same issue between the same parties. There is nothing, however, in the doctrine or in its historic application which encourages the court to so apply it as to ignore principles of right and justice and the court should be hesitant to so apply the doctrine as to deprive any person of property rights without having his day in court.

(Emphasis added).

The Pinneys have not had their day in court; Belfor admits that it made guarantee which it did not fulfill; and the Pinneys are left with \$73,699 in uncompensated damages. They should have their day in court with the party at fault.

VI. CONCLUSION

The trial court misinterpreted and misapplied the doctrine of *res judicata* in dismissing the Pinneys' suit against Belfor on summary judgment on the eve of trial. The trial court erroneously concluded that since *some* of the damages claimed by the Pinneys in their suit against American Family were later claimed in their suit against the Belfor defendants, then *res judicata* applied. This is a gross over-simplification of the doctrine.

Belfor did not carry its burden in the trial court for proving the elements of *res judicata*. The Pinneys therefore ask that this court

reverse the dismissal of the trial court and remand this case for trial.

RESPECTFULLY SUBMITTED this 10th day of February, 2014.



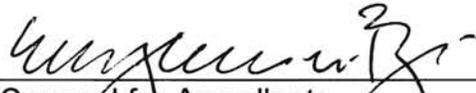
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I emailed a true copy of appellants' motion for an extension of time to counsel for respondents at the following addresses:

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