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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 359956

STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Appellant,

vs.

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,

Respondent.

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REPLY BRIEF OF APPELLANT

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## **I. ARGUMENT**

### **A. Res Judicata**

#### **1. Res Judicata Bars Seipp's Perverting the Court and Failure to Arbitrate Claim**

In his response brief, Seipp strategically addresses res judicata in general terms without applying an analysis to each of his four claims. Indeed, the reader would be forgiven if they forgot that Seipp not only alleged tortious interference, but also a claim for failure to arbitrate and “perverting the court.” The reason Seipp steers away from these claims is obvious—because the trial court should have held that res judicata applied to bar these claims from being asserted in a CBA arbitration.<sup>1</sup>

Seipp's argument concerning res judicata focuses on an idea that the two lawsuits concern separate pieces of property and commissions. However, a reading of Seipp's Amended Arbitration Complaint concerning “Perverting the Court” and “Failure to Arbitrate” reveals that Seipp was not concerned with any loss of real estate commissions, but rather desired to re-litigate the first lawsuit in a CBA arbitration setting. Under “Perverting the Court,” Seipp alleged that Cornerstone claimed he had

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<sup>1</sup> To date, Seipp has not removed these claims from his arbitration complaint.

“stolen trade secrets” and “Cornerstone relied on information caused by their action to keep their lawsuit from being remanded back to CBA mandatory arbitration.” CP 254. In regard to his “failure to arbitrate claim” Seipp alleged that Cornerstone wrongly filed the First Lawsuit. CP 256. Indeed, Seipp even alleged “failure to arbitrate” as an affirmative defense in his Answer filed to the First Lawsuit, and Judge Cooney remarked that failure to arbitrate was an issue in the First Lawsuit. Vol. I, p. 115, Ins. 18-20. These claims involve the same rights, infringements of rights, evidence, and transactions present in the First Lawsuit.

Seipp now tries to run away from these two claims by outright ignoring them in his res judicata argument, and then attempted to merge them into his compulsory claim analysis under malicious prosecution claim. But call a spade a spade. These claims were blatant attempts of Seipp to re-litigate the First Lawsuit. Seipp has made no effort to amend his Arbitration Complaint for a third time and dismiss these actions.

Thus, Seipp must be enjoined from proceeding on these claims in a CBA arbitration.

## **2. Seipp’s Tortious Interference Claim is Barred By Res Judicata**

Seipp attempts to salvage his tortious interference claim by arguing that because he is seeking only monetary compensation for lost

commissions on Crapo's property, his arbitration suit does not possess the same cause of action or the subject matter that was present in the First Lawsuit. But this argument can be dismantled by methodically examining the claims made by Seipp in his Arbitration Complaint and the claims made by Seipp in the First Lawsuit. What this analysis reveals is Seipp was legally required to allege a tortious interference claim in the First Lawsuit because the facts underlying his claim were presented and addressed in that matter.<sup>2</sup>

As noted in previous briefing, cause of action has not necessarily been defined by Washington courts. In Eugster v. Washington State Bar Ass'n, Division 3 wrote: "Washington law does not necessarily **define** the term '**cause of action**' for purposes of **res judicata**." Eugster v. Washington State Bar Ass'n, 198 Wn. App. 758, 787-88, 397 P.3d 131, 146 (2017). The Eugster court noted that in other situations, a cause of action is defined as "the act that occasioned the injury" coupled with "a legal right of the plaintiff invaded by the defendant." Id. The court then turned to *Black's Law Dictionary*, writing that it defines "cause of action" as "a group of

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<sup>2</sup> In his Response Brief, Seipp conceded that the identity of parties and the quality of person elements were present under the res judicata analysis. Therefore, this brief will not address those elements.

operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; claim.” Id. Further, “a matter should have been raised if it is merely an alternative theory of recovery or an alternate remedy.” Id. at 790, 397 P.3d at 147 (emphasis added). Other jurisdictions have addressed “cause of action” in a similar matter as the “primary rights” at stake. The 9<sup>th</sup> Circuit wrote:

[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads *different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.*

San Diego Police Officers Ass’n v. San Diego City Employee Retirement Systems, 568 F.3d 725, 734 (9th Cir. 2009) (quoting California law) (emphasis added).

Turning to both his first and amended Arbitration Complaint, Seipp alleges Cornerstone tortuously interfered with his business relationship because it filed the First Lawsuit instead submitting the matter to a CBA arbitration. Seipp premises his entire tortious interference claim on the grounds that he lost business because of Cornerstone filed a lawsuit, a lawsuit where Cornerstone alleged that Seipp tortuously interfered with its own contracts.

Seipp defended the action by claiming that Cornerstone should have filed the case in arbitration. Without a doubt, the arbitration question was the driving issue in the First Lawsuit *because Seipp made it an issue before the trial court and the appellant court.* CP 121-143. He alleged as affirmative defenses “mandatory and binding arbitration” and “breach of contract.” CP 169. He sought from the court an order compelling Cornerstone to submit to CBA arbitration. CP 121-143. When the trial court disagreed with Seipp, he appealed to Division 3. After Division 3 remanded the case back to the trial court, Seipp made the decision to resolve the case and pay Cornerstone \$20,000. CP 90-96.

Seipp made the tactical and strategic decision to make mandatory arbitration an issue but not to seek compensatory damages despite knowing he had a claim for monetary damages. As early as January of 2017, Seipp knew, or should have known, that he was losing business. Seipp voluntarily decided not to pursue monetary relief during the First Lawsuit, seeking instead to force Cornerstone into CBA arbitration. Seeking a different form of relief in the CBA arbitration does not create a separate cause of action that survives *res judicata* when the “act that occasioned the injury” was Cornerstone’s decision to forgo CBA arbitration and file in Spokane County Superior Court.

Seipp tries to dodge these inconvenient facts by alleging there were no counterclaims, only affirmative defenses, and therefore res judicata does not apply. (Response Brief, p. 25). But this Court has recognized that claims that are made, or could have been made, in the defense of an action can be subject to res judicata. See Eugster, 198 Wn. App. 758, 787-88, 397 P.3d 131, 146. In Eugster, an attorney failed to challenge the constitutionality of an attorney disciplinary process in an earlier proceeding that resulted in a final disposition. Id. at 785, 198 Wn. App at 145. Later, the attorney filed a lawsuit, challenging the constitutionality of the same process. Id. The Eugster court held that “res judicata stops the second suit.” Id. In coming to its conclusions, the Eugster, court set forth numerous out-of-state legal authorities addressing res judicata in the context of attorney disciplinary proceedings. One such case analyzed with approval was Vandenplas v. City of Muskego. This court wrote:

In Vandenplas v. City of Muskego, 753 F.2d 555 (7th Cir. 1985), the city obtained a state court order authorizing the razing of Lawrence Vandenplas’ farm buildings. After the razing, Vandenplas sued the city and alleged that the destruction of his buildings resulted from his criticism of the city and thus breached his due process, equal protection, and First Amendment rights. The federal court summarily dismissed Vandenplas’ suit on the basis of res judicata. Vandenplas could have raised his constitutional *arguments as defenses in the state court action*. Although the state court could not have

awarded Vandenplas damages for the constitutional violations, if Vandenplas had prevailed on the constitutional issues, the city would have been precluded from razing the buildings and thereby Vandenplas would have averted damage.

Id. at 792-93, 397 P.3d at 148-149 (emphasis added). Contrary to Seipp's position, the Eugster decision stands for the proposition that res judicata is not concerned with the procedural vehicle that brings an issue before the court. Rather, the key question is whether the issue should have been brought forward at the time of the First Lawsuit. Id. at 790, 397 P.3d at 147. Here, Seipp brought the issue forward by asking the Court to compel Cornerstone to arbitrate. He could have asked for monetary damages or asserted a tortious inference counterclaim, but declined to do so. He cannot now file this action and seek an alternative remedy. See Eugster.

Finally, Seipp's brisk analysis of the Rains v. State<sup>3</sup> factors needs to be addressed. Seipp asserts that the loss of commission from the Crapo property requires different evidence, involvement of different rights, and a different nucleus of facts; thus, res judicata is not applicable. But Washington courts do not apply these four factors in such a mechanical fashion and not all the factors must be present for res judicata to apply. Eugster, 198 Wn. App. at 789, 397 P.3d at 146. The fact that Crapo's

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<sup>3</sup> Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165, 168 (1983)

property sold after the First Lawsuit is an irrelevant and insignificant fact. The CBA arbitrators will grapple with the same questions that the trial court and this Court grappled with during the First Lawsuit, namely whether Cornerstone should have filed its first claim in the CBA arbitration. This will require the CBA arbitrators to examine and weigh the evidence Cornerstone possessed concerning its claims, such as trade secret violations, breach of I.C. agreement, and whether Cornerstone had the listings it claimed to have in the First Lawsuit.

Seipp's argument implies this Court already determined that Cornerstone should have filed the first complaint in CBA arbitration. However, Seipp misreads SVN Cornerstone LLC v. N. 807 Incorporated, 2017 WL 2259054. This Court upheld the trial court's decision denying Seipp's motion to dismiss, noting that the trial court still retained jurisdiction "to confirm an award following arbitration or take other actions authorized by Chapter 7.03A RCW." Id. at 6. This Court further rejected Seipp's arguments that all of Cornerstone's claims must be submitted to arbitration. Id. at 6, instead, it directed the trial court to compel arbitration on only the claims Cornerstone sought to recover commissions or lost fees. Id. at 6. Thus, this Court left it to the trial court

to determine which claims should be submitted to CBA arbitration and which claims should be stayed until arbitration was complete.

This case is strikingly similar to Pederson v. Potter, where the Pedersons executed a confession of judgment “thereby allowing the Potters to believe that this matter had been fully resolved.” 103 Wn. App. at 67, 11 P.3d at 835. The Pederson court noted the Pedersons were aware of their claim but declined to prosecute it. Id. The court noted that the settlement and confessions of rights established the rights of liabilities of the parties. Id. at 103.

Like in Pederson, the events leading up to the dismissal of Cornerstone’s claims reveal Seipp’s intent to lure Cornerstone into believing the case was resolved. In January of 2017, Seipp was informed Crapo would not list with him because of the Cornerstone lawsuit. CP 413-414. Between January 2017 and the dismissal of this case, Seipp did not seek any monetary damages from Cornerstone. On June 21, 2017, Cornerstone filed a petition for review before the Washington Supreme Court (Case No. 94675-2). Seipp entered into an agreement with Cornerstone on July 31, 2017, to resolve the case. *On August 17, 2017, Seipp obtained a signed letter statement from Crapo concerning Crapo’s asserting that he was not intending to list with Seipp because of*

*Cornerstone's lawsuit.* CP 370.<sup>4</sup> On August 21, 2017, Cornerstone dismissed its petition for review and a final order dismissing the lawsuit was entered August 22, 2017. Thus, the sequence of events clearly shows that Seipp lured Cornerstone into settling the case so he can retaliate in a CBA arbitration. The stipulated order of dismissal and release has established the rights between the parties; the exact rights Seipp now seeks to impede with his arbitration action.

Seipp resolved the issue of whether Cornerstone should have filed the First Lawsuit in CBA arbitration and he now cannot make a claim for tortious interference seeking a different remedy. Seipp settled the issue of arbitration, and the consequences thereof, in the First lawsuit when he paid \$20,000 and executed a release and stipulated order of dismissal. Therefore, Seipp's tortious interference claim is barred by *res judicata*.<sup>5</sup>

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<sup>4</sup> A point of clarification. Crapo signed and provided a *letter* statement to Seipp on August 17, 2017. This letter was the declaration that has previously been referred to by the briefing. That declaration is located at CP 413-414.

<sup>5</sup> Seipp's tortious interference claim is not supported by Washington law, because lawsuits are protected activities.

### 3. Res Judicata Bars Seipp's Malicious Prosecution Claim

Seipp's response brief does not go into detail concerning his malicious prosecution claim in relation to res judicata, and instead relies on the idea that the claim is not barred because the two actions involve two different real estate commissions. However, to justify his malicious prosecution claim, Seipp initially alleged in his first Arbitration Complaint numerous points of fact that were the subject matter of the First Lawsuit. CP 21-28. In his *Amended Arbitration Complaint*, Seipp attempted to clean up his claim, but continued to assert that Cornerstone "confused the court" with its claim that it had a "listing" or "pocket listing." CP 252-258. He went on to claim that Cornerstone "played an active role in misleading the court in the case brought against me." CP 252-258. Seipp also attempted to turn Cornerstone's Second Lawsuit into a basis for his claims in the Amended Arbitration Complaint by indicating that Cornerstone's actions in the Second Lawsuit "damaged" Seipp" because it delayed the arbitration. CP 252.

However, Seipp's various attempts to clean up his arbitration complaint should be taken with a grain of salt. The remedy that he is seeking, as highlighted by Seipp in his response brief, is for lost commissions from Crapo's property. This alleged loss occurred *before*

Cornerstone filed the Second Lawsuit. What is key from reading the first Arbitration Complaint and the Amended Arbitration Complaint is that Seipp believed Cornerstone made false allegations in the First Lawsuit and he desires to re-litigate the matter before the CBA arbitration panel.

Seipp will likely continue to rely on the argument that his malicious prosecution claim is not barred by res judicata because the real estate closing occurred in August of 2017, after the First Lawsuit was settled. But the touchstone of res judicata is whether the claim *should have been brought forward in the previous litigation*. See Histle v. Todd Pacific Shipyards Corp., 151 Wn.2d 843, 865, 93 P.3d 108, 114 (2004) (emphasis added). To prevail on his malicious prosecution claim, Seipp must allege that Cornerstone maliciously filed and prosecuted the First Lawsuit because that act is the act that caused him to lose the Crapo real estate sale. This will require Seipp to show that Cornerstone should have filed the First Lawsuit in the CBA, *which was an issue in the First Lawsuit*. This will require Seipp to show that Cornerstone did not have a trade secret, *which was an issue in the First Lawsuit*. This will require Seipp to show that Cornerstone misrepresented its relationship and real estate listings, *which was an issue in the First Lawsuit*. These issues all involve the same rights,

evidence, nucleus of facts, and infringement of the same rights that were at issue in the First Lawsuit.

Therefore, the fact that Crapo's property sold in August of 2017 is irrelevant. Seipp should have alleged his malicious prosecution claim in the First Lawsuit.

**B. Seipp's Claims Are Compulsory Counterclaims**

**1. Seipp's Tortious Inference Claim was a Compulsory Counterclaim that Should Have Been Alleged in the First Lawsuit**

Seipp's asserts that his tortious inference claim is not a compulsory counterclaim because the real estate transaction did not close until August 28, 2007, which was after the First Lawsuit was settled. However, Seipp leapfrogs over the CR 13(a) analysis entirely and attempts to arbitrarily set a time when his claim "accrued" to avoid the claim accruing during the pendency of the lawsuit. But the question is whether Seipp's claim possessed a logical relationship to Cornerstone's claims in the First Lawsuit.

Plaintiff's tortious interference claim is logically related to Cornerstone's First Lawsuit because it involves the same issues, to-wit: should Cornerstone's action be submitted to CBA arbitration? The facts

supporting this argument have previously been set forth and, for the sake of brevity, adopted here.

In responding to Cornerstone's argument that Seipp's tortious interference claim is a compulsory counterclaim, Seipp asserts that he did not have a right to apply for relief until after Crapo's property was sold because they did not know the amount of damages they would claim. Therefore, the argument goes, his claim is not logical related to the claims made by Cornerstone in the First lawsuit.

But Seipp's reliance on the closing date of August 27, 2017, as the time his claim "accrues" is not supported by any legal authority or even the facts.<sup>6</sup> It is black letter law that a tort claim, including tortious interferences, begins to accrue at the time of the act or omission that gives rise to the action. Matter of Estate of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690, 694 (1992). When specifically reviewing tortious interference of a contractual relationship, other jurisdiction have held that the claim begins to accrue at the time the contract was terminated. See e.g., Dual

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<sup>6</sup> Seipp provides no legal authority for the claim that tortious interference with a contract accrues only *after* the real property at issue is sold as opposed to the time Seipp knew, or should have known, he would not be the one to list the property because of Cornerstone's lawsuit.

Inc. v. Lockheed Martin Corp, 857 A.2d 1095, 1104-05, 383 Md. 151, 168-69 (Md. 2004); Hwang v. Dunkin' Donuts, Inc., 840 F.Supp. 193, 196 (N.D.N.Y. 1994); Trembath v. Digardi, 43 Cal.App.3d 834, 118 Cal. Rptr. 124, 126 (1974). Moreover, the exact amount the party has been damaged does not need to be finalized. Woods View, LLC v. Kitsap County, 188 Wn. App. 1, 19-20, 352 P.3d 807, 816-17 (2015). For purposes of a tortious interference claim, courts are more concerned with the “fact of damages” rather than the “extent or amount of damages.” Mutual of Enumclaw Ins. Co. v. Greg Roofing, 178 Wn. App. 702, 714, 315 P.3d 1132, 1149 (2013). Uncertainty in the amount of damages will not prevent recovery. Id.

Furthermore, Seipp’s attempts to apply a hyper-technical argument to a CR 13(a) analysis is misguided given CR 13(a) is designed to be flexible and liberally construed to ensure finality. See Schoeman v. New York Life, Co., 106 Wn.2d 855, 865, 726 P.2d 1, 6 (1986) (CR 15(a) must be liberally construed to avoid multiplicity of lawsuits). The logical relationship test does not require a party to boil the damages of their claim down to an absolute and precise dollar figure because the test comprehends a “series of many occurrences” that depend of its immediateness and logical connection. Id. at 865, 726 P.2d at 6. Tort damages, after all, include future

damages.<sup>7</sup> Taking Seipp's allegations as true, he was harmed when Cornerstone filed the First Lawsuit. He knew Crapo did not intend to list his property with him by January of 2017. The fact it took Crapo eight months to sell the property with another agent is irrelevant for the purposes of determining when Seipp knew, or should have known, that he had a tortious interference claim.

Moreover, Seipp's attempt to make August 28, 2017, as the accrual date is further defeated by the fact Crapo signed his declaration on August 17, 2017.

Seipp's tortious interference claim is logically related to the First Lawsuit, and thus was a compulsory counterclaim.

**2. Seipp's Malicious Prosecution Claim is a Compulsory Counterclaim**

In his response brief, Seipp argued that his malicious prosecution claim is not a compulsory counterclaim because of the word "may" found in RCW 4.24.350(1):

In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages *may* be litigated in the principal action for malicious prosecution on the

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<sup>7</sup> The measure of damages for tortious interference include pecuniary loss of the benefits of the contract *or perspective relation; consequential losses;* and emotional distress or actual harm to reputation. Mutual of Enumclaw Ins. Co. v. Greg Roofing, 178 Wn. App. 702, 714, 315 P.3d 1132, 1149 (2013).

ground that the action was instituted with knowledge that the same was false, and unfounded, malicious and without probable cause in the filing of such action, or that the same was filed as a part of a conspiracy to misuse judicial process by filing an action known to be false and unfounded.

(emphasis added). However, Seipp's reliance on the word "may" is misplaced. Contrary to Seipp's argument, the word "may," as used in RCW 4.24.350(1), does not automatically turn malicious prosecution into a permissive counterclaim in every situation. Instead, the touchstone for 13(a) analysis remains whether Seipp's malicious prosecution claim possesses a logical relationship to the subject matter of the opposing party's lawsuit.

Prior to the passage of RCW 4.24.350, a party could only assert a malicious prosecution claim until after the underlying lawsuit was resolved in the party's favor. Hanson v. Estell, 100 Wn. App. 281, 285, 997 P.2d 426, 430 (2000). The idea was that, as a condition precedent to a malicious prosecution claim, Plaintiff had to first prevail in the original lawsuit. See Id. RCW 4.24.350 was amended to allow a defendant to assert a malicious prosecution claim during the pendency of the underlying original lawsuit. This was done "in the interests of judicial economy and to protect the defendants from meritless attacks." Id.

Thus, word "may" was intended to allow a party to assert a malicious prosecution counterclaim. It does not change or address the analysis under CR 13(a) as to whether malicious prosecution is a compulsory counterclaim or a permissive counterclaim. Malicious prosecution is no different than any other claim in Washington. Whether a claim is a compulsory or permissive counterclaim is determined by the specific facts of the case under the rubric of the logical relationship test.

In the case at bar, Seipp's malicious prosecution claim was a compulsory counterclaim. To successfully prevail on a malicious prosecution claim, Seipp requires one of two situations to occur in regard to Cornerstone's First Lawsuit. The first situation is where Seipp prevails on the merits against Cornerstone, and thus could potentially have the grounds to bring a malicious prosecution claim in a subsequent legal proceeding. This is the type of situation Washington common law envisioned. In the second situation, Seipp brings his malicious prosecution claim as a counterclaim and a judicial officer finds that the plaintiff maliciously brought and prosecuted his/her claim; and thus, potentially gives the Defendant grounds to prosecute a malicious prosecution claim. See, Hanson, 100 Wn. App. 281, 997 P.2d 426.

When Seipp determined that he was going to resolve the case with Cornerstone, Seipp was under a duty to allege a malicious prosecution claim against Cornerstone in the First Lawsuit because the claim was dependent on a determination by the trial court that Cornerstone's action was malicious and lacked probable cause. Without a verdict in Seipp's favor, he could not peruse a malicious prosecution claim as he would be missing an essential element of his claim.

Finally, Seipp argues that his causes of action could not be compulsory because he could not initiate the CBA arbitration until Mr. Crapo closed on the sale of his duplexes. "Seipp did not have a right to apply for relief until the sale of the real property closed, and he lost the commission as issue." (Resp. Brief, p. 31). Seipp has a strained interpretation of the CBA rules in order to make his argument. CBA Rule No. 6 entitled "Time Limit for Complaint" provides in relevant part:

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) 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.

(CP 163-171). Rule 6 merely provides the *last* date by which a member can file the complaint with the CBA. There is nothing in Rule 6 that says the

member must wait until after the closing of a sale in order to file a complaint with the CBA.

CBA Rule 7 is entitled "Sale Must Be Closed," and provides in relevant part:

If a pending sale is involved, it must be closed before the matter will be heard, unless the Board of Directors, on written application by one of the parties, rules otherwise.

(CP 163-171).

Rule 7 provides that there normally will not be an arbitration hearing until after the sale is closed. Just because there will not be a full trial (or full arbitration hearing) for a claim until after the sale of the property closes, does not prevent Seipp from filing the complaint with CBA before the sale of the property closed. The CBA Rules do not affect the Court's CR 13(a) compulsory counterclaim analysis.

Thus, because Seipp decided not to proceed with the First Lawsuit and prevail on the merits in regard to Cornerstone's claims, Seipp's malicious prosecution claim was a compulsory counterclaim that had to be alleged in the First Lawsuit so that the trial court could make a determination that Cornerstone lacked probable cause and acted with malice. Therefore, Seipp's malicious counterclaim is a compulsive counterclaim under CR 13(a).

**C. Seipp Must Be Enjoined From Proceeding With CBA Arbitration**

Seipp argues that the trial court correctly determined Cornerstone was not entitled to an injunction. The first argument is that Cornerstone has adequate remedy at law. The second ground relied upon by Seipp is the assertion that Cornerstone did not prove res judicata or CR 13(a) barred his claims. This argument has been addressed already by Cornerstone. The third basis is the assertion that Cornerstone failed to establish "actual or substantial injury" necessary to establish injunctive relief. This contention must be rejected.

First, Seipp's assertion that Cornerstone has an adequate remedy at law misstates the facts and the law. For his assertion, Seipp cites to legal authority where the party is seeking an injunction where monetary relief is an available remedy. See e.g. Kucera v. State, Dept. of Transp., 140 Wn.2d 200, 210, 995 P.2d 63, 69 (2000) (plaintiff landowners could not seek an injunction for property damage claim where damages provided an adequate remedy). This is not the case here because Cornerstone is seeking to enforce a prior judgement to enjoin arbitration and not seeking monetary damages. The only remedy available to Cornerstone is to prevent Seipp from going forward with the arbitration.

Second, contrary to Seipp's argument, Cornerstone is not required to establish actual or substantial injury when it is seeking an injunction on res judicata grounds. Washington courts have the inherent power to "compel obedience to its judgments, decrees, orders and process." RCW 2.28.010(4). When confronting cases with similar facts to the case at bar, federal courts have not addressed actual or substantial injury, but instead focus on the court's authority to protect its judgments. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1134 (9th Cir. 2000). "No matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations." In re Y & A Group Securities Litigation, 38 F.3d 380, 382 (8th Cir. 1994). Federal courts have held that a court has the power to enjoin a subsequent arbitration to protect a prior court judgment without any consideration of harm. In Miller Brewing Co. v. Fort Worth Distribution Co., Inc., the Fifth Circuit held that a subsequent arbitration must be enjoined on res judicata grounds without consideration of whether the plaintiff would be substantially harmed. 781 F.2d 494, 501 (5th Cir. 1986).

Cases such as Miller Brewing Co. comports with the policies underlying CR 13 and the doctrine of res judicata. Both CR 13 and res judicata are based on the principle that litigants have a right to finality and

that aggrieved parties should not have a second bite at the same apple. Schoeman v. New York Life. Co., 106 Wn.2d 855, 865, 726 P.2d 1, 6 (1986); Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833, 836 (2000). Seipp's argument that Cornerstone's possible harm is speculative because it has submitted to arbitration creates a blank check to future litigants who, like Seipp, are displeased that they settled a previous lawsuit and so decide to submit their claim in a different forum such as arbitration. What Seipp wants is to drag Cornerstone through an arbitration process, attempt to obtain a judgment, and then force Cornerstone to seek relief from Superior Court after incurring fees and costs in defending an arbitration action that should have been barred by res judicata. Seipp's abuse of legal proceedings should not be sanctioned by this Court.

Furthermore, taking a position that irreparable harm will only occur until after an arbitration award is made and entered ignores the fact that a superior court applies a limited scope of review when reviewing an arbitration award. A trial court cannot vacate an award unless there is a legal error on the face of the arbitration award. Broom v. Morgan Standly DW Inc., 169 Wn.2d 213, 239, 236 P.3d 182, 185 (2010). If the arbitrator enters an award against Cornerstone, there is only a 10-day automatic stay period before Seipp can start collecting on the judgment. CR 62(a). Seipp's

claim of \$1,920,000 against Cornerstone in the CBA is more than double the gross annual income of Cornerstone's business in a given year. Cornerstone would have no ability to pay that type of arbitration award and judgment. CP 720-722. Cornerstone would be forced into bankruptcy and be forced out of business. CP 720-722.

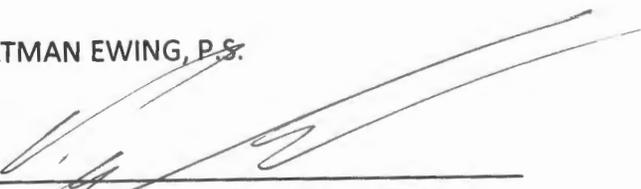
Injunctions are intended to prevent such catastrophic results. Courts have made it clear that economic harm qualifies as irreparable harm when it "is so severe as to cause extreme hardship to the business or threaten its existence." See e.g., Tyler Pipe Industries, Inc. v. Dept. of Revenue, 96 2d 785, 794-95 638 P.2d 1213 (1982). Thus, Seipp must be enjoined from proceeding with arbitration.

## **II. CONCLUSION**

Based on the foregoing, Cornerstone requests this Court to overturn the trial court's decision and enjoin Seipp from proceeding with CBA arbitration.

DATED this 16th day of November 2018.

FELTMAN EWING, P.S.

By: 

KENT NEIL DOLL, JR., WSBA 40549  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November 2018, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

Matthew T. Ries Stamper Rubens, P.S. 720 W. Boone, Suite 200 Spokane, WA 99201	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery/Messenger Service <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Fax <input type="checkbox"/> Email
Nicolas D. Kovarik Whitny L. Norton Piskel Yahne Kovarik, PLLC 522 W. Riverside Ave., Ste. 700 Spokane, WA 99201	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery/Messenger Service <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Fax <input type="checkbox"/> Email

  
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KENT NEIL DOLL, JR.