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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 359956

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Appellants,

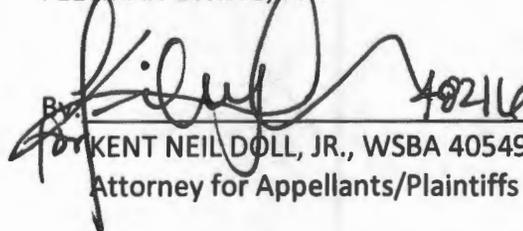
vs.

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.

BRIEF OF APPELLANT

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I. INTRODUCTION

On July 31, 2017, Seipp paid \$20,000 to resolve numerous allegations asserted by Cornerstone in a lawsuit filed on April 29, 2016, with the Spokane Superior Court. And, as can be gleaned from the record, he was really displeased about paying Cornerstone \$20,000. Shortly after agreeing to dismiss Cornerstone's case with prejudice and tendering \$20,000 to Cornerstone, Seipp filed an arbitration complaint against Cornerstone with member-owned cooperative (CBA) that requires its members to arbitrate some types of claims. In his complaint, Seipp alleged he lost business as a result of Cornerstone's lawsuit. He further accused Cornerstone of lying to the Spokane County Superior Court concerning certain factual allegations made in Cornerstone's complaint. Finally, his allegations concluded in the following claims against Cornerstone: "perverting the court," "failing to arbitrate," "malicious prosecution," and "tortious interference with business relations."

On November 27, 2017, Cornerstone filed a second lawsuit against Seipp, alleging that Seipp breached his settlement agreement with Cornerstone and all of his claims were barred by CR 13(a) and the doctrine of res judicata. The trial court, Judge Cooney, applied neither

CR 13(a) logical relationship test nor any factors set forth under the doctrine of res judicata. Instead, Judge Cooney determined that Seipp's arbitration claims were not barred from going forward because, even though they lacked merit under Washington law, the CBA did not have to follow any state law. As a result, Judge Cooney granted Plaintiff's motion for summary judgment.

For simplicity sake, the lawsuit filed in 2016 by Cornerstone will be referred to as "First Lawsuit." The lawsuit filed in 2017 by Cornerstone will be referred to as "Second Lawsuit." The Plaintiff, SVN Cornerstone, LLC, will be referred to as "Cornerstone." The Defendants, N. 807 Incorporated, Berkshire Corp., Homeservices First Look Real Estate, Kenneth Lewis, Michelle Lewis, Henry Seipp, and Jane Doe Seipp, will simply be referred to as "Seipp."

II. ASSIGNMENTS OF ERROR

1. Did the court err when it failed to apply the doctrine of res judicata to the claims asserted in Seipp's arbitration action when:

a. Seipp's "Failure to Arbitrate" claim was previously alleged in the First Lawsuit with the only difference being that Seipp requested monetary damages in his arbitration action and only asked to compel arbitration in the First Lawsuit. The judge further

acknowledged that Seipp's Failure to Arbitrate claim was "the whole issue with the original lawsuit."

b. Seipp's "Malicious Prosecution" claim requires the CBA arbitrator to destroy the rights Cornerstone established in the First Lawsuit by accepting a \$20,000 settlement from Seipp to dismiss the case and is dependent on:

(1) Inaccurate facts that misstated this Court's holding;

(2) The same evidence that would have been presented in the First Lawsuit;

(3) Requiring the arbitrator to evaluate the same infringement of rights that were at issue in the First Lawsuit.

c. Seipp's "Tortious Interference" claim accrued by January 2017, and is dependent on allowing an individual like Seipp avoid black letter law that filing a lawsuit is not "improper interference" for purposes of an interference claim. Further, allowing Seipp to proceed would allow him to retry issues that were present in the First Lawsuit and engage in a collateral attack on the dismissal in the First Lawsuit.

d. Seipp's "Perverting the Court" claim requires the CBA arbitrator to destroy the rights Cornerstone established in the First

Lawsuit by accepting a \$20,000 settlement from Seipp to dismiss the case and is dependent on:

(1) Inaccurate facts that misstated this Court's holding;

(2) The same evidence that would have been presented in the First Lawsuit;

(3) Requiring the arbitrator to evaluate the same infringement of rights that were at issue in the First Lawsuit.

2. The trial court failed to hold Seipp's arbitration claims were compulsory counterclaims that should have been asserted in the First Lawsuit when said arbitration claims arise out of the same transaction and occurrences at issue in the First Lawsuit.

3. The trial court failed to enjoin Seipp's arbitration action when:

a. Seipp's arbitration action was barred by the doctrine of res judicata and CR 13(a);

b. Cornerstone has a right to protect its legal interests and rights arising from the First Lawsuit;

c. Cornerstone has a well-grounded fear of an invasion of its rights;

d. The arbitration action filed by Seipp has and will result in harm to Cornerstone.

III. STATEMENT OF THE CASE

A. The First Lawsuit: SVN Cornerstone LLC v. N. 807 Incorporated

This case has its genesis in this Court's decision in SVN Cornerstone LLC v. N. 807 Incorporated, 2017 WL 2259054. CP 78-88. Defendant Henry Seipp ("Seipp") was a former real estate agent who had an independent contract agreement with Plaintiff SVN Cornerstone ("Cornerstone"). Prior to terminating his relationship with Cornerstone, Cornerstone had developed a marketing package for the sale of Timber Court Apartments owned by EZ Properties. Seipp, with other Cornerstone brokers, was attempting to locate potential buyers for the Timber Court Apartments. Acting on EZ Properties' behalf, Cornerstone negotiated initial terms of the sale of the Timber Court Apartments. However, Seipp left Cornerstone and, after being employed for two days with Berkshire, another real-estate firm, EZ properties entered into an exclusive listing agreement with Berkshire for the sale of the Timber Court Apartments. CP 78-88.

Cornerstone filed a complaint in Spokane County Superior Court against Berkshire; its owners, Kenneth and Michelle Lewis; and Mr. Seipp and his marital community. CP 220-230. Cornerstone alleged Seipp's activities in connection with the sale of the Timber Court Apartments

breached provisions of an independent contractor agreement he had signed with Cornerstone. CP 220-230. In addition, Cornerstone alleged against all defendants the following claims: unjust enrichment, tortious interference with business relations, violation of RCW 19.108, conversion, and breach of a fiduciary duty of loyalty. CP 220-230.

Seipp filed an answer on August 8, 2016. CP 163-171. In his answer, Seipp alleged the following “affirmative defenses”:

- (1) Plaintiff’s claims are subject to mandatory and binding arbitration;
- (2) Plaintiff’s claims are barred due to restraint of trade;
- (3) Plaintiff’s claims are barred by breach of contract.

CP 169.

Shortly after filing his Answer, Seipp moved to compel arbitration and dismiss the lawsuit based on all parties involved being members of the CBA. The CBA is a member-owned cooperative. CBA members are required to agree to abide by its bylaws and rules, which require arbitration of some member disputes. CP 190-197. The arbitration rules are set forth in CP 115-120. The CBA rules have a three-month time limit to initiate an arbitration proceeding after the closing on the sale of the Timber Court Apartments, and Seipp argued that the matter was time barred.

The Honorable John Cooney declined to compel arbitration, a decision which Seipp subsequently appealed. Division 3 held that the trial court must compel arbitration on all of Cornerstone's claims for relief that seek to determine or recover commissions or fees. However, any other claims for relief (e.g., injunction) were not subject to arbitration.

This Court wrote:

Accordingly, although we direct the trial court to compel arbitration of all of Cornerstone's claims for relief that seek to determine or recover commissions, or commissions or fees lost as a result of the acts of the defendants, it is conceivable that some claims for relief will not be arbitrable—for example, a request for an injunction against use of trade secrets or for the court-ordered return of Cornerstone's property would not be.

SVN Cornerstone LLC v. N. 807 Incorporated, 2017 WL 2259054, p. 6.

The case was remanded for proceedings consistent with the opinion. CP 78-88. The decision was filed on May 23, 2017. CP 78-88.

B. Cornerstone And Seipp Entered Into A Settlement Agreement While the Matter Was Pending Before The Washington Supreme Court

After Division 3 issued its written opinion, Cornerstone petitioned for discretionary review with the Washington Supreme Court. Case No. 946756. However, on July 31, 2017, Cornerstone and Seipp were able

to enter into a settlement agreement.¹ CP 90-96. The agreement specified the following:

In consideration of Cornerstone waiving and forever relinquishing any and all claims against Berkshire Hathaway, Mr. & Mrs. Lewis, and Mr. Seipp as set forth in paragraph 2 herein, Cornerstone shall receive payment in the amount of \$20,000.00, within fourteen (14) calendar days after execution of this Agreement.

....

The Parties shall enter into a Stipulation and Voluntary Withdrawal of Cornerstone's Petition for Review to the Supreme Court of Washington, without an award of attorney fees or costs, within ten (10) calendar days of execution of this Agreement and the settlement funds have been delivered to Stamper Rubens, PS.

CP 90-96. Paragraph 2 provided the following.

Release. Except for the conditions precedent set forth in Paragraph 1 of this Agreement and the rights and claims under or expressly granted in or preserved by this Agreement, Cornerstone and its respective successors and assigns hereby fully, finally, and forever releases, acquits, and discharges Berkshire Hathaway, Mr. and Mrs. Lewis and Mr. Seipp and their successors and assigns, of and from, any claims, causes of action, suits, debts, liens, obligations, liabilities, demands, losses, costs, expenses (including attorneys' fees), and damages of any kind, character or nature whatsoever, known or unknown, fixed or contingent that Cornerstone may have or claim to have now or which may hereafter arise out of, or

¹ The settlement agreement was executed prior to the Washington Supreme Court determining whether to accept discretionary review.

be connected with, the Spokane County Case or the I.C. Agreement.

CP 90-96. Paragraph 3 further provided that the settlement agreement terminated the Independent Contractor Agreement:

Termination of Independent Contractor Agreement. Any and all agreements, except this Agreement, between Berkshire Hathaway, including Henry B. Seipp, individually, and Cornerstone, are hereby terminated. The termination of the Parties' I.C. Agreement and all other agreements, except this Agreement, shall contemporaneously operate to also terminate the Parties duties and obligations arising out of those agreements.

CP 90-96. Finally, the agreement provided that if a dispute arose under the settlement agreement, the prevailing party shall be entitled to reasonable attorney fees and costs. CP 90-96.

On August 22, 2017, a Stipulation and Order of Dismissal was entered with the Spokane County Superior Court dismissing the lawsuit with prejudice and without an award of attorney fees and costs. CP 98-99. This stipulation was executed by all parties. CP 98-99.

C. Seipp Files An Arbitration Claim With The CBA Shortly After Paying Cornerstone \$20,000 to Resolve The First Lawsuit

On September 18, 2017—less than a month after the Stipulation and Order of Dismissal was filed with Spokane County Superior Court—Seipp filed an Arbitration Complaint with the CBA against Cornerstone, Guy Byrd, and Matthew Byrd. CP 101-108. For simplicity sake, Seipp's

claims and allegations to support those claims, are set forth below in a table:

CAUSE OF ACTION	ALLEGATIONS IN COMPLAINT
Perverting the Court	<ul style="list-style-type: none"> (1) Cornerstone alleged in the original action that it was in the appropriate venue; (2) Cornerstone falsely said it had real estate listings for the apartments at issue in the action; (3) Cornerstone falsely said they had trade secrets; (4) Cornerstone "relied on information caused by their fraud to keep their lawsuit from being remanded back to CBA"; (5) Cornerstone's illegal actions caused Seipp to lose a listing/sale.
Malicious Prosecution	<ul style="list-style-type: none"> (1) Cornerstone filed a lawsuit in Superior Court when they should have filed in CBA; (2) Cornerstone maliciously prosecuted the case in an improper venue; (3) Cornerstone confused the court by claiming they had a listing or pocket listing; (4) Court of Appeals determines case should be in CBA; (5) Cornerstone took an active role in misleading the court; (6) Cornerstone did not have reasonable grounds to support case.

Failure to Arbitrate	(1) Cornerstone violated contract by filing the action in Superior Court; (2) Suffered damages, including emotional distress and attorney fees.
Tortious Interference with Business Relations	Claimed that the original action caused him to lose more than one significant listing and therefore he is entitled to an award for all damages sought.

CP 101-108. For a remedy, Seipp requested \$60,000 in attorney fees incurred in defending Cornerstone’s claims in the previous action and \$1,920,000 in “lost commissions.” CP 107-108.

At no time in the previous action did Seipp allege or assert that Cornerstone’s actions in the First Lawsuit amounted to “malicious prosecution,” “perverting the court,” and “tortious interference.”

D. Cornerstone Files A Complaint For Breach Of Contract In Spokane Superior Court Requesting The Court To Enforce The July 31, 2017, Settlement Agreement

On November 27, 2017, Cornerstone filed a Summons and Complaint for Breach of Contract against Seipp. CP 1-8 (“Second Lawsuit”). Cornerstone specifically noted that Seipp’s request for \$60,000 in attorney fees breached the explicit terms of the July 31, 2017 settlement release. CP 6.

During the brief discovery process, it was revealed that Seipp always planned to file a claim with the CBA, even while luring

Cornerstone into settling and dismissing the First Lawsuit. While the First Lawsuit was being litigated before Judge Cooney, an individual by the name of Dennis Crapo approached Seipp about listing his real estate property.² CP 413-414. Allegedly, sometime around January 2017, Crapo learned of the ongoing litigation and decided to list with a different agent. CP 413-414. No evidence was brought forth that Cornerstone was the party that informed him of the ongoing lawsuit. Furthermore, Seipp's claim for fees was greatly exaggerated given that the HFO Brokers obtained a commission of only \$91,000. CP 941-943. Seipp was provided with Crapo's signed statement on August 17, 2017, five days before the Stipulation and Order of Dismissal was entered with Spokane County Superior Court. CP 413-441 (date of signature on statement).

On February 9, 2018, Superior Court Judge Cooney granted Cornerstone's Motion to Amend its complaint to add a claim under the Uniform Declaratory Judgment Act (RCW 7.24.010), seeking a declaratory

² The property was allegedly worth \$28,609,223. However, Crapo only owned a small percentage of that property. The majority of the duplex properties were owned by 920 Evergreen, LLC, which Dennis Crapo was a managing member. CP 871-930. Crapo, personally, and as a manager, entered into an agreement with the buyer on June 16, 2007. CP 871-930.

judgment that the various claims being made by Seipp were barred by res judicata and CR 13(a) (compulsory counterclaims). CP 471-472.

As the reader can glean from the docket, the Second Lawsuit generated numerous pleadings, including discovery motions/motions to quash, motion to strike, and motions for contempt and sanctions. CP 345-368 (Motion to Strike); CP 505-543 (Non-party Objection to Subpoena); CP 1011-1020 (Motion for Sanctions). Further, both Seipp and Cornerstone filed motions to dismiss/summary judgment. CP 121-143 (Defendant's Motion to Dismiss); CP 269-286 (Defendant's Response to Plaintiff's Motion for Summary Judgment); CP 287-315 (Plaintiff's Reply In Support of its Motion for Summary Judgment); CP 371-374 (Plaintiff's Responses to Defendant's Motion to Dismiss).

The hearing concerning the dismissal/summary judgment was held on February 9, 2018. In that hearing, the judge indicated he would reserve making several rulings until Cornerstone amended its complaint. Vol. I, p. 52, Ins. 1-2. The court further stated it would provide a letter opinion on issues it felt it could address without the need to review Cornerstone's amended complaint. Vol. I, p. 53, Ins. 16-21.

The trial court filed a letter opinion on February 12, 2018. In the letter, the trial court denied Cornerstone's request for injunctive relief

but granted its motion that Seipp breached the settlement agreement for seeking attorney fees with the CBA. CP 501-504.

A second hearing was held on February 28, 2018, concerning a motion to quash. During that hearing, the trial court expressed its feelings on the case: "I think this case is getting, at least at this point, overly complicated." Vol. I, p. 73, Ins. 16-19. Despite not being directly before the court, the trial court mentioned Cornerstone's argument that the claims being asserted by Seipp in the present action were compulsory counterclaims:

Maybe I got off track, but I started looking at the compulsory counterclaims to make a determination as to whether they were compulsory counters, and I'm not so sure that they were for the simple reason that I don't think you need any claim in law before the CBA.

The trial court declined ruling, "I'm not ruling on that necessarily today, but I think that is at least an issue." Vol. I, p. 75, Ins. 1-4.

A third hearing was conducted on March 9, 2018. In beginning his ruling, the trial court noted:

There is a lot more going on here than perhaps should be. This case is already four volumes and it was just filed earlier this year, end of last year. There's been a lot of motion practice already. There's a lot of moving parts and it's difficult to get my head around everything that's happened here.

Vol. I, p. 111, Ins. 8-13. In the hearing, Judge Cooney acknowledged that he should have used the word “reserved” instead of denying various claims in a letter opinion that was filed on February 12, 2018. Vol. I, p. 112, Ins. 7-20.

Turning to Cornerstone’s arguments, Judge Cooney noted he “felt” the case should have ended with the settlement agreement.” Vol. I, p. 113, Ins. 7-16. Judge Cooney further acknowledged that Seipp’s arbitration action was unfair to Cornerstone:

When there was a settlement, the plaintiff gave up everything by withdrawing its petition for review to the Supreme Court. That can’t be reinstated...

Vol. I, p. 113, Ins. 11-13. And later in the hearing:

I guess the point I’m getting at is personally it seems as though this wasn’t the proper way to handle this type of matter, the plaintiffs gave up everything and as soon as that’s done the defendant tries to seek recovery in a different forum.

Vol. I, p. 118, Ins. 1-7. Judge Cooney also noted his own history with the case.

I have a history with the previous case that was dismissed, and my recollection is I was reversed by the Court of Appeals when I didn’t order arbitration. It dates back some time. But it seems as though that should have been the end of this matter because there was a settlement.

Vol. I, p. 113, Ins. 6-11.

Judge Cooney ruled that the July 31, 2017, release was “one-sided” and thus Seipp did not surrender any claims. Vol. I, p. 114, Ins. 17-25.

Once determining that the release did not prohibit Seipp’s arbitration complaint, Judge Cooney moved on to whether Seipp’s claims were barred by CR 13(a) and res judicata. Strangely, the trial court never addressed Cornerstone’s res judicata argument in any substantial manner but for one time in its oral opinion, stating:

So when I look at res judicata and when I look at compulsory counterclaims, I’m trying to determine whether any of these causes of action fit either of those two theories.

CP.³ Instead, the trial court focused and utilized the CR 13(a) framework when addressing each individual claim made by Seipp. Judge Cooney’s order can be broken down as follows:

General Ruling	“As far as the compulsory counterclaim, these could not be compulsory counterclaims because they’re not actions or damages that are recognized or would be recognized by state courts.” Vol. I, pp. 115-116.
Count I: Perverting the Court	This was not a compulsory counterclaim because the statements made by Cornerstone

³ The doctrine of res judicata was extensively briefed by the parties prior to the March 9, 2018 hearing. Cornerstone’s Memorandum in Support of its Motion for Summary Judgment spent a total of 8 pages on the res judicata topic alone. In its reply brief, Cornerstone spent a total of 18 pages briefing the doctrine of res judicata. CP 46-77; CP 287-334.

	in the original lawsuit were “protected statements.” Vol. I, p. 116, Ins. 12-17.
Count II: Malicious Prosecution	Judge Cooney just made a general statement that this was a permissive counterclaim. Vol. I, p. 116, Ins. 18-20.
Count III: Failure to Arbitrate	Judge Cooney acknowledged this was at issue in the action (Vol. I, p. 115, Ins. 18-20), but noted: “Now [Seipp is] seeking damages for not arbitrating. That would not have been appropriate to bring as a compulsory counterclaim.” Vol. I, p. 116, Ins. 21-24.
Count IV: Tortious Interference	General statement that the claim was not a compulsory counterclaim. Vol. I, p. 116, Ins. 1-4.

The linchpin to Judge Cooney’s rulings seems to have been that the CBA agreement enabled arbitrators to only consider, not follow, Washington law; thus, nothing would be a compulsory counterclaim under CR 13(a) or would be barred by res judicata. Vol. I, p. 116, Ins. 3-11. The court therefore granted Seipp’s Motion to Dismiss. CP 1330-1332. The court further denied Cornerstone’s Motion for a Permanent Injunction.

However, Judge Cooney did find that Seipp breached the settlement agreement by requesting compensation for the attorney fees in the arbitration action that he allegedly incurred from the First Lawsuit. CP 1345-1354. Judge Cooney further found that Cornerstone was the

prevailing party and thus a judgment was entered against Seipp. CP 1345-1354.

IV. ARGUMENT

A. Standard Of Review

Whether res judicata bars an action is a question of law that is review de nova by the Court of Appeals. Emeson v. Department of Corrections, 194 Wn.App. 617, 376 P.3d 430 (2016).

Moreover, a decision by a trial court to grant summary judgment is reviewed de novo. Keck v. Collins, 181 Wn.App. 67, 80, 325 P.3d 306, 312 (2014). See also Board of Regents of University of Washington v. City of Seattle, 108 Wn.2d 545, 550, 741 P.2d 11, 14 (1987) (appellate court engaged in same inquiry as the trial court in reviewing summary judgment order that included an injunction). This is consistent with federal courts which have reviewed a trial court's refusal to enjoin arbitration proceeding barred by res judicata. See e.g. John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 139 (3rd Cir. 1998) ("Because the issues raised in the context of this appeal are purely legal, our standard of review is plenary.").

B. Res Judicata

1. Res Judicata Law in Washington State

Res judicata is a legal doctrine that bars litigation of claims and issues that were litigated, or might have been litigated, in a prior legal action. Res judicata will apply if there has to be identity between the prior judgment and subsequent action as to: (1) parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Pederson v. Potter, 103 Wn.App. 62, 69, 11 P.3d 833, 836 (2000).⁴

As stated by the Pederson court, the underlying principles of res judicata are as follows:

Broadly stated, preclusion principles developed under the rubric of res judicata and collateral estoppel are designed to prevent repetitive litigation of the same matters.

A number of facts support this goal, particularly as it relates to claim preclusion. First, and most important, is the integrity of the legal system; a legal system that permits the litigation of the same claims again and again is hardly worthy of the name. There is no assurance that the second or third decision on a claim will be more reliable than the first. Second, is the element of finality and repose, both as a societal matter and as a matter affecting the successful litigant. Third parties, successors in interest, creditors, and other members of the

⁴ It appears the trial court accepted that all of the four elements were met as it never provided any analysis to any of these four factors.

commonality should be able to carry forward their affairs in reliance on a judgment duly entered. The successful party should not be subjected to the vexation and exhaustion of resources that repetitive litigation may entail. Thus, judicial resources are finite. The court should not be burdened by a party's desire for another chance, and perhaps yet another.

Id. at 71, 11 P.3d at 837 (quoting 14 Orland & Tegland, supra 359).

Neither the courts nor successful parties should be burdened "by a party's desire for another chance, and perhaps yet another." Id. at 69, 11 P.3d at 836.

For res judicata to apply, there must be a final judgment on the merits. A final judgment on the merits does not require the litigation to be determined on the merits necessarily, rather, "[i]t is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases." Pederson, 103 Wn.App. at 70, 11 P.3d at 837 (quoting CenTrust Mortgage Corp. v. Smith & Jenkins, P.C., 220 Ga.App. 394, 397, 469 S.E.2d 466, 469 (1996)). A dismissal with prejudice constitutes a final judgment for res judicata purposes. Histle v. Todd Pacific Shipyards Corp., 151 Wn.2d 843, 865, 93 P.3d 108, 114 n. 10 (2004).

Importantly, res judicata applies claims that were not asserted but should have been asserted in a previous action. Histle, 151 Wn.2d at 865, 93 P.3d at 114. As noted by the court in Histle, res judicata applies to

“every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.” *Id.* When reviewing whether an issue should have been litigated in a prior proceeding, Washington courts have declined to set forth an all-inclusive test. Kelly-Hansen v. Kelly Hansen, 87 Wn.App. 320, 941 P.2d 1108 (1997). Instead, the courts must consider a variety of factors such as: (1) whether rights and 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. Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165, 168 (1983); Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn.App. 304, 328, 237 P.3d 316, 329 (2010). Moreover, *a matter asserted for defensive purposes may thereafter be precluded if asserted as an affirmative claim*. See Angel v. Lados, 143 Wash. 622, 255 P. 945 (1927); Crabtree v. McDaniel, 143 Wash. 122, 245 P. 1092 (1927); see also Philip Trautman, CLAIM AND ISSUE PRECLUSION IN CIVIL LITIGATION

IN WASHINGTON, 60 Wash. L. Rev. 805, 818 (1985).⁵ Moreover, there is no legal authority in Washington that indicates another forum's rules are determinative to whether a claim should have been brought in the first lawsuit.

In the situation where an arbitration action is filed after a final order has been entered with a Washington court, it is for the courts to decide the question of whether res judicata bars a subsequent attempt to arbitrate a matter after a court has entered a final judgment on the merits. See, Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn.App. 304, 326, 237 P.3d 316, 328 (2010).⁶ In Yakima, the court was presented with the question of whether res judicata applied to a subsequent attempt to arbitrate a claim. The court noted that several federal courts have determined arbitrability is a question for the courts to "protect the finality and integrity of prior judgments." Id. at 326, 237 P.3d at 328. The court declined to rule on the issue explicitly, but did go through a res judicata analysis to conclude: "[e]ven if res judicata is then

⁵ Professor Trautman's article has been cited by 78 court opinions. Kathleen McGinnis, REVISITING CLAIM AND ISSUE PRECLUSION IN WASHINGTON STATE, 90 Wash. L. Rev. 75, 75 (2015).

⁶ See also Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1134 (9th Cir. 2000); John Hancock Mut. Life. Ins. Co. v. Olick, 151 F.3d 132, 137-38 (3rd Cir. 1998).

a threshold question of arbitrability for the courts, we conclude that the court erred in *applying the doctrine of res judicata* in a way that barred the Guild's grievance." Id. (emphasis added).

Finally, judgements and orders that are reserved by an appellate court, but not vacated, are still given preclusive effect under *res judicata*. Reed v. Allen, 286 U.S. 191, 199 (1932). "The rule has been settled for this Court that, where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata*, although the first judgment [is] subsequently reversed." Id. at 199.

2. Seipp Acknowledged and Did Not Contest That Cornerstone Established "Identity of Party" and "Quality of Persons" Under Res Judicata Analysis Before the Trial Court

Seipp did not contest either "identity of party" or the "quality of the persons" factors before the trial court, acknowledging that these two factors had been satisfied by Cornerstone. Vol. I, p. 66, Ins. 2-11. Instead, the arguments centered on whether the First Lawsuit and the arbitration action had the same cause of action and subject matter. Vol. I, p. 66, Ins. 2-11. Thus, these "identity of party" and "quality of person" factors are satisfied.

3. Cornerstone Established the Subject Matter Factor Under the Res Judicata Test

Turning to the “subject matter” factor, it should be stressed that there is very little guidance from the courts on this factor. As Professor Trautman wrote: “of the four elements, the first, the same subject matter, has generated the least discussion and the least guidance as to its meaning.” 60 Wash. L. Rev. 804, 812-813. Professor Trautman went on to conclude:

Another common feature in the cases is that, after listing the requirements of subject matter and cause of action separately, the court will unite the two in its discussion. What usually receives specific treatment is the nature of the cause of action or claim. That analysis is more helpful.

60 Wash. L. Rev. 804, 813. This analysis was confirmed in the most recent cases and The Washington Practice Series. See Pederson, 103 Wn.App. at 73, 11 P.3d at 838 (concluded in brisk fashion cases had same subject matter); Karl B. Tegland, 14A Wash. Prac. Civil Procedure 35:25 (2nd Ed).⁷

Here, the subject matter factor is met because Seipp’s arbitration action centers on the same subject matter as the First Lawsuit, naming the I.C. agreement, Seipp’s subsequent actions upon leaving

⁷ Tegland wrote: “The issue of whether the subject matter of the two proceedings is the same usually overlaps with the issue of whether the cause of action or claims are also the same.” Karl B. Tegland, 14A Wash. Prac. Civil Procedure 35:25 (2nd Ed).

Cornerstone's agency, and Cornerstone's allegations set forth in the First Lawsuit.

This brief will now address the cause of action element with each of Seipp's arbitration actions.

4. The Trial Court Erred When it Determined the Failure to Arbitrate Claim In Seipp's Arbitration Action Was Not the Same Cause of Action Present in the First Lawsuit

The trial court erred when it determined Seipp's Failure to Arbitrate Claim was not the same cause of action that was present in Cornerstone's First Lawsuit, despite acknowledging: "The whole issue with the original lawsuit was whether or not the arbitration was required." Vol. I, p. 115, Ins. 18-20. It is clear both the First Lawsuit and Seipp's arbitration action centered on Cornerstone's alleged failure to arbitrate. Thus, Seipp's arbitration action shares the same cause of action as the First Lawsuit.

In the First Lawsuit, Seipp explicitly brought forth his claim that Cornerstone failed to arbitrate, asserting that the trial court must compel arbitration. In addition, Seipp asserted "breach of contract" as an affirmative defense in his answer. CP 169. The remedy he sought at that time was for the trial court to order arbitration. He did not seek any monetary damages or fees when he requested the trial court to compel arbitration. CP 169. Although Judge Cooney's order was reversed by

Division 3, Seipp resolved the case with Cornerstone by stipulating to dismissal and paying Cornerstone \$20,000.

Now, in the subsequent matter, Seipp seeks monetary damages because Cornerstone failed to arbitrate. This is the same claim (breach of contract/must arbitrate) that was presented in the First Lawsuit. Seipp had every opportunity to seek damages as a result of Cornerstone's alleged failure to arbitrate in the First Lawsuit but failed to do so. Furthermore, the fact he is utilizing a claim for offensive as opposed to defensive purposes in the subsequent action does not assist Seipp in escaping the reach of res judicata, because a claim being used for defensive purposes cannot be used for offensive purposes in a subsequent lawsuit. See Angel v. Lados, 143 Wash. 622, 255 P.945 (1927); see also Philip Trautman, CLAIM AND ISSUE PRECLUSION IN CIVIL LITIGATION IN WASHINGTON, 60 Wash. L. Rev. 805, 818 (1985).

It is anticipated that Seipp will assert that res judicata does not apply in this case because he is seeking different remedies in his arbitration action.⁸ However, legal authority provides that res judicata applies to subsequent claims that are based on the same set of facts,

⁸ One of those remedies was found to have breached the settlement agreement. CP 1345-1354.

regardless of the remedies sought. Bill v. Gattavaria, 34 Wn.2d 645, 209 P.2d 457 (1949)⁹; Sound Build Homes, Inc. v. Windermere Real Estate/South, Inc., 118 Wn.App. 617, 629, 72 P.3d 788, 795 (2003). Seipp elected to compel arbitration and not seek monetary damages. He resolved the First Lawsuit by paying \$20,000 to Cornerstone.

It is further anticipated that Seipp will argue his “breach of contract” was only an affirmative defense and not subject to res judicata. This contention ignores Angel v. Ladous. Further, it ignores Washington civil rules, which provide: “When a party mistakenly designates 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.” CR 8(c). There is no “breach of contract” affirmative defense. In short, Seipp cannot escape res judicata by masquerading his breach of contract and failure to arbitrate claim as an affirmative defense.

Finally, it is anticipated that Seipp will assert he did not know the full extent of his damages until after the order dismissing the First

⁹ Plaintiff sued a landowner and others for trespass; after final judgment for landowner, plaintiff sued landowner for unjust enrichment based on same facts; new claims precluded.

Lawsuit was entered, stressing that he lost business because he was preoccupied with the lawsuit. This assertion, however, does not comport with Washington law because contract breaches accrue *at the time of breach*. Schriener Farms, Inc. v. American Tower, Inc., 173, Wn.App. 154, 160, 293 P.3d 407, 411 (2013). Seipp knew he can make a claim for “failure to arbitrate” prior to filing his answer because he alleged “contract breach” as an affirmative defense. The fact that his damages were not final is irrelevant for res judicata purposes. CP 169.

Seipp’s breach of contract claim and failure to arbitrate claim were the same cause of action present in the First Lawsuit. Cornerstone had a right to rely on Seipp’s allegations and answer when it determined to resolve the case and accept Seipp’s settlement offer of \$20,000. Therefore, the doctrine of res judicata bars Seipp’s failure to arbitrate claim.

5. The Trial Court Erred When it Determined Malicious Prosecution Should Not Be Asserted in the First Lawsuit

As set forth in the fact section, the trial court’s decision as to why res judicata did not apply to Seipp’s claim for malicious prosecution is not clearly set forth in the record. However, utilizing the factors set forth in Rains, it is clear that the malicious prosecution claim is Seipp’s attempt to

re-litigate the First Lawsuit and recoup the \$20,000 he paid to Cornerstone to settle.

Here is a summary of Seipp's allegations to support his malicious prosecution claim:

(1) Cornerstone filed a lawsuit in Superior Court when they should have filed in CBA;

(2) Cornerstone maliciously prosecuted the case in an improper venue;

(3) Cornerstone confused the court by claiming they had a listing or pocket listing;

(4) Court of Appeals determined case should be in CBA;

(5) Cornerstone took an active role in misleading the court; and

(6) Cornerstone did not have reasonable grounds to support case.

CP 101-108.

Most of Seipp's contentions can be dismissed out of hand as simply inaccurate. First, the Court of Appeals determined that *some* of Cornerstone's claims should be placed in CBA. The trade secret issue, for example, was properly before the Superior Court. And Seipp settled this by paying Cornerstone \$20,000. Second, there was no finding by any Washington State judge that Cornerstone failed in its burden of proof or

actively misled any judicial officer when the case was dismissed. CP 98-99.

In addition, the allegations Seipp set forth in his Arbitration Action require the *same evidence* that would have been required in the First Lawsuit. Seipp apparently wants to put Cornerstone to task to prove: (1) that it possessed trade secrets; (2) that it had listings or a pocket listing for subject property, and (3) that it had "reasonable grounds" to support its claims in the First Lawsuit. This would require Cornerstone to produce the same evidence as it would have in the First Lawsuit, such as whether Cornerstone had negotiated terms of a sale with EZ Properties prior to Seipp's departure from Cornerstone's employ. Instead, Seipp resolved the First Lawsuit by agreeing to pay \$20,000 to dismiss Cornerstone's claims.

Seipp's malicious prosecution claim also arises from the *same transactional nucleus of facts* that were present in the First Lawsuit, namely the CBA terms, I.C. agreement between Seipp and Cornerstone, and the appropriateness of filing an action in Superior Court. These are the same facts and transactions that were disputed in the First Lawsuit. Although Division 3 reversed Judge Cooney's order denying his motion to

arbitrate, Seipp did not vacate the order, but instead agreed to pay \$20,000 to Cornerstone so it would dismiss its case.

These points are important because the arbitrator will evaluate the same "*infringement*" of rights that were at issue in the First Lawsuit, specifically, Seipp's Independent Contractor Agreement and his departure from Cornerstone's agency. Cornerstone agreed to dismiss the First Lawsuit against Seipp in exchange for \$20,000. Now, Seipp is attempting to *destroy those rights Cornerstone established in the First Lawsuit* through settlement by forcing Cornerstone to re-litigate the same issues in a CBA arbitration.

So in essence, Seipp's malicious protection claim misstates this Court's prior decision and uses the same set of facts and evidence set forth in the First Lawsuit. Seipp seeks to destroy the rights Cornerstone established in the First Lawsuit out of spite. Seipp's malicious prosecution is driven more by spite than any actual recognized legal harm.¹⁰

¹⁰ It is important to remember that Seipp attempted to recoup his attorney fees in the CBA arbitration that he incurred in the First Lawsuit despite agreeing to settle the case by paying \$20,000 and signing an agreement that each party bore their own attorney fees. CP 1345-1354. This was determined to be a breach of the settlement agreement. CP 1345-1354.

Therefore, his malicious prosecution claim must be barred by res judicata.

6. The Trial Court Erred When it Determined Seipp’s “Tortious Interference” Claim Was Not the Same Cause of Action Present In the First Action

Seipp’s tortious interference claim should have been brought forth in the First Lawsuit.¹¹ Res judicata applies to every point “which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.” Histle, 151 Wn.2d 843, at 93 P.3d at 114 n. 10. The general rule for a tort claim is that the cause of action accrues at the time the act or omission occurs. Matter of Estate of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690, 694 (1992).¹² The exact amount a party has been damaged does not

¹¹ To assert a successful tortious interference claim, a plaintiff must prove: (1) the existence of a valid relationship or business expectancy, (2) the defendant had knowledge of relationship/expectancy, (3) there was an intentional interference causing breach, (4) defendant interfered for an improper purpose or used an improper means, and (5) resulting damage. Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288, 300 (1997).

¹² The “discovery rule” only applies in the narrow set of torts where injured parties do not, or cannot, know they have been injured. Matter of Estates of Hibbard, 118 Wn.2d at 744-45. In those situations, cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. The discovery rule only delays accrual until the plaintiff knows it has been injured, not until the plaintiff is able to calculate the full

need to be finalized. Woods View, LLC v. Kitsap County, 188 Wn.App 1, 19-20, 352 P.3d 807, 816-17 (2015).¹³

In reviewing the arbitration complaint, Seipp's entire tortious interference claim rests on the fact Cornerstone filed a lawsuit in Spokane Superior Court:

As a direct result of Cornerstone filing a lawsuit against me they interfered with my business relations causing me to lose more than one significant transaction....

CP 410 (emphasis added). However, whether Cornerstone's decision to file in Superior Court was appropriate was directly at issue in the First Lawsuit and that case was settled by Seipp.

Moreover, by his own admission, Seipp knew there was a potential claim for tortious interference when Cornerstone began litigating the First Lawsuit. The claim arose from the same set of facts—the Independent Contractor Agreement between Cornerstone and Seipp—and would require the same type of proof. Indeed, Cornerstone had filed a tortious interference claim against Seipp arising from the same

extent of the injury. Mayer v. City of Seattle, 102 Wn.App. 66, 76, 10 P.3d 408, 413 (Div. 1, 2000)

¹³ The court held that the cause of action for the intentional interference accrued when the county exceeded the time period required by statute to make a decision, and there was no need to wait until all of the damages had been determined and quantified in order for it to accrue.

conduct. Seipp knew Crapo decided to not list with him in January of 2017 due to the ongoing litigation involving Cornerstone, and spent the First Lawsuit luring Cornerstone into a position of settlement all the while intending to file a CBA arbitration against it. Seipp managed to obtain a signed statement from Crapo on August 17, 2017, that he had listed the sale of his duplex portfolio worth \$32,000,000 with a different brokerage company. This was five days before the stipulation and order of dismissal was entered with the court on August 22, 2017. The original contract for sale of that property was executed on June 16, 2017.

Further, and importantly, Seipp's claim is groundless under Washington law and a CR 12(b)(6) analysis. Washington courts have held that exercising one's legal interests is not improper interference. Leingang, 131 Wn.2d at 157, 930 P.2d at 300; See also McNeal v. Allen, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980) (that allegedly libelous statements set forth in the complaint by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the relief sought.); see also Jeckle v. Crotty, 120 Wash. 374, 386, 85 P.3d 831, 938 (2004).

The trial court appeared to recognize this issue in its remarks regarding “perverting the court” when it noted that Cornerstone’s lawsuit was “protected.” Vol. I, p. 118.

Seipp will likely argue that the CBA does not have to follow Washington law and, therefore, Washington law is irrelevant. The relevant question is *not* whether another forum would deem the claims lawful, but rather, whether the claims *should have been brought in the original action*. Indeed, the purpose behind the doctrine of res judicata is to prevent repetitive litigation and secure finality. Pederson, 103, Wn.App. at 69, 11 P.3d at 836. Neither the courts nor successful parties should be burdened “by a party’s desire for another chance, and perhaps yet another.” Id. By holding that another forum’s rules are determinative to a res judicata analysis would in essence defeat the underlying policies of the doctrine. A party could simply file claims in different forums—such as a CBA arbitration—until he/she secured a win so long as the claims are deemed “unlawful” by Washington courts because res judicata cannot be applied due to another forum’s rules. This would amount to constant collateral attacks on valid judgments or orders.

Cornerstone filed the First Lawsuit and Judge Cooney denied Seipp's motion to compel arbitration. Judge Cooney's decision was reversed, but Seipp agreed to pay Cornerstone \$20,000 to resolve its claims and the case was dismissed, which included Cornerstone's own claim for tortious interference. Seipp's claim had accrued when he filed his answer in the First Lawsuit and he should have alleged the claim at that time. Therefore, Seipp's arbitration action concerning tortious interference is barred by res judicata.

7. The Trial Court Erred When it Determined Seipp's "Perverting the Court" Claim Was Not Barred by Res Judicata

The trial court erred when it declined to apply res judicata to bar Plaintiff's "perverting the court" claim.¹⁴ Seipp specifically relied on issues at issue in the original action to assert this claim against Cornerstone. However, renaming or reclassifying previous causes of action that are based on the same set of facts are barred by res judicata. Trane Co. v. Randolph Plumbing & Heating, 44 Wn.App. 438, 722 P.2d 1325 (1986), (first action on unjust enrichment theory; second action on conversion theory and barred by res judicata).

¹⁴ To this counsel's knowledge, there is no "perverting the court" cause of action in Washington.

In one instance, Seipp alleged, “Cornerstone stated that I had stolen trade secrets, however showed no evidence.” However, the trade secret issue was subject to the First Lawsuit and settled by the parties. Even Division 3 acknowledged that Cornerstone’s trade secret claim was properly before the Superior Court and could proceed accordingly.

In another section, Seipp alleged that “Cornerstone stated they had a listing for the property in question.” The “property in question” is the apartment complex at issue in the First Lawsuit. Again, this matter was front and center in the original action and was resolved by Seipp when he paid \$20,000 to Cornerstone.

Next, Seipp alleged that Cornerstone perverted the court by filing in Spokane County. This court determined that *some* of the issues brought forward by Cornerstone in the First Lawsuit should have been submitted to CBA. Thus, Seipp relays a blatant misrepresentation of the facts to make his point to the CBA arbitrators.

Finally, Seipp alleged that Cornerstone made false statements about him in the action. Again, these statements were at issue in the case *and Seipp settled*. He cannot now re-litigate the same issue in the CBA.

Therefore, the trial court erred by declining to apply *res judicata* to bar Seipp’s “perverting the court” claim.

C. The Trial Court Erred When It Determined Seipp's Various Claims Were Permissive Counterclaims And Not Compulsive Counterclaims

The trial court erred by holding that all of Seipp's claims were permissive counterclaims. A party who fails to assert a compulsory counterclaim, either at the time of serving an answer or later with leave of court, is barred from asserting the claim in a subsequent action. Krikava v. Webber, 43 Wn.App. 217, 716 P.2d 916 (1986). The touchstone of a 13(a) analysis is whether the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." CR 13(a). Under the "logical relationship" test approved by Washington courts, trial courts must ask whether the claim and counterclaims are "logically related." Under the logical related test:

[C]ourts should give the phrase "transaction or occurrence that is the subject matter" of the suit a broad realistic interpretation in the interest of avoiding a multiplicity of suits. Subject to the exceptions, [not instantly relevant] any claim that is logically related to another claim that is being sued on is properly the basis for a compulsory counterclaim; only claims that are unrelated or are related, but within the exceptions, need not be pleaded.

Schoeman v. New York Life, Co., 106 Wn.2d 855, 865, 726 P.2d 1, 6 (1986). Furthermore, the term "transaction" is a word of flexible meaning. Id. at 866, 726 P.2d at 6. "It may comprehend a series of

many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” Id. (quoting Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926)).

Furthermore, CR 13(a) must be liberally construed to avoid multiplicity of lawsuits. Id. at 864. The purpose of CR 13(a) is to discourage “circuitry of action” and to encourage speedy resolution of all controversies between the parties in one action. Chew v. Lord, 143, Wn.App. 807, 813, 181 P.3d 25, 29 (2008).

Here, the trial court erred when it determined Seipp’s arbitration claims were not compulsory counterclaims. All of Seipp’s claims are logically related to Cornerstone’s claims brought in the First Lawsuit. In fact, Seipp’s arbitration claims are simply the different side of the coin to Cornerstone’s claims in the First Lawsuit. In his arbitration complaint, Seipp accused Cornerstone of misstating facts in the First Lawsuit because, in his mind, Cornerstone never had a real estate listing for the apartments that were at issue in the First Lawsuit. Further, Seipp alleges Cornerstone never possessed any trade secrets but this issue was at the forefront of the First Lawsuit. If Seipp believed Cornerstone was misrepresenting the truth in the original action, then he should have

brought his own claims against Cornerstone. Instead, he settled the claim by paying Cornerstone \$20,000 and dismissing the lawsuit with prejudice.

The trial court in this matter never applied the logical relationship test to any of Seipp's arbitration claims. Instead, the trial court was seduced by the CBA arbitration rules and focused on the fact the CBA would potentially consider the claims. By determining that claim—no matter how silly—was valid in a CBA arbitration, the trial court concluded that none of Seipp's claims were compulsory counterclaims that should have been presented in the First Lawsuit. However, a 13(a) analysis does not rest on the validity of the claim in any given forum, but rather whether the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." CR 13(a). The court erred and misapplied the law as set forth in Schoeman v. New York Life, Co. Instead, the trial court sanctioned a collateral attack on a prior judgment and order through the arbitration process and "circuitry of action." Chew, 143 Wn.App. at 813, 181 P.3d at 29; C.f., Reed v. Allen, 286 U.S. 191, 199 (1932) (collateral attack).

In the end, Seipp was essentially displeased that Cornerstone filed the First Lawsuit which resulted in him paying Cornerstone \$20,000. He asserts that Cornerstone should have sought arbitration and not even

filed the First Lawsuit. He accuses Cornerstone of lying because, in his mind, Cornerstone never had a listing for the apartments that were at issue in the First Lawsuit. He accuses Cornerstone of lying to the court about possessing trade secrets. His allegations cumulate in the conclusion that he lost business because Cornerstone filed a lawsuit. *However*, Seipp settled Cornerstone's claims by paying \$20,000, despite knowing full well he was allegedly losing business.

Now, still apparently upset, Seipp files a CBA arbitration demanding compensation from Cornerstone for filing the First Lawsuit. However, the *reasons* Seipp believes he has a claim go to the same facts and circumstances that underlie the First Lawsuit, i.e., whether Seipp breached an I.C. agreement; whether Cornerstone in fact possessed trade secrets; whether Cornerstone in fact had a listing for the apartments; whether the case should have been arbitrated. Indeed, for Cornerstone to rebut Seipp's various allegations, it essentially must provide evidence that it possessed trade secrets and evidence that it had a listing for the apartments. These claims all arise out of the transaction or occurrence that is the subject matter of Cornerstone's First Lawsuit.

As such, Seipp's claim arises from the same transaction and occurrences of the First Lawsuit and he is barred from asserting the claim in a subsequent arbitration.

D. The Court Abused Its Discretion When It Failed To Issue A Permanent Injunction To Prevent Seipp From Moving Forward With His Arbitration Action Based On Allegations Set Forth In His Arbitration Action

1. General Law Concerning Permanent Injunctions

The trial court erred when it failed to enjoin Seipp from proceeding with his CBA arbitration. A party who seeks a permanent injunction must show: (1) he has a clear legal or equitable right, (2) has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury to him. Kucera v. State, Dept. of Transp., 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). Other factors the court can consider are: (a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff, if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interest of third persons and of the public, and (g) the practicability of framing and enforcing the order or

judgment. Holmes Harbor Water Co., Inc. v. Page, 8 Wn.App. 600, 603, 508 P.2d 628, 630-31 (1973). Injunctions have been granted by other courts to protect prior judgments. In re Y & A Group Securities Litigation, 38 F.3d 380, 383 (8th Cir. 1994); see also Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 498-99 (5th Cir.1986) (The court of appeals ruled that the district court should issue an injunction to stay the arbitration from proceeding).

2. Cornerstone Has a Clear Legal and Equitable Right to Protect the Prior Dismissal of the First Lawsuit

Here, Cornerstone has a clear legal and equitable right to protect its settlement agreement and dismissal of the First Lawsuit. Cornerstone filed a lawsuit and Judge Cooney agreed with Cornerstone that the matter was not subject to mandatory arbitration with the CBA. After Division 3 reversed Judge Cooney but before the Washington Supreme Court was to decide whether to grant discretionary review, Cornerstone and Seipp came to a settlement which involved dismissing the First Lawsuit. Given Seipp's claims in his arbitration action are barred by the doctrine of res judicata and CR 13(a), Cornerstone has a right to seek that Seipp's arbitration action be enjoined.

3. Cornerstone Has a Well Grounded Fear of Immediate Invasion of its Legal Rights

Second, Cornerstone has a well-grounded fear of immediate invasion of that right. Seipp has already submitted a demand for arbitration with the CBA seeking nearly \$2 million in alleged damages. It will cost Cornerstone substantial funds to defend an action that is barred by the dismissal with prejudice from the First Lawsuit.

4. Seipp's Arbitration Action Will Result in Actual or Substantial Injury

Third, the acts that Cornerstone is complaining of will result in actual and substantial injury. Economic harm may qualify as irreparable where a plaintiff establishes that the harm "is so severe as to cause extreme hardship to the business or threaten its very existence." Coalition for Common Sense in Gov't Procurement v. United States, 576 F.Supp.2d at 168 (internal quotations omitted); see Toxco Inc. v. Chu, 724 F.Supp.2d 16, 31 (D.D.C.2010); TD Int'l, LLC v. Fleischmann & Tertium Datur Int'l, LLC, 639 F.Supp.2d at 48. In the case of Tyler Pipe Industries, Inc. v. Department of Revenue, 96 Wn.2d 785, 794-95, 638 P.2d 1213 (1982), the court recognized the principal that economic damages could constitute irreparable harm to a business if it was unable to pay the debt and it drove the business into bankruptcy.

There was no evidence submitted that the tax at issue would cause irreparable injury to the plaintiff. The critical consideration under this exception is the effect that the purported economic harm will have on a movant's business or its very existence—not any monetary amount *per se*.

Before delving into the analysis as to whether Cornerstone showed sufficient harm to justify an injunction, it must be stressed that this element is not necessary when the court is protecting prior judgments. Federal courts have issued an injunction preventing a subsequent arbitration from taking place in the *res judicata* context without engaging in an analysis of whether the subsequent arbitration would result in irreparable injury. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1134 (9th Cir. 2000); John Hancock Mut. Life. Ins. Co. v. Olick, 151 F.3d 132, 137-38 (3rd Cir. 1998).

Indeed, the cases recognized the court's inherent authority to maintain and protect the legal effect of the previous judgment.¹⁵ This is consistent with Washington cases which have found the authority to

¹⁵ In Washington, every court of justice has inherent power "(4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein." RCW 2.28.010(4)

issue injunctions without going through the factors of whether there is irreparable injury or damage to the plaintiff. The Washington Supreme Court expressly stated that there is no need to weigh the harm when seeking to enforce the covenant. Hollis v. Garwall, Inc., 137 Wn.2d 683, 699, 974 P.2d 836, 845 (1999) (no showing of substantial damage from the violation of a restrictive covenant need be shown to enjoin a violation). In the case of Board of Regents of University of Washington v. City of Seattle, 108 Wn.2d at 549, 741 P.2d at 13, the court found that the University was equitably estopped to challenge the previous judgment establishing ownership of an easement over the street, and decided the matter on that basis alone.¹⁶ The court entered an injunction to remove the skybridge. The court did not evaluate the relative harm to the City in order to enforce the property rights and the previous judgment, and to issue the mandatory injunction to remove the skybridge.

¹⁶ Although the parties' briefs addressed the theory of res judicata and other equitable theories, the court decided the issue of equitable estoppel.

If this Court requires a finding of substantial harm, Cornerstone has met that burden. Cornerstone faces the prospect of having to spend considerable time and resources defending Seipp's arbitration action. There is no legal or factual basis for these claims. Moreover, In this case, Berkshire's claims of \$1,920,000 against Cornerstone in the CBA are substantial and threaten its very existence. CP 720-722 Cornerstone's gross income for 2017 was \$823,739. CP 717-718. The gross income for Cornerstone for 2016 was \$895,820. CP 717-718. The gross income for Cornerstone for 2015 was \$741,365. CP 717-718. The gross income for Cornerstone for the year 2014 was \$592,003. CP 717-718. Berkshire's claim of claims of \$1,920,000 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. Cornerstone would lose substantial customer base and goodwill once it filed for bankruptcy. CP 720-722.

There is obviously a substantial risk that an award may be entered for substantial damages against Cornerstone and its officers. The court reviewing an arbitrator's award is very limited. courts may not be able to vacate an award even if it is contrary to the law unless the legal error is

apparent from the face of an arbitration award. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 239, 236 P.3d 182, 185 (2010).

5. Holmes' Factors Support Cornerstone's Motion for an Injunction

Turning to the other factors set forth in Holmes, it is clear Cornerstone is entitled to an injunction. Cornerstone has a right to finality with its dealings with Seipp. It resolved its dispute with Seipp in a timely fashion. Seipp, on the other hand, waited for the most opportune time to file his arbitration action, forcing Cornerstone into further expensive legal proceedings. Cornerstone has no remedy available other than to seek an injunction from a court to enjoin Seipp from proceeding into an arbitration. Seipp had his chance to litigate his claims at the same time Cornerstone filed its lawsuit, but he failed to do so. He paid \$20,000 to Cornerstone so Cornerstone could not appeal Division 3's decision to the Washington Supreme Court.

Therefore, Seipp must be enjoined from proceeding to CBA arbitration.

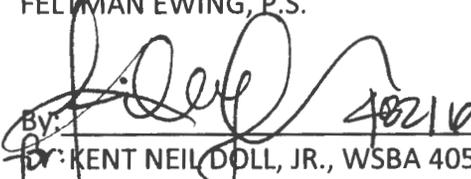
V. CONCLUSION AND REQUEST

Cornerstone respectfully requests this Court reverse the trial court's decision and hold that Seipp's arbitration claims are barred by CR 13(a)

and res judicata. Further, Cornerstone requests Seipp be permanently enjoined from pursuing his arbitration claim. Finally, Cornerstone requests its costs pursuant to RAP 14.1(a).

DATED this 18th day of September 2018.

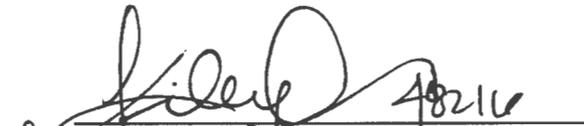
FELTMAN EWING, P.S.


By: _____
for: KENT NEIL DOLL, JR., WSBA 40549
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 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., Suite 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



KENT NEIL DOLL, JR.