Case No. 729497-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JEANNE HAWKINS and JULIE WILSON,
Plaintiffs-Appellants,

v.

EMPRES HEALTHCARE MANAGEMENT, LLC f/k/a EVERGREEN HEALTHCARE MANAGEMENT, LLC; and EVERGREEN AT TALBOT ROAD, LLC d/b/a TALBOT CENTER FOR REHABILITATION AND HEALTHCARE
Defendants-Respondents

Appeal relating to King County Superior Court,
Case No. 14-2-26963-3 (Judge Chad Allred)

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff Jeanne Hawkins underwent back surgery in June 2007 and developed a serious post-operative infection. She was placed on intravenous antibiotics and transferred to Talbot Center for Rehabilitation and Healthcare ("Talbot Center") on July 9, 2007 for post-hospital nursing care. Over the course of her care at Talbot Center, Ms. Hawkins experienced a toxic reaction to her antibiotics and was discharged to a hospital for acute care on July 30, 2007. At or near the time of her discharge, a copy of Ms. Hawkins' medical records was provided to her daughter, Julie Wilson.

In December, 2008, Ms. Hawkins brought suit against defendants Evergreen Healthcare Management, LLC and Talbot Center, Evergreen at Talbot Road, LLC ("Talbot"), alleging that her toxic reaction and resulting injuries were caused by Talbot's failure to follow-up with its on-call physician, Dr. John Chen, regarding certain "abnormal lab reports" and in continuing her intravenous antibiotics for fourteen days longer than prescribed by her infectious disease specialist.

After a period of discovery – but apparently without deposing Talbot's alleged agent, Dr. Chen – plaintiff agreed to settle for $237,500. The Settlement Agreement released any and all claims for personal injuries arising out of Ms. Hawkins' care at Talbot Center. It also released any claim that Julie Wilson might have arising out of her mother's care at Talbot

Center. The Settlement Agreement did not release any potential claims Ms. Hawkins had against Dr. Chen.

Ms. Hawkins then filed suit against Dr. Chen. In that case, Dr. Chen obtained Ms. Hawkins' medical records from Talbot Center, and at mediation, he produced certain records indicating that he had reviewed the "abnormal lab reports" and instructed Talbot to discontinue Ms. Hawkins' antibiotic treatment on July 23, 2007 – a week before her transfer to the hospital, but still a week longer than the period prescribed by Ms. Hawkins' infectious disease specialist. It is not clear what effect these records had on the settlement with Dr. Chen, if any.

After settling with Dr. Chen, plaintiffs filed their Petition[1] in this case, alleging that the medical records provided to Ms. Wilson at or shortly after Ms. Hawkins' discharge from Talbot Center had been "altered" and that certain communications with Dr. Chen had been omitted. Plaintiffs allegedly "relied" on these records in settling with Talbot, and they asserted a variety of fraud-based claims seeking rescission of the Settlement Agreement and additional damages for Ms. Hawkins' personal injuries. In effect, plaintiffs demanded a "do-over" of their prior settlement based on the

[1] Although the pleading initiating the current lawsuit is properly denominated a "complaint" (*see, e.g.,* CR7(a)), Talbot will use plaintiffs' term "Petition."

newly discovered medical records. The superior court correctly dismissed plaintiffs' Petition based on the Settlement Agreement, and this appeal ensued.

II. ISSUES PRESENTED FOR REVIEW

A. *Assignments of Error*

Talbot assigns no error to the superior court's correct decision to dismiss plaintiffs' Petition in its entirety.

B. *Issues Pertaining to Assignments of Error*

Talbot disagrees with plaintiffs' statement of issues. Talbot believes this appeal presents four issues which are more properly stated below:

1. Did the superior court properly dismiss plaintiffs' Petition under CR 12(b)(6) where the allegations in the Petition along with the documents referenced and attached to the Petition established as a matter of law that all of plaintiffs' claims were released by the Settlement Agreement?

2. Did the superior court properly construe the Settlement Agreement as releasing any and all claims arising out of Jeanne Hawkins' stay at Talbot Center, regardless of whether plaintiffs reasserted those claims in a later lawsuit under new legal theories or based on new evidence?

3. Did the superior court properly dismiss plaintiffs' claim for declaratory relief based on "claim preclusion" where plaintiffs sought a declaration that the Settlement Agreement did not bar the exact claims

Jeanne Hawkins had alleged in the underlying lawsuit and which were dismissed by a final judgment of dismissal?

4. Did the superior court correctly conclude that plaintiffs could not rely on the alleged misrepresentations and omissions in Ms. Hawkins' medical records where the Settlement Agreement contained a "no-reliance" clause and where the alleged misrepresentations and omissions went to the very issue in dispute, *viz.*, whether Talbot was negligent in failing to discontinue Ms. Hawkins' antibiotic treatment?

III. STATEMENT OF THE CASE

Talbot does not accept plaintiffs' statement of the case because it is not "a fair statement of the facts and procedure relevant to the issues presented for review, without *argument*." RAP 10.3(a)(5). Significantly, plaintiffs argue that the trial court erred in "condon[ing] Talbot's perjury and falsification of medical records." Appellant's Brief at p. 7. No court has found that Talbot "falsified" any medical records or that it committed "perjury." Talbot vigorously denies that it falsified Jeanne Hawkins' medical records, and plaintiffs' unsupported jury argument should be ignored. The relevant facts are as follows:

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/ / /

/ / /

A. *The Underlying Lawsuit*

Or about September 22, 2008, Jeanne Hawkins ("plaintiff") filed a lawsuit against Talbot entitled *Jeanne Hawkins v. Evergreen Healthcare Management LLC, Evergreen at Talbot Road, LLC dba Talbot Center for Rehabilitation and Healthcare and Unknown John Does*, Case No. 08-2-32455-9-KNT (the "underlying lawsuit"). CP 4 (Petition ¶4.6); *see also* CP 60-70 (complaint from underlying lawsuit) ("complaint"). The complaint in the underlying lawsuit alleged that plaintiff was a patient at the Talbot Center from approximately July 9, 2007 until her discharge on July 30, 2007. CP 61 (Complaint ¶2.4) and that during her stay at the Center, she was administered excessive amounts of antibiotics for treatment of an infection, resulting in temporary renal failure and persistent "dizziness and weakness." *Id.* (Complaint ¶¶4.8-4.13). Plaintiff asserted numerous claims against Talbot including "general negligence," "statutory negligence violation of federal law," "statutory negligence violations of Ch. 74.34 RCW" (vulnerable person statute), "statutory negligence violations of Ch. 74.42 RCW and WAC" (relating to regulation of nursing homes), "statutory negligence violations of Ch. 70.129 RCW" (relating to rights of patients in long-term care facility), "medical negligence," "informed consent," "corporate negligence," "respondeat superior," and violations of the Consumer Protection Act. RCW 19.86. *See id.*

The gravamen of the underlying lawsuit was that the alleged over-administration of antibiotics resulted from Talbot's failure to communicate with plaintiff's infectious disease specialist, "Dr. Hori," and that "contrary to Dr. Hori's orders and recommendations, Talbot Center administered the [antibiotics] for longer than prescribed or recommended." *Id.* (Complaint ¶4.8). Rather than communicating with Dr. Hori, Talbot communicated with its on-call physician, John Chen, M.D., who was allegedly an "employ[ee] and or agent of Talbot Center." *Id.* (Complaint ¶4.6.)

Plaintiff further alleged that Dr. Chen failed to "monitor" her lab work and failed to instruct Talbot to discontinue her antibiotics before she sustained kidney damage. *Id.* (Complaint ¶¶4.10-4.11.) Although plaintiff alleged that Talbot was responsible for the negligence of Dr. Chen under the doctrine of respondeat superior (*see id.* (Complaint ¶4.6 & ¶13.1)), plaintiff, for whatever reason, did not name Dr. Chen as a defendant or later seek to add him as a defendant in that case. In the underlying litigation, Talbot then filed an answer (*see* CP 72), the parties engaged in discovery, and pursuant to CR 26, the parties disclosed their "possible primary witnesses." Notably, plaintiff disclosed Dr. Chen as one of her expert witnesses, stating that he would testify "regarding facts and circumstances surrounding plaintiff's injuries." *See* CP 79.

The underlying lawsuit settled prior to trial for $237,500. CP 17-22. The parties' Settlement Agreement also disposed of any claims that could be brought by plaintiff's daughter, Julie Wilson. *Id.* The Settlement Agreement provided in part:

> "[Plaintiff releases Talbot] from all claims and causes of action, which may ever be asserted by the undersigned, her executors, administrators, successors, assigns or others, whether such claims or causes of action are presently known or unknown, which in any way arise out of the facts stated in the [underlying Complaint], or which in any way involve the diagnoses, care and treatment of Jeanne Hawkins during her stay at Talbot Center for Rehabilitation and Healthcare from July 9, 2007 to July 30, 2007.
>
> The undersigned acknowledges that she has accepted the above-referenced consideration as full compensation for any and all injuries, damages and losses (past, present and future, known or unknown), which were or every could be claimed in connection with the above-referenced diagnosis, care and treatment, or failure to diagnose or treat.
>
> **The undersigned warrants that no promise or inducement has been offered except as herein set forth and that this release is executed without reliance upon any statement or representation concerning the nature and extent of the injuries and/or damages, and/or legal liability therefor.**"

CP 17-18 (emphasis added). The following text appears above plaintiffs' signatures:

> "I HAVE COMPLETELY READ THIS FINAL RELEASE AND SETTLEMENT AGREEMENT AND FULLY UNDERSTAND AND VOLUNTARILY ACCEPT IT FOR THE PURPOSE OF FINAL RESOLUTION AND SETTLEMENT OF ANY AND ALL CLAIMS, DISPUTES OR OTHERWISE FOR THE EXPRESS PURPOSE OF PRECLUDING FOREVER ANY OTHER CLAIMS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE INCIDENTS, INJURIES OR DAMAGES ABOVE MENTIONED."

CP 21.

B. *The Current Lawsuit*

Plaintiffs allege that after settling with Talbot, Jeanne Hawkins filed a separate lawsuit against Dr. Chen. CP 5 (Petition ¶4.10) (the "Chen lawsuit"). Plaintiffs allege that while mediating the Chen lawsuit, Ms. Hawkins learned for the first time that her designated expert Dr. Chen had instructed Talbot to discontinue her antibiotics. Plaintiffs further alleged that Dr. Chen's instructions had not been included in the copy of Ms. Hawkins' chart that Talbot gave to Julie Wilson at or near the time of Ms. Hawkins' discharge from the facility on July 30, 2007 – and over a year before she had

filed the underlying lawsuit.[2] *Id.* (Petition ¶4.12). It is not clear from the current Petition what effect this revelation had on the settlement with Dr. Chen, if any. It appears, however, that the crux of plaintiffs' damage claim is that they had settled "too cheaply" with Talbot in 2010 because they had failed to discover or otherwise obtain certain factual information about the case prior to entering into that settlement.

In the Petition, plaintiffs alleged various claims including: damages based on fraud or misrepresentation, rescission of the Settlement Agreement based on or fraud or misrepresentation, relief from the judgment of dismissal based on the Settlement Agreement pursuant to CR 60(b)(2),(3), and in the event the court did not set-aside the judgment of dismissal, a declaration that certain tort claims against Talbot were not barred by *res judicata* or claim preclusion ("claim preclusion"). *See generally* CP 1-15.

[2] Plaintiff's Petition incorporated a declaration from Dr. Chen which attached a copy of a faxed lab report containing his order to discontinue antibiotic treatment on July 23, 2007. CP 28. Although Dr. Chen asserts that this particular version of the faxed document was not contained in the original chart provided to plaintiffs, Dr. Chen's declaration does not assert that the content of his July 23 order to discontinue the antibiotic treatment was omitted from the original chart. To the contrary, Dr. Chen's July 23 order was present elsewhere in the original chart, and therefore available to plaintiff at all times. RP 21-22.

C. *Disposition in the trial court and claims on appeal.*

Talbot moved against all of plaintiffs' claims under CR 12(b)(6) on various bases as set forth in the motion. CP 43-56. The trial court granted the motion on the grounds that plaintiffs' current claims were barred by the Settlement Agreement and alternatively that their claim for declaratory judgment was barred by claim preclusion. CP 112-113. On appeal, plaintiffs assign as error the trial court's dismissal of their fraud and misrepresentation claims and their alternative claim for a declaratory judgment. They did not assign as error the refusal to grant relief from judgment under CR60(h) or the dismissal of their claim for rescission. CP8 (Petition ¶7.1); CP 9 (Petition ¶8.1).

IV. ARGUMENT

A. *Standard of Review*

Talbot agrees that review of the superior court's dismissal of plaintiffs' Petition under CR 12(b)(6) is *de novo*.[3] Under CR 12(b)(6), the court may dismiss a complaint for failure to state a claim if "the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc*., 89 Wn.2d

[3] The parties agreed to a determination under CR 12(b) and did not convert the motion to a motion for summary judgment under CR 56. RP 6; CP 112.

959, 961, 577 P.2d 580 (1978); *Roe v. Quality Transp. Svcs., Inc*., 67 Wn. App. 604, 606, 838 P.2d 128 (1992). Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may be considered in ruling on a CR 12(b)(6) motion to dismiss. *Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 726, 189 P.3d 168 (2008); *Matsyuk v. State Farm Fire & Cas. Co*., 155 Wn. App. 324, 329 n.2, 229 P.3d 893 (2010). The court may take judicial notice of public documents if their authenticity cannot be reasonably disputed. *Rodriguez*, 144 Wash. App. at 725-26.

Talbot also agrees that review of the superior court's interpretation of the Settlement Agreement is *de novo* where, as here, "the evidence before the trial court consisted entirely of affidavits and the proceeding is similar to a summary judgment proceeding." *Kwiatkowski v. Drews*, 142 Wash. App. 463, 479, 176 P.3d 510, 518 (2008) (*citing Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000)).

1. *The trial court correctly concluded that all of plaintiffs' claims against Talbot were released.*

In the trial court, plaintiffs sought rescission of the Settlement Agreement, asserting that the agreement was unenforceable because it was procured by fraud. CP 9 (Petition ¶ 8.1). On appeal, plaintiffs do not assign error to the dismissal of the rescission claim or argue in any way that the trial

court erred in dismissing that claim[4]. Thus, the rescission claim – including the subsidiary issue of the enforceability of the Settlement Agreement – is not properly before this court. *See* RAP 10.3(a)(4),(6); *Nishikawa v. U.S. Eagle High, L.L.C.*, 138 Wn. App. 841, 853, 158 P.3d 1265 (2007) (refusing to consider dismissal of alternative claim for "issue is not properly before us" where appealing party failed to assign error to a particular trial court decision); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.")

Plaintiffs' first assignment of error also assumes that the Settlement Agreement is enforceable and raises only the question of whether the trial court "erred in ruling that the release language of the settlement agreement [] bars Hawkins' claims in this litigation." Appellants' Brief at p. 8.

[4] Talbot moved to dismiss the rescission claim on various grounds, including plaintiffs' failure to allege their willingness and ability to tender back the amounts they received in settlement. *See Lucas v. Andros*, 185 Wn. 383, 55 P.2d 330 (1936) (noting that the party defrauded must restore, or offer to restore, the consideration which he has received under the contract); *Bunting v. State*, 87 Wn. App. 647, 653-54, 943 P.2d 347, 350 (1997) (requiring party seeking to rescind settlement agreement to return amount paid in settlement).

Accordingly, Talbot will address only the claimed error and not the abandoned rescission claim.[5]

"A release is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used." *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992); *see also Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004) ("This court has consistently held that personal injury releases are contracts governed by contract principles"). The interpretation of a Settlement Agreement is a matter of law, where, as here, the meaning of specific words does not (and cannot) depend on extrinsic evidence.[6] *See generally Condon v. Condon*, 177 Wn.2d 150, 162-163, 298 P.3d 86 (2013) (discussing methodology for interpreting settlement agreement).

Here, the Settlement Agreement contains three clauses comprehensively releasing any claims or causes of action, known or unknown, including: (1) any claims which "*in any way* involved the

[5] In effect, plaintiffs have elected to affirm the settlement and sue for damages in fraud. *See, e.g., Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1994) ("Under contract law, a material misrepresentation permits the defrauded party to elect from three possible remedies: damages, rescission, or enforcement of the bargain against the fraudulent party according to the fraudulent party's representation of the bargain. *See* 12 Samuel Williston, *Contracts* § 1523, at 606-07 (3d ed. 1970)").

[6] The only extrinsic evidence would be communications made in connection with the mediation, which are privileged under RCW 5.60.070.

diagnoses, care and treatment" of Jeanne Hawkins during her stay at Talbot Center, (2) any claims "which *in any way* arise out of the facts stated [in the underlying complaint]," and (3) any claims "arising out of or *in any way connected with* incidents, injuries or damages" alleged in the underlying complaint or arising out of Jeanne Hawkins' "diagnoses, care and treatment" at Talbot Center. CP 17-18, 21 (emphasis added). On appeal, plaintiffs' focus on the first release clause and argue that it is "narrow" and does not bar the claims alleged in the current complaint. Appellant's Brief at p. 24. Plaintiffs are wrong, and moreover, they entirely fail to explain why their claims are not barred by the other two release clauses.

Plaintiffs' claims in this case are based on the alleged falsification of medical records relating to Jeanne Hawkins' stay at Talbot Center – records documenting her "diagnoses, care and treatment" at the Center and which were created *solely* because Ms. Hawkins was a patient at the Center. Plaintiffs cannot seriously argue that the alleged falsification of records relating to Ms. Hawkins' "diagnoses, care and treatment" does not "*in any way involve*" her "diagnoses, care and treatment" at the Center. The first release clause clearly bars plaintiffs' fraud and misrepresentation claims. *See, e.g., Dresden v. Detroit Macomb Hosp. Corp.*, 218 Mich. App. 292, 297-98, 553 N.W.2d 387, 390 (1996).

In *Dresden*, the decedent presented to the defendant hospital complaining of chest pain. Her chest x-ray was deemed normal. She was discharged but died three days later. Plaintiff filed a medical malpractice lawsuit against defendant and requested a copy of the x-ray. Defendant advised plaintiff that it was unable to find the x-ray after having made a diligent search. Plaintiff eventually settled the lawsuit, signing a release without ever having received a copy of the x-ray. Later, plaintiff became aware that the x-ray may have been intentionally destroyed and brought suit alleging fraud. The trial court dismissed the action based on the language of the settlement and release. The Michigan Court of Appeals affirmed, holding that:

> The release specifically mentions all the defendants and includes language releasing the defendants from liability for 'any and all' causes of action that could have been based upon, or could have arisen out of, the medical care rendered to Dresden or in any manner related to Dresden, including liability for damages incurred as a result, and liability for any and all matters and things alleged or that could have been alleged against the defendants in the lawsuit. Plaintiff's claim that the release is silent concerning unknown claims is erroneous, because the release mentions 'any and all' causes of action. The scope of the release was sufficiently broad to bar the fraud claim.

Id.

As in *Dresden*, the first release clause contains language releasing any and all claims arising out of Ms. Hawkins' medical treatment at Talbot Center and similarly operates to bar any claims based on the alleged falsification of medical records. Moreover, the two other release clauses in the Settlement Agreement are even more comprehensive, and the last clause broadly releases any claim "*in any way connected with incidents, injuries or damages*" alleged in the underlying complaint. There is no question that the current lawsuit arises out of the "incidents" alleged in the underlying complaint, and in fact, the allegedly falsified or omitted medical records were specifically referenced in underlying complaint. CP 63 (Complaint ¶ 4.9). The underlying complaint alleged that "there was no evidence" that Dr. Chen responded to the first lab report on July 14, 2007 (*id.*) and that Dr. Chen wrote "O.K." on the second lab report dated July 23, 2007. *Id.* Plaintiffs assert in the current Petition that Dr. Chen *did* follow-up with Talbot and that Dr. Chen did *not* write "O.K." on the second lab report. CP 6 (Petition ¶ 4.14). Both "complaints" relate to the same incidents – although the current Petition alleges that plaintiffs' original understanding of those incidents was wrong.

Plaintiffs' current lawsuit also seeks the *same damages* as the underlying lawsuit. The gravamen of plaintiffs' fraud claims is that they were deceived into settling "too low" and that they are entitled to additional

compensation for Jeanne Hawkins' personal injuries – compensation that Ms. Hawkins apparently expected to collect from Dr. Chen and now seeks to recover from Talbot. However, the Settlement Agreement expressly bars any and all claims against Talbot for "injuries or damages," known or unknown, arising out of Jeanne Hawkins' stay at Talbot Center. CP 17. In other words, plaintiffs executed a broad release giving up any and all claims for personal injuries arising out of Jeanne Hawkins' stay at Talbot Center, regardless of the theory of liability and regardless of whether those claims were known at the time of settlement. *See, e.g., Kobatake v. E.I. Dupont de Nemours & Co.*, 162 F.3d 619, 623 (11th Cir. 1998).

In *Kobatake*, plaintiffs settled a claim for crop damage caused by defendant's defective fungicide. After settlement, plaintiffs discovered information that led them to believe that defendants acted improperly and fraudulently during the defense of the previous litigation by, among other things, scheming to destroy harmful evidence and presenting perjured testimony. Plaintiffs subsequently filed actions against Dupont alleging fraud, civil conspiracy, spoliation of evidence, violations of the Georgia Fair Business Practices Act, public nuisance, and racketeering. The trial court held that these claims were barred by the general release. The Eleventh Circuit affirmed, holding that if plaintiffs affirmed the settlement, their fraud-based claims were barred:

> When "[a] contract provides plainly that it was the intent of the parties to settle and effect a resolution of all claims and disputes of every kind and nature among them…; that it is the entire agreement of the parties; and that they released and waived all claims against each other of any kind whether known or unknown,…no grounds at law or in the contract itself exist to open [it] to jury examination." [citation omitted]. *Thus, however egregiously defendants may have behaved during the prior litigation, plaintiffs' execution of such all-encompassing releases prohibits them from suing defendants for that behavior.*

Id. at 624-25 (emphasis added).

Plaintiffs argue that the release in this case was not a general release and was much narrower in scope than the release in *Kobatake* – which even if true, is a distinction without a difference. The Settlement Agreement in this case was a general release in the sense that it released *any and all of plaintiffs' claims for personal injuries arising out of Jeanne Hawkins' stay at Talbot Center* regardless of the theory of liability. As in *Kobatake*, plaintiffs cannot avoid the release by recasting their personal injury claims as claims for fraud and misrepresentation. The parties agreed that the amount paid in settlement was in full release of *any and all claims for the injurie*s alleged in the underlying complaint, and the superior court correctly concluded that the Settlement Agreement barred recover for those injuries under the new claims alleged in plaintiffs' Petition.

2. *In the alternative, the superior court properly dismissed plaintiffs' fraud and misrepresentation claims because their Petition failed to allege "reliance" as a matter of law.*

The superior court held that even if plaintiffs' claims were not barred by the Settlement Agreement, their Petition probably failed to state claims for fraud or intentional misrepresentation. CP 113. To state a claim for fraud or intentional misrepresentation, a plaintiff must plead: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff. *Stiley v. Block,* 130 Wn.2d 486, 505, 925 P.2d 194, 204 (1996). To recover damages for fraud or intentional misrepresentation, each of these nine elements must be proven by clear, cogent and convincing evidence. *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992).

Here, plaintiffs' Petition fails to allege either reliance or a "right to rely" as a matter of law. Although the Petition alleges that plaintiffs "reasonably relied" on Talbot's alleged misrepresentations concerning its legal liability to Jeanne Hawkins "in negotiating [the] release and settlement of all claims" CP 7-8 (Petition ¶¶5.1 & 6.1), the Petition also incorporates the Settlement Agreement wherein plaintiffs specifically represented that

they *did not* rely "upon any statement or representation concerning [Talbot's] legal liability" in negotiating the release and settlement. CP 18. In other words, plaintiffs could not have "reasonably relied" on the alleged misrepresentations in negotiating their settlement with Talbot when they represented that they had not relied at all. *See Kwiatkowski v. Drews*, 142 Wn. App. at 463, 481. *See also Rodriguez,* 144 Wn. App. at 714 ("when ruling on a CR 12(b)(6) motion to dismiss an action for failure to state a claim on which relief can be granted, a court is not required to accept as true legal conclusions in the plaintiff's complaint."); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992 (9th Cir. 2010) ("We are not, however, required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.")

In *Kwiatkowski*, plaintiff brought a claim for breach of fiduciary duty against several banks based on their misconduct while acting as his legal guardian. Plaintiff settled with the banks, but before he filed a stipulated order of dismissal, one of his attorneys discovered "new" information pertaining to the banks' failure to fulfill their fiduciary duties to plaintiff. *Id.*, 142 Wn. App. at 472. This information had been omitted from or misrepresented in the documents the banks were required to file in the guardianship proceeding. *Id.* at 480. The banks moved for summary

judgment enforcing the settlement, and plaintiff opposed the motion, contending that the settlement should be rescinded because it was procured by fraud. The trial court granted summary judgment to the banks, and the judgment was affirmed on appeal. On appeal, the court noted that plaintiff had stipulated in the settlement agreement that he *had not* relied on the "representations of any other party" in deciding to execute the settlement. Therefore, *as a matter of* law, plaintiff could not prove reliance – reasonable or otherwise – on the alleged non-disclosures and misrepresentations made in the guardianship proceeding:

> Kwiatkowski's fraud, misrepresentation, and equitable estoppel arguments also have no merit. To establish intentional, negligent, or innocent misrepresentation; fraud; or estoppel, Kwiatkowski must show that he reasonably or justifiably relied on the truth of the Banks' representations, if any. [citations omitted]. But Kwiatkowski specifically agreed in paragraph five of the settlement agreement that he did not rely on any representations by any other party when negotiating the settlement agreement. Furthermore, as discussed above, any such reliance would have been unreasonable.

Id. at 481-82. The court also noted earlier in the opinion that plaintiff could not prove "reasonable reliance" on the banks' court filings in the guardianship matter:

> Kwiatkowski cannot assert that he reasonably relied on the Banks' performance of their fiduciary duties [in filing complete and

> accurate documents with the court] when whether the Banks breached their fiduciary duties was the very issue being resolved in the adversarial relationship. *See Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 122, 86 P.3d 1175 (2004) (discussing and stating in dicta that it "do[es] not disagree" with conclusion in *Mergens v. Dreyfoos*, 166 F.3d 1114, 1118 (11th Cir.), *cert. denied*, 528 U.S. 820 (1999), which held that in the context of a contentious adversarial relationship, reliance on misrepresentations or omissions is unreasonable as a matter of law between the parties negotiating a settlement agreement)."

Id. at 480.

In *Kwiatkowski*, the court relied on two alternative grounds for holding that the plaintiff failed to prove "reasonable reliance" as a matter of law. First, plaintiff represented in the settlement that he had not relied on any representation by the defendants in deciding to execute the settlement. In other words, the settlement contained an enforceable "no-reliance" clause. Second, plaintiff had no right to rely on court filings made by the defendants in the guardianship matter tending to prove they fulfilled their fiduciary duties to plaintiff when the very issue in dispute was whether defendants had fulfilled their fiduciary duties to plaintiff. *See also Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 122, 86 P.3d 1175 (2004) (discussing *Mergens v. Dreyfoos*, 166 F.3d 1114 (11th Cir. 1999), court did "not disagree" that reliance on misrepresentations or omissions was unreasonable

as a matter of law between the parties negotiating a settlement agreement in the context of a contentious adversarial relationship "where the misrepresentations or omissions were at the heart of the issues being resolved in the adversarial relationship.") The same two grounds also exist in this case.

Here, the Settlement Agreement contained a no-reliance clause. That clause was a conspicuous part of a Settlement Agreement that was negotiated by represented parties. Plaintiffs did not argue below and do not argue on appeal that the no-reliance clause is in any way unenforceable under Washington law. The no-reliance clause disposes of plaintiffs fraud and misrepresentation claims because regardless of whether they had a right to rely on any representations made by defendant, plaintiffs expressly represented that they did not rely "upon any statement or representation by [Talbot] concerning the nature and extent of the injuries, and/or damages, and/or legal liability therefore." CP 18. Representations relating to Ms. Hawkins' treatment at Talbot Center which tend to exculpate the Center from liability certainly amount to "statement[s] or representation[s]" concerning the nature and extent of Ms. Hawkins' injuries and its legal liability therefore. Plaintiffs' fraud and intentional misrepresentation claims are barred by the no-reliance clause as a matter of law.

Apart from the no-reliance clause, plaintiffs had no "right to rely" on alleged misrepresentations made by Talbot that went to the "very issue being resolved in the adversarial relationship." *Kwiatkowski*, 142 Wn. App. at 480. The *central* issue in the underlying lawsuit was whether Talbot exercised due care in its treatment of Jeanne Hawkins, and in particular, whether it followed the orders of Jeanne Hawkins' treating physicians including Dr. Chen. Jeanne Hawkins and her counsel were free to serve discovery requests, take depositions, file motions to compel, meet with witnesses, add new parties – and simply interview their supposed trial expert, Dr. Chen, to determine what instructions he had given to Talbot and whether those instructions had been followed. Instead, plaintiffs agreed to a "cards-down" settlement with an adversary based on minimal discovery and patently incomplete medical records. *See, e.g.*, CP 40 (incomplete discharge report). The deception alleged by plaintiffs (which Talbot denies) clearly relates to the "very issue" being resolved in the underlying lawsuit – whether Talbot acted negligently in light of the instructions given to it by Ms. Hawkins' treating physicians, and necessarily, what instructions it was given.

Finally, plaintiffs assert they had a "statutory" right to rely on the medical chart based on WAC 388-97-1720, which imposes certain record-keeping requirements on nursing homes. In *Kwiatkowski*, the plaintiff made a similar argument that he had a right to rely on defendants' filings in the

guardianship matter because defendants were under a fiduciary duty to make those filings. The court rejected that argument, holding that "as a matter of law, [plaintiff] cannot assert that he *reasonably* relied on the Banks' performance of their fiduciary duties when whether the Banks breached their fiduciary duties was the very issue being resolved in the adversarial relationship." 142 Wn. App. at 480 (emphasis in original). Here, the underlying complaint specifically alleged that Talbot failed to comply with the "minimum standard of care required by [WAC 388-97]." CP 67 (Complaint ¶8). Plaintiffs cannot claim that they *reasonably* relied on Talbot's compliance with WAC 388-97 when the alleged non-compliance with WAC 388-97 was "the very issue being resolved in the adversarial relationship." *Id.*

3. *The superior court properly dismissed plaintiffs' claim for declaratory judgment because it was barred by "claim preclusion."*

In their "fifth cause of action," plaintiffs sought a declaration that the Settlement Agreement did not bar certain claims. Talbot argued that apart from the release clauses in the Settlement Agreement, the claims identified in the "fifth cause of action" were barred by the judgment of dismissal in the underlying lawsuit and the doctrine of claim preclusion. The superior court agreed and dismissed the claims identified in the "fifth cause of action"

based on the Settlement Agreement and on the alternative grounds of claim preclusion. CP 113.

"Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action." *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000), *rev. denied*, 143 Wn.2d 1006, 25 P.3d 1020 (2001). For claim preclusion to bar a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Richert v. Tacoma Power Util*., 179 Wn. App. 694, 704, 319 P.3d 882, 888 (2014). A judgment of dismissal based on settlement is a final judgment entitled to res judicata effect. *Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist*., 121 Wn.2d 257, 262, 850 P.2d 1306, 1308 (1993); *see also Schoeman v. N.Y. Life Ins. Co*., 106 Wn.2d 855, 862, 726 P.2d 1 (1986) ("The need for finality when actions are settled is safeguarded by res judicata"); *In re Phillips' Estate*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955) ("A compromise or settlement is res judicata of all matters relating to the subject matter of the dispute"); *Handley v. Mortland*, 54 Wn.2d 489, 342 P.2d 612 (1959) (same).

Here, the persons and parties in the current lawsuit are identical to those in the underlying lawsuit, and the only question on appeal is whether

the two lawsuits allege the same claims and subject matter. Plaintiffs argue in their brief that the Petition alleges "new" claims based on the "falsification of medical records [and] fraud in the prior litigation" – and not the same claims alleged in the underlying complaint seeking recovery for Jeanne Hawkins' personal injuries. Appellants' Brief at p. 32. However, an examination of the Petition reveals that the "fifth cause of action" alleges claims for personal injury arising out of Ms. Hawkins stay at Talbot Center, and in fact, those claims were simply "cut and pasted" from the underlying complaint. The following chart cross-references the allegations in the underlying complaint and the Petition:

Underlying Complaint	**Petition**
5.1	9.3
5.2	9.4
6.1	9.5
6.2	9.6
6.3	9.7
6.4	9.8
7.1	9.9
7.2	9.10
7.3	9.11

9.1	9.12
9.2	9.13
14.1	9.14

The "fifth cause of action" merely recycles the claims alleged in the underlying complaint. Those claims were dismissed by judgment and are barred by claim preclusion. Finally, even if plaintiffs had sought recovery for their injuries under entirely new legal theories, those claims would be barred by claim preclusion.[7] *Stevedoring Srvcs. v. Eggert*, 129 Wn.2d 17, 40, 914 P.2d 737 (1996) (plaintiff cannot "recast [her] claim[s] under a different theory and sue again" for the same injuries). To the extent that *any* of plaintiffs' claims seek recovery for the injuries alleged or that could have been alleged in the underlying lawsuit, those claims are barred by claim preclusion. The superior court correctly concluded that the claims for personal injury alleged in plaintiffs' "fifth cause of action" are barred by claim preclusion.

[7] Jeanne Hawkins is not claiming (nor could she claim) that her physical injuries were caused by Talbot's alleged "fraud." Her injuries were caused by the over-administration of antibiotics. *See, e.g., Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 887, 91 P.3d 897, 902 (2004) (noting that failure to disclose property damage did not cause that damage).

V. CONCLUSION

For the reasons stated above, the court should affirm the judgment of dismissal in its entirety.

Dated this 29th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2015, I caused to be served a copy of the **BRIEF OF RESPONDENTS** on the following persons(s) in the manner indicated below at the following address(es):

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