97651-1

Court of Appeals Cause No. 359956

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SVN CORNERSTONE, LLC, a Washington Limited Liability Company,

Appellant,

vs.

N. 807 INCORPORATED, a Washington corporation, d/b/a BERKSHIRE HATHAWAY HOMESERVICES FIRST LOOK REAL ESTATE; KENNETH M. LEWIS AND MICHELLE S. LEWIS, and the marital community composed thereto; HENRY SEIPP AND JANE DOE SEIPP, and the marital community composed thereof,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

KENT NEIL DOLL, JR., WSBA 40549
Feltman Ewing, P.S.
421 W. Riverside Avenue, Suite 1600
Spokane, WA 99201
(509) 838-6800
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Page

REGULATIONS AND RULES

I. IDENTITY OF PETITIONER

The Petitioner is SVN Cornerstone, LLC, a Washington limited liability company that does business in the state of Washington.

II. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Petitioner seeks review of the published Court of Appeals decision in *SVN Cornerstone, LLC v. N. 807 Incorporated, et al.*, No. 35995-6-III (August 20, 2019).

III. ISSUES PRESENTED FOR REVIEW

1. Is an order of dismissal a "Final Judgment on the Merits" for purposes of res judicata?

In *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004), the Supreme Court of Washington has answered that an order of dismissal, even as a product of settlement negotiations, is a final judgment on the merits for purposes of res judicata.

2. Does a Court have an interest in defending the terms of its prior judgments?

Washington courts have long held that they have an interest in defending the terms of their prior judgments. A substantial public interest is challenged by Division 3's decision that limits a court's power to defend the terms of its prior judgment. Despite the strong interest to enforce

arbitration agreements, there is a stronger public interest in holding that courts, and not arbitrators, must defend and determine the terms of their prior judgments for res judicata purposes.

IV. STATEMENT OF THE CASE

Seipp worked for Cornerstone until April 20, 2015, when he left to work as a broker for Berkshire Hathaway Home Services First Look Real Estate ("Berkshire"). (CP 220-230). Prior to Seipp's departure, Cornerstone had developed a marketing package for the sale of the Timber Court Apartments owed by EZ Properties, LLC. (CP 220-230). Two days after Seipp associated with Berkshire, Berkshire and EZ Properties entered into an exclusive listing agreement to sell the Timber Court Apartments. (CP 220-230). Berkshire sold the Timber Court Apartments. (CP 220-230).

Cornerstone filed a complaint in Spokane County Superior Court against Berkshire, its owners, and Seipp, alleging Seipp's involvement in the sale of the Timber Court Apartments breached his independent contractor agreement with Cornerstone. (CP 220-230). Cornerstone also made claims for unjust enrichment, tortious interference with contract, violation of the Uniform Trade Secret Act, loyalty, conversion, and breach of fiduciary duty. (CP 220-230). Seipp responded to Cornerstone's complaint by alleging Cornerstone's claims were subject to arbitration with

the Commercial Brokers Association ("CBA"), since all the parties were members of the CBA and were required to arbitrate disputes. (CP 163-171). Berkshire and Seipp then filed for dismissal and to compel arbitration. (CP 232-242). Cornerstone filed a cross-motion for partial summary judgment for its breach of contract claim. (CP 287-314). The trial court declined to compel arbitration and denied the motion to dismiss. Berkshire and Seipp filed an Answer to the Complaint in August 2016, in which they did not file any counterclaims. (CP 163-171).

In May 2017, Division 3 affirmed the trial court's decision to not dismiss the complaint, but reversed denial of the motion to compel arbitration, finding the plain language of CBA's bylaws required arbitration of all of Cornerstone's claims related to lost commissions. (CP 78-88). Division 3 allowed the trial court to retain jurisdiction over any claims unrelated to commissions. (CP 78-88).

Cornerstone petitioned for review by the Washington Supreme Court. Case No. 946756. While the petition was pending the parties negotiated a settlement. (CP 90-96). Under the terms of their settlement agreement, Seipp agreed to pay Cornerstone $20,000. (CP 90-96). Cornerstone agreed to dismiss its Supreme Court Petition for Review, and the parties agreed the Spokane County Superior Court case would be

dismissed with prejudice. (CP 90-96). The case was dismissed with prejudice on August 22, 2017. (CP 403-404). Prior to the entry of the order of dismissal, Seipp had never asserted any claims against Cornerstone, and never sought to amend its Answer to assert any claims in the lawsuit.

In January of 2017, about eight months before the finalization of the settlement agreement, Seipp approached an individual named Dennis Crapo. (CP 413-414). Seipp had hoped to list some of Crapo's duplex properties valued at about $32,000,000. (CP 413-414). Crapo allegedly decided to proceed with another broker to list the duplex portfolio because Crapo did not want to become involved in the lawsuit between Cornerstone and Seipp. (CP 413-414).

Crapo listed the duplex property with another broker, and Crapo executed the purchase and sale agreement for the sale of the duplex property on June 16, 2017. (CP 941-943). The sale was scheduled to close on or about August 28, 2017. (CP 941-943). While Cornerstone and Seipp were finalizing the settlement agreement and entering the order of dismissal of the lawsuit, Seipp was working with Crapo to obtain a declaration from Crapo dated August 17, 2017. (CP 413-441).

Seipp filed an arbitration complaint with the CBA against Cornerstone in September 2017 (one month after entry of the stipulated

dismissal order). (CP 101-108). In his complaint, Seipp alleged Cornerstone's prior lawsuit caused him to lose the opportunity to list and sell Crapo's property. (CP 101-08). Seipp asserted several causes of action: perversion of the court, malicious prosecution, failure to arbitrate, and tortious interference with business relations. (CP 101-108). The table below summarizes Seipp's arbitration complaint:

CAUSE OF ACTION	ALLEGATIONS IN COMPLAINT
Perverting the Court	(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	(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).

Cornerstone filed a complaint in Superior Court for breach of contract against Seipp and Berkshire. (CP 1-8). Cornerstone alleges Seipp breached the terms of the settlement agreement by seeking an award of attorney fees and costs incurred in the first lawsuit in the arbitration complaint. (CP 1-8). Cornerstone requested damages and injunctive relief to prevent the CBA from arbitrating claims that were dismissed in the first lawsuit via the settlement agreement. (CP 1-8). Cornerstone argued that the arbitration complaint was barred by the doctrine of res judicata and compulsory counterclaims. (CP 471-472).

The trial court granted Cornerstone's motion for summary judgment in part after determining Seipp had breached the terms of the settlement agreement by seeking attorney fees and costs in the arbitration complaint.

(CP 501-504). The court denied Cornerstone's motion to enjoin Seipp's arbitration complaint, concluding Cornerstone had not made a requisite showing of imminent irreparable injury. (CP 501-504).

Cornerstone appealed to Division 3. Division 3 upheld the trial court's decision and determined that res judicata and compulsory counterclaims were issues best left to CBA arbitration. *SVN Cornerstone, LLC v. N. 807 Incorporated, et al.*, No. 35995-6-III (August 20, 2019). Further, Division 3 held that a stipulated order of dismissal did not qualify as a final judgment on the merits for res judicata purposes, relying on *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 897, 907 (2009). Division 3 wrote, "The court therefore has no unique qualification to ascertain the scope and preclusive effect of a final judgment." *Id.* at 11.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Division 3's Decision Is Contrary To The Supreme Court Decision of *Hisle v. Todd Pacific Shipyards, Corp.*, 151 Wn.2d 843, 93 P.3d 108 (2004)

Before res judicata can be applied, there must be a final judgment of the merits. Division 3 determined a stipulated order of dismissal is not a final judgment on the merits. This is contrary to this Court's decision in *Hisle v. Todd Pacific Shipyards*. In footnote 10, The Supreme Court specifically held that an order of dismissal is a final judgment on the merits

for res judicata purposes. 151 Wn.2d 853, 865, 93 P.3d 108, 114, FN 10 (2004).

In *Hisle v. Todd Shipyards*, the plaintiff was an employee of Todd Pacific Shipyards Corp. and was represented by a union, PSMTC. *Id. at 857.* PSMTC entered into a CBA with Todd covering all production, repair, and maintenance performed at Todd's Seattle Facility. *Id.* Todd employees rejected three different proposed agreements by Todd and PSMTC. *Id.* The matter was referred to an arbitrator. *Id.* The arbitrator authorized one of the agreements. *Id.*

Afterward, 200 hundred Todd employees filed a complaint against PSMTC and Todd in the United States District Court seeking to nullify the CBA. Hisle was among the employees named in the suit. *Id.* Todd and PSMTC alleged numerous counterclaims. *Id. at 859.*

The parties then entered into a settlement agreement. An order of dismissal was entered. *Id. at 859-860.*

Hisle and like-situated employees worked overtime hours during the period covered by the agreement. *Id. at 860* They filed suit against Todd in King County Superior Court. *Id.* The trial court determined that the doctrine of res judicata barred Hisle's claim. *Id.*

In reviewing the doctrine of res judicata, the Washington Supreme Court explained that "the threshold requirement of res judicata is a final judgment on the merits in the prior suit." Id. at 865. After that sentence, the Supreme Court inserted footnote 10, which read:

> Although the Court of Appeals did not expressly address whether the Adams dismissal was a final adjudication on the merits, *Hisle*, 113 Wash. App. at 410–14, 54 P.3d 687, this threshold res judicata requirement is satisfied because Adams was dismissed with prejudice. *Maib v. Md. Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943) (a dismissal with prejudice constitutes a final judgment on the merits).

(Emphasis added). *Id. at 865, FN 10.* Thus, the Supreme Court recognized that an order of dismissal with prejudice is a "final judgment on the merits" for purposes of res judicata. *Id.*

Division 3's decision is directly contrary to *Hisle v. Todd Shipyards.* Division 3 found that the order of dismissal was not a final order for purposes of res judicata because the court "was not involved in the settlement process" and "was not privy to the bases for the agreed resolution." Division 3 did not cite to or address *Hisle v. Todd Shipyards.* Instead, it relied upon a decision from an Illinois appeal court and the Federal 9th Circuit. *Chiron Corp. v. Ortho Diagnostic Syst., Inc.*, 207 F.3d 1126 (9th Cir. 2000); *Ford Motor Credit Co. v. Cornfield, 395 Ill. App. 3d 896, 907 (2009).*

However, the cases cited by Division 3 are the minority view. A majority of courts have held that a stipulated dismissal with prejudice is a final judgment on the merits for res judicata purposes. *Gerber v. Holcomb,* 219 S.W.3d 914 (Tenn. Ct. App. 2006) (holding a consent order of dismissal with prejudice entered after settlement is a final judgment on the merits for the purposes of res judicata); *Jackson v. Bell*, 123 So.3d 436, 439 (Miss. 2013) (holding a dismissal with prejudice indicates a dismissal on the merits); *Schwartz v. Folloder*, 767 F.2d 125 (5th Cir. 1985) (holding dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties); *Nemaizer v. Baker*, 793 F.2d 58, 61 (2nd Cir. 1986) ("The District Court ordered plaintiff's action dismissed with prejudice in accordance with the stipulation. Accordingly, res judicata precluded appellees from raising the ERISA claim in a later Federal suit."); *Bowman v. East Enterprise State Bank*, 100 Ind. App. 682, 197 N.E. 726, 727 (Ind. Ct. App. 1935) (holding a dismissal with prejudice entered pursuant to a settlement agreement constitutes a final judgment on the merits for purposes of applying claim preclusion); *Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888, 891 (11th Cir. 1997). See 18A Fed. Prac. & Proc. Juris. § 4435

(3d ed.) ("A stipulated dismissal with prejudice operates as an adjudication on the merits for claim-preclusion purposes.")

Holding that an order of dismissal is not a final judgment on the merits for purposes of res judicata will lead to more litigation. The vast majority of civil cases settle without trial court involvement. Allowing Division 3's decision to stand would run counter to the Supreme Court's decision in *Hisle v. Todd Shipyards* and open the door for repetitive litigation because stipulated orders of dismissal with prejudice do not constitute judgment on the merits.

Therefore, the Washington Supreme Court should grant Cornerstone's Petition for Discretionary Review.

B. Division 3's Determination That A Dismissal With Prejudice Is Not A Final Judgment On The Merits Is Contrary To *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 833 (2000)

In *Pederson v. Potter*, 103 Wn. App. 62, 11 P.3d 933 (2000), Division 3 held that a confession of judgment was a judgment on the merits for res judicata purposes. In making this determination, Division 3 cited with approval *CenTrust Mortgage Corp. v. Smith & Jenkins, P.C.*, 220 Ga. App. 394, 397, 469 S.E.2d 466, 469 (1996) for the proposition:

> In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It 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.

Id. at 70.

Contrary to Division 3's decision that a trial court does not have an interest in resolving or defending an order of dismissal, the *Pederson v. Potter* court makes clear that a case does not have to be litigated. It is sufficient that the parties had an opportunity to have their cases presented if correctly managed.

C. Courts Must Defend The Scope And Terms Of Its Judgments, Including Orders Of Dismissal With Prejudice

This case presents an important policy question that implicates a vital public interest: should the doctrine of res judicata be subservient to the presumption favoring arbitration? The answer should be a resounding no.

Res judicata is designed to protect litigants from constantly being burdened by litigation. *Pederson* at 71, 11 P.3d at 837 (quoting 14 Orland & Tegland, *supra* 359). Res judicata prevents repetitive litigation of the same matters. Res judicata further protects the integrity of the legal system. Indeed, 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 decision.

Res judicata also ensures finality and repose, both as a societal matter and as a matter affecting the successful litigant. The successful party should not be subjected to the vexation and exhaustion of resources that repetitive litigation may entail. 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.

The policy behind res judicata is so powerful that this Court has held that possible *defenses* can be subject to res judicata if those defenses are later used to form a basis for a subsequent claim. See *Eugster v. Washington State Bar Association*, 198 Wn. App. 758, 787-88, 397 P.3d 131, 146. In *Eugster*, an attorney failed to challenge the constitutionality of an attorney disciplinary process in an earlier proceeding that resulted in a final disposition. *Id.* at 785, 198 Wn. App at 145. Later, the attorney filed a lawsuit challenging the constitutionality of the same process. *Id.* The *Eugster* court held that "res judicata stops the second suit." *Id.* In coming to its conclusions, the *Eugster* court set forth numerous out-of-state legal authorities addressing res judicata in the context of attorney disciplinary proceedings. One such case analyzed with approval was *Vandenplas v. City of Muskego*. This court wrote:

> In *Vandenplas v. City of Muskego*, 753 F.2d 555 (7th Cir. 1985), the city obtained a state court order authorizing the razing of

> Lawrence Vandenplas' farm buildings. After the razing, Vandenplas sued the city and alleged that the destruction of his buildings resulted from his criticism of the city and thus breached his due process, equal protection, and First Amendment rights. The federal court summarily dismissed Vandenplas' suit on the basis of res judicata. Vandenplas could have raised his constitutional *arguments as defenses in the state court action*. Although the state court could not have awarded Vandenplas damages for the constitutional violations, if Vandenplas had prevailed on the constitutional issues, the city would have been precluded from razing the buildings and thereby Vandenplas would have averted damage.

Id. at 792-93, 397 P.3d at 148-149 (emphasis added).

Despite the strong policy favoring arbitration, many federal courts are in accord with the principle that courts must decide claims of res judicata prior to compelling or enjoining arbitration. *See, e.g., John Hancock Mut. Life Co. v. Olick*, 151 F.3d 132 (3rdCir. 1998); *In re Y & A Group Sec. Litig.,* 38 F.3d 380, 382 (8th Cir.1994); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 985 F.2d 1067, 1069 (11th Cir.1993); *Miller Brewing Co. v. Fort Worth Distrib. Co.,* 781 F.2d 494, 499 (5th Cir. 1986); *see also Miller v. Runyon,* 77 F.3d 189, 194 (7th Cir.1996) (collecting other cases). These courts reason that federal courts must protect the finality and integrity of prior judgments. *See Kelly,* 985 F.2d at 1069; *In re Y & A,* 38 F.3d at 382. The Eleventh Circuit wrote: "[c]ourts should not have to stand by while parties re-assert claims that have already been resolved." *Kelly,* 985 F.2d at 1069.

In *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 326, 237 P.3d 316, 328 (Div. 3, 2010), the court faced a situation where there was an earlier civil lawsuit that was dismissed, and then followed by an arbitration that involved similar parties and similar legal issues. *Yakima County*, 157 Wn. App. at 331. The court wrestled with the issue of what to do in that scenario. Should the court decide the legal argument of res judicata involved in the earlier lawsuit in that court? Or, should the legal effect of res judicata be decided by a different decisionmaker, the arbitrator, who had no involvement in the earlier court proceedings? In that type of situation (a civil lawsuit followed by an arbitration) the courts have determined the court is the best entity to determine the res judicata objection to arbitrability.

The case of *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 139 (3rd Cir. 1998), involved a hybrid situation where there was a prior lawsuit that resulted in a judgment, and also a prior arbitration with NASD that issued an award. A subsequent arbitration proceeding was initiated with the NASD. The court concluded that the district court should have first decided the res judicata preclusive effect of the prior federal judgment as it relates to Olick's demand for arbitration before the NASD. Accord *Miller v. Runyon*, 77 F.3d 189, 194 (7th Cir. 1996).

In the case of *In re Y & A Group Sec. Litig.*, 38 F.3d 380, 382 (8th Cir.1994), an investor became plaintiff in a 1991 shareholder class action against Y & A Group, which resulted in the district court entering a final judgment incorporating a negotiated settlement of these fraud-on-the-market claims against Y & A. The same investor in 1992 filed an arbitration claim against Dean Witter (who was not a party in the class action), but the investor's damages sought in the arbitration against Dean Witter stemmed from Y & A stock losses. The court found that subsequent arbitration was precluded by res judicata of the earlier lawsuit, and the court enjoined the arbitration from proceeding against Dean Witter.

See also *Miller Brewing Co. v. Fort Worth Distrib. Co.,* 781 F.2d 494, 498–99 (5th Cir.1986)(The lawsuit sat idle for several years, and then was dismissed with prejudice for lack of prosecution). The day after the lawsuit was dismissed, FWDC contacted the American Arbitration Association for the first time to schedule an arbitration. The court ruled the arbitration was precluded because of res judicata.

At the trial court level, Seipp cited to the case of *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d at 1134, (referenced in the Yakima County case) for support of its argument that the arbitrator should decide arbitrability issues. However, the court in *Yakima County* specifically cited

to page 1134 of the *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d at 1134, because that portion of the decision recognized that the majority rule is that the court decides the res judicata effect of its own judgment prior on a subsequent arbitration. The court in *Chiron Corp.* was also addressing a different scenario where there was an arbitration, and that arbitration decision was confirmed by the federal district court. This was followed by a second arbitration. *Chiron Corp.*, 207 F.3d at 1129. The court concluded that the arbitrator was the best decisionmaker to rule upon legal objection of res judicata, since the court's involvement was simply confirming the arbitration award into a judgment. That is not the situation involved in this case, and facts of *Chiron Corp.* are far different than this case.

In this case, it likewise makes abundant sense for the Court to rule upon the arbitrability issue of the res judicata objection. First, this Court is already familiar with the facts in the underlying lawsuit and already considered substantial documentation and legal arguments in the competing motions for summary judgments brought by the parties. The Court would have continued to have maintained jurisdiction over some of the claims even after it was remanded back from the Court of Appeals. Second, this matter settled before it was ever submitted to the CBA for

arbitration. The CBA has no familiarity with the underlying lawsuit, the causes of action pled, that factual disputes considered, and the legal procedure of the trial and appellate courts. The CBA would be starting from nothing and having to be completely educated about the underling lawsuit. Third, the CBA arbitration panel consists of three real estate brokers who are not attorneys, and the CBA arbitration rules provide that the arbitrators can consider the law, but they are not bound to follow it. (See Rule 4, Rule 17, and Rule 32 of the CBA Arbitration Rules attached as Ex. "G" to the Aff. of M. Ries.) (CP 115; CP 117; CP 119).

Finality of a court order must take priority over a subsequent arbitration. *John Hancock Mut. Life Co., 151 F.3d at* 138. The finality and integrity of judgments would be defeated if parties were free to ignore orders of dismissal with prejudice that would have conclusively resolved the same claims the party is now attempting to arbitrate. *Id.* at 138. In *John Hancock Mut. Life Co. v. Olick,* the Third Circuit was confronted with whether a trial court must first determine the scope of a prior federal order before compelling arbitration. *Id.* at 137-138. After examining the underlying policies of res judicata and arbitration, the court held:

> The district court did not reach the merits of the Board of Arbitrators' interpretation of the Collective Bargaining Agreement. **It turned, first, to the judgment preclusion effect of the Consent Decree. This was the proper course. When a federal**

> **court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment**. This is so whether the question arises in an action to compel arbitration or, as here, in an action to enforce a disputed award. The federal policy favoring forum selection clauses, based in part on the institutional interest of federal courts in avoiding litigation, does not come into play until the court first determines whether prior completed litigation has already finally determined all issues.

Id. at 138 (emphasis added).

In this case, if the trial court had determined the scope of the stipulated order of dismissal and correctly applied the factors of res judicata to Seipp's arbitration claim, then arbitration would not have been compelled. The trial court judge acknowledged on the record that he "felt" the case should have ended with the first settlement agreement." Vol. I, p. 113, lns. 7-16. The trial court 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, lns. 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, lns. 1-7. But the trial court felt its hands were tied because there was an arbitration agreement.

> 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, lns. 6-11.

Therefore, the Washington Supreme Court must take this matter to determine the important policy question as to whether the policy's underlying res judicata is subservient to the policy's underlying arbitration.

VI. CONCLUSION

Cornerstone respectfully requests this Court to grant discretionary review.

DATED this 13th day of September 2019.

s/Kent Neil Doll, Jr., WSBA 40549
Feltman Ewing, P.S.
421 W. Riverside, Suite 1600
Spokane, WA 99201
Phone: 509-838-6800
Fax: 509-744-3436
Email: kentd@feltmanewing.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2019, I electronically served a true and correct copy of the Petition for Review in Court of Appeals, Division III, Cause No. 359956 to the following:

Matthew T. Ries — mries@stamperlaw.com
Stamper Rubens, P.S.
720 W. Boone, Suite 200
Spokane, WA 99201

Nicolas D. Kovarik — nick@pyklawyers.com
Whitny L. Norton — whitny@pyklawyers.com
Piskel Yahne Kovarik, PLLC
522 W. Riverside Ave., Ste. 700
Spokane, WA 99201

Original electronically served via Appellate Court Portal to:
Clerk's Office, Court of Appeals, Division III

KENT NEIL DOLL, JR.

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APPENDIX "A"

Opinion Published in Part

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 20, 2019

Whitny L. Norton
Piskel Yahne Kovarik PLLC
522 W Riverside Ave Ste 700
Spokane, WA 99201-0581
whitny@pyklawyers.com

Kent Neil Doll, Jr
Feltman Ewing PS
421 W Riverside Ave Ste 1600
Spokane, WA 99201-0406
kentd@feltmanewing.com

Nicholas D Kovarik
Piskel Yahne Kovarik,PLLC
522 W Riverside Ave Ste 700
Spokane, WA 99201-0581
nick@pyklawyers.com

Matthew Thomas Ries
Stamper Rubens PS
720 W Boone Ave Ste 200
Spokane, WA 99201-2560
mries@stamperlaw.com

CASE # 359956
SVN Cornerstone, LLC v. N 807, Incorporated, et al
SPOKANE COUNTY SUPERIOR COURT No. 172046412

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Washington Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable John O. Cooney

FILED
AUGUST 20, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

SVN CORNERSTONE, LLC, a Washington Limited Liability Company, Appellant, v. 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 thereof; and HENRY SEIPP and JANE DOE SEIPP, and the marital community composed thereof, Respondents.	)	No. 35995-6-III OPINION PUBLISHED IN PART

PENNELL, J. — SVN Cornerstone, LLC (Cornerstone) appeals several superior court orders permitting former employee Henry Seipp to go forward with an arbitration complaint for lost real estate commissions. Cornerstone argues that Seipp's claims should have been raised in the parties' prior litigation,[1] and therefore Seipp's current claims are barred by the doctrine of res judicata and as waived compulsory counterclaims.

[1] *See SVN Cornerstone LLC v. N. 807 Inc.*, No. 34692-7-III (Wash. Ct. App. May 23, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/346927_unp.pdf.

Because Cornerstone's arguments regarding res judicata and compulsory counterclaims are defenses to the merits of Seipp's arbitration complaint, they must be decided in arbitration, not by a court. Although there are circumstances in which a court should determine whether a prior judgment precludes a subsequent arbitration claim under a theory of res judicata, this case is not one of them. The parties' prior suit was resolved through a negotiated, out of court settlement agreement—not by a trial or contested motions. Given this circumstance, this court has no special role to play in discerning the scope of the prior litigation or the applicability of res judicata. Instead, because Seipp's claim for commissions properly belongs in arbitration, the defense of res judicata and related issues must be decided in that forum.

BACKGROUND

Seipp worked for Cornerstone until April 20, 2015, when he left to work as a broker for Berkshire Hathaway Home Services First Look Real Estate (Berkshire).[2] Prior to Seipp's departure, Cornerstone had developed a marketing package for the sale of the Timber Court Apartments owned by EZ Properties, LLC. Two days after Seipp associated with Berkshire, Berkshire and EZ Properties entered into an exclusive listing

[2] The corporation, N. 807 Incorporated, will be referred to by one of its registered trade names rather than its corporate entity name.

agreement to sell the Timber Court Apartments. Berkshire sold the Timber Court Apartments, and once Cornerstone learned of the sale it asserted it was entitled to a commission from the sale. The final sale agreement for the property listed Seipp as the listing broker and Berkshire as the listing firm.

Cornerstone filed a complaint in Spokane County Superior Court against Berkshire, its owners, and Seipp, alleging Seipp's involvement in the sale of the Timber Court Apartments breached his independent contractor agreement with Cornerstone. Cornerstone also made claims for unjust enrichment, tortious interference with contract, violation of the Uniform Trade Secrets Act, chapter 19.108 RCW, conversion, and breach of the fiduciary duty of loyalty. Berkshire responded to Seipp's complaint by alleging Cornerstone's claims were subject to arbitration with the Commercial Brokers Association (CBA), since all the parties were members of the CBA and were required to arbitrate some disputes. Berkshire and Seipp then filed for dismissal and to compel arbitration. Cornerstone filed a cross motion for partial summary judgment for its breach of contract claim. The superior court declined to compel arbitration and denied the motion to dismiss.

In May 2017, this court affirmed the superior court's decision to not dismiss the complaint, but reversed the denial of the motion to compel arbitration, finding the plain

language of the CBA's bylaws required arbitration of all of Cornerstone's claims related to lost commissions. We allowed that the superior court could retain jurisdiction over any claims unrelated to commissions.

Cornerstone petitioned for review by the Washington Supreme Court. While the petition was pending, the parties privately negotiated a settlement. Under the terms of their settlement agreement, Seipp agreed to pay Cornerstone $20,000, Cornerstone agreed to dismiss its Supreme Court petition for review, and the parties agreed the superior court case would be dismissed with prejudice and without attorney fees or costs to any party. The settlement agreement contained a one-sided release provision, in that Cornerstone agreed to release its claims against Seipp, but Seipp did not waive any claims or potential claims against Cornerstone. The agreement specified that disputes arising from the agreement would be decided in Spokane County Superior Court. On August 22, 2017, a stipulation and order of dismissal with prejudice was entered in Cornerstone's superior court lawsuit. The stipulation and order did not refer to the settlement agreement or cite the reasons for dismissal.

Prior to finalization of the settlement agreement, Seipp was approached by an individual named Dennis Crapo. Crapo had hoped to enlist Seipp's services in selling some commercial property. But when Seipp informed Crapo about the ongoing litigation

with Cornerstone, Crapo decided to proceed with another broker. Crapo ultimately sold the property on August 28, 2017.

Seipp filed an arbitration complaint with the CBA against Cornerstone during September 2017 (the month after entry of the stipulated dismissal order). In his complaint, Seipp alleged Cornerstone's prior lawsuit caused him to lose the opportunity to list and sell Crapo's property, which could have resulted in a commission of over $1 million. Seipp asserted several causes of action: perversion of the court, malicious prosecution, failure to arbitrate, and tortious interference with business relations. In his prayer for relief, Seipp requested lost commissions for Crapo's property, punitive damages, and $60,000 for attorney fees and costs incurred in defending the recently dismissed lawsuit related to the Timber Court Apartments commissions.

Seipp later amended the arbitration complaint to remove the request for punitive damages and attorney fees and costs, but prior to this Cornerstone filed a complaint in superior court for breach of contract against Seipp and Berkshire (hereinafter collectively Seipp). Cornerstone alleged Seipp breached the terms of the settlement agreement by seeking an award of attorney fees and costs incurred in the first lawsuit in the arbitration complaint. Cornerstone requested damages and injunctive relief to prevent the CBA from arbitrating claims that were dismissed in the first lawsuit via the settlement agreement.

Cornerstone moved for summary judgment on its complaint on January 5, 2018. Cornerstone argued Seipp's arbitration complaint was barred by the parties' settlement agreement. Cornerstone also argued Seipp's claims were barred by the doctrine of res judicata and that Seipp waived his claims by failing to bring them as compulsory counterclaims in the prior litigation. Cornerstone requested the superior court address the issues of res judicata and compulsory counterclaims by issuing an injunction, prohibiting Seipp from going forward with his claims in arbitration.

Shortly after Cornerstone's motion for summary judgment, Seipp filed a CR 12(b)(6) motion to dismiss, arguing that because Seipp amended the arbitration complaint to remove the claims for punitive damages and attorney fees and costs, Cornerstone had failed to state a claim upon which relief could be granted. Seipp also argued the settlement agreement did not bar Seipp's amended arbitration complaint.

In response to Cornerstone's motion for summary judgment, Seipp made a two-fold argument. First, Seipp claimed Cornerstone's arguments regarding res judicata and compulsory counterclaims were defenses to the pending arbitration complaint and needed to be raised in arbitration. Second, Siepp argued Cornerstone's claims on the merits, contending the arbitration complaint was not barred by res judicata or waived compulsory counterclaims.

During the pendency of the superior court motion practice, Cornerstone filed a motion to amend its complaint, adding a cause of action for declaratory judgment. Cornerstone's request for declaratory relief pertained to its arguments regarding res judicata and compulsory counterclaims. The superior court granted Cornerstone leave to amend the complaint.

Seipp subsequently filed a motion to dismiss the amended complaint. Again, Seipp argued the amended arbitration complaint was not barred by the parties' settlement agreement and that the issues of res judicata and compulsory counterclaims needed to be decided in arbitration, not superior court.

The superior court issued several written rulings in response to the parties' motions. The court granted Cornerstone's motion for summary judgment in part after determining Seipp had breached the terms of the settlement agreement by seeking attorney fees and costs in the arbitration complaint. The court denied Cornerstone's motion to enjoin Seipp's arbitration complaint, concluding Cornerstone had not made a requisite showing of imminent irreparable injury. The court also granted Seipp's motion to dismiss. Although the superior court made some oral comments regarding the parties' arguments on res judicata and compulsory counterclaims, the court never issued a written ruling addressing Cornerstone's request for declaratory judgment on these matters.

Cornerstone now appeals the superior court's adverse rulings.

ANALYSIS

In their briefing, the parties operate under the mistaken assumption that the superior court decided the merits of Cornerstone's res judicata and compulsory counterclaim arguments. In fact, the court never entered a written ruling addressing these issues.[3] Instead, the court simply rejected Cornerstone's request to enjoin Seipp from going forward with arbitration. The court also granted Seipp's motion to dismiss, which was based in part on the claim that the issues of res judicata and compulsory counterclaims needed to be decided in arbitration, pursuant to the broad CBA rules governing arbitration.

The superior court's decision to avoid a final decision on the issues of res judicata or compulsory counterclaims was appropriate. This is because the substance of such claims are for a CBA arbitration panel to decide, not the court.

As we recognized in our prior decision, the CBA bylaws obligate Seipp and Cornerstone to arbitrate any claim regarding lost commissions "regardless of the legal

[3] "It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963).

theory." *SVN Cornerstone, LLC v. N. 807 Inc.*, No. 34692-7-III, slip op. at 10 (Wash. Ct. App. May 23, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/346927_unp.pdf. In the present case, Seipp has requested arbitration based on lost commissions from Crapo's property that is attributed to Cornerstone. This is an arbitrable claim. *See id.* Whether or not Cornerstone can prevail against Seipp's claim on the basis of an affirmative defense[4] such as estoppel or res judicata goes to the merits of the dispute, not the question of arbitrability. The CBA arbitration policy does not exclude equitable defenses such as estoppel or res judicata from the terms of its broad arbitration clause. Thus, Cornerstone's legal defense to Seipp's arbitration complaint falls within the scope of the parties' arbitration agreement. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (Estoppel is an issue of procedural arbitrability that is for the arbitrator to decide.); s*ee also Yakima County v. Yakima*

[4] Res judicata, or claim preclusion, prevents relitigation of a claim or cause of action that has already been adjudicated or should have already been adjudicated in a prior suit. Res judicata is an affirmative defense that must be pleaded and proved by the party seeking its application. *See Large v. Shively*, 186 Wash. 490, 497, 58 P.2d 808 (1936); *Meder v. CCME Corp.*, 7 Wn. App. 801, 806, 502 P.2d 1252 (1972). For res judicata to apply there must be identity of (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of persons and parties. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For background on the law of res judicata in Washington, *see* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985).

County Law Enf't Officers Guild, 157 Wn. App. 304, 321, 237 P.3d 316 (2010) (Doubts over the scope of arbitrability are resolved in favor of arbitration.).

Cornerstone does not seriously dispute that a legal defense to Seipp's claim for lost commission is arbitrable under the scope of the parties' arbitration agreement. Yet Cornerstone claims special circumstances govern this case because Cornerstone's legal defense involves the scope of a prior court order of dismissal and it is for a court to discern the scope of a prior order, not an arbitration panel.

Courts undoubtedly have a role to play in discerning the scope of their own prior judgments. After a case has been litigated and the court has resolved the parties' dispute, the court may properly defend its judgment and ensure the parties do not reassert claims that have already been decided. *See id.* at 326; *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 138 (3rd Cir. 1998); *In re Y&A Group Sec, Litigation*, 38 F.3d 380, 382 (8th Cir. 1994). For this reason, a majority of courts that address this issue hold that when a res judicata "objection is based on a prior court judgment from the same jurisdiction," application of res judicata "is a question for the trial court." *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 907, 335 Ill. Dec. 327, 918 N.E.2d 1140 (2009).

But here, the superior court was not involved in resolving the merits of the parties' prior dispute. The last substantive order from the court determined that the parties needed to present the bulk of their claims to an arbitration panel. Rather than going through the time and expense of arbitration, the parties settled the dispute privately and submitted an agreed order of dismissal. The court was not involved in the settlement process and was not privy to the bases for the agreed resolution.[5] The court therefore has no unique qualification to ascertain the scope and preclusive effect of a final judgment. An exception to the general rule of arbitrability does not apply in such circumstances. *Ford Motor Credit Co.*, 395 Ill. App. 3d at 909 (An agreed order of dismissal is unlike a decision on the merits and does not implicate the court's duty to decide res judicata.); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1133-34 (9th Cir. 2000) (same with respect to order confirming arbitration award).

To the extent the superior court has an interest in defending the terms of its prior judgment, this interest weighs in favor of arbitration. The primary issue resolved in the prior case was that the parties' dispute over lost commissions (including any defenses thereto) had to be decided in arbitration. To now hold that a court should decide the

[5] This case is therefore distinguishable from *Y&A Group Securities Litigation*, 38 F.3d at 383, which involved a court-approved consent decree.

scope of the prior case and whether it necessarily encompassed affirmative defenses or counterclaims would run counter to our prior decision and would deprive Seipp of the right to arbitration set forth in the CBA bylaws. *See Local Union No. 370 of Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356, 1358-59 (9th Cir. 1986) (Estoppel defenses are arbitrable and cannot be asserted in a way that deprives a party of the right to arbitration.).

Cornerstone complains that the defense of res judicata is complicated and, therefore, it should be resolved by a court instead of an arbitration panel. We are not unsympathetic to this claim. But that is the nature of arbitration. An agreement to arbitrate is enforceable, regardless of the complexity of the legal claim that winds up before the arbitration panel. *See* RCW 7.04A.060(1) (An arbitration agreement may properly cover "any . . . controversy arising between the parties.").

The superior court's orders are affirmed to the extent they hold that Seipp is not prohibited from pursuing the arbitration complaint against Cornerstone. Any defenses Cornerstone has to Seipp's complaint, including defenses related to res judicata and compulsory counterclaims, shall be determined in first instance by the CBA arbitration panel.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Even if the issues of res judicata and compulsory counterclaims were proper for the court to resolve, as opposed to an arbitration panel, Cornerstone would still need to go forward with arbitration because at least some of Seipp's claims are clearly not barred by the prior litigation. The gravamen of Seipp's arbitration complaint is that Seipp lost a commission from the sale of Crapo's property because Cornerstone tortiously interfered with Seipp's business relationship with Crapo. The elements of a tortious interference claim are: (1) the existence of a valid contractual relationship or business expectancy, (2) knowledge by the defendants of that relationship or business expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or business expectancy, (4) improper purpose by the defendants, and (5) resultant damage. *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Cornerstone's prior complaint did not touch on these issues. The prior complaint alleged Seipp improperly stripped Cornerstone of commissions from the sale of the Timber Court Apartments. Even if Cornerstone's complaint had been brought with an improper motive

(and we do not wish to imply it was),[6] whether Cornerstone knew of Seipp's business relationship with Crapo and intended to interfere with that relationship are matters that were never addressed or resolved by the prior proceedings. Thus, res judicata would be inapplicable. *See Yakima County*, 157 Wn. App. at 327-28 (Res judicata requires identity of subject matter and cause of action.).

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

[6] The question of whether Cornerstone's prior complaint should have been filed with the CBA instead of the superior court was legally debatable. The superior court originally agreed with Cornerstone that its complaint was not subject to mandatory arbitration. In addition, our prior decision indicated that at least some of Cornerstone's complaints may not have been subject to arbitration.

FELTMAN EWING PS

September 13, 2019 - 3:11 PM

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