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No. 65867-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Robert S. Bryan and Jim Macpherson, on behalf of themselves and all
others similarly situated,

Respondents,

vs.

CMCS Management, Inc., and Jay Campbell, d/b/a Parkside Spine Care,

Appellant.

BRIEF OF RESPONDENTS

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INTRODUCTION

The decisions of the trial court in this matter both initially denying the summary judgment motion of Appellant/Defendant Dr. Jay Campbell. Hereafter “Dr. Campbell” and his subsequent motion for reconsideration were correct and should be affirmed so this matter may proceed on the merits.

ASSIGNMENTS OF ERROR

Plaintiffs/Respondents, hereafter “Plaintiffs” concur with Dr. Campbell’s description of the Assignments of Error.

STATEMENT OF THE CASE

The class in *Shorett* was all persons who received a fax in the form of a purported newsletter that had the names of Dr. Sue or Dr. Hansen on it. The faxes sent or caused to be sent by Dr. Campbell may have had Dr. Sue or Dr. Hansen on some of them, and probably did not on others. The class in this case is all persons who received a fax from Dr. Campbell. A subset of that class might also have received a fax with Dr. Sue or Dr. Campbell on it.

Dr. Campbell claims the faxes he sent out were substantially similar to those sent out in *Shorett*. He is correct. The issue is whether Dr. Campbell was released in *Shorett*.

The “Facts” are set forth, in part, in the Declaration of Rob Williamson in Support of Plaintiffs’ Motion to Continue Summary Judgment Motion. (CP 232-248). The claims in this action are not the same as those brought in *Shorett*. In this case, claims are brought against Dr. Campbell for his wrong doing, on behalf of a class that will include some of the *Shorett* class and others. The issue is whether a defendant may take advantage of a settlement and release in another case to which he was not a party, and where the intention of that settlement and release was not to include that defendant.

Shorett did not include any faxes sent to class members by or on behalf of Dr. Campbell, although it did, indeed, involve substantially similar claims against other chiropractors who had conspired with CMCS Management, Inc., (“CMCS”) to send out illegal facsimiles disguised as newsletters in order to build their practices, as Dr. Campbell has done in this case. (CP 235-6, 240-3)

ARGUMENT

A. The Proper Standard of Review

While Dr. Campbell is correct that a de novo standard of review is to be used in this case, he fails to set forth the standards that would apply to review of a summary judgment motion.

Summary judgment is appropriate only where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). Any doubt about the existence of a genuine issue of material fact is to be resolved against the moving party by denial of his motion for summary judgment. *Atherton Condominium Association v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Facts and reasonable inferences from the facts are to be construed in favor of the non-moving party. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Campbell’s motion should be denied “If the record shows any reasonable hypothesis which entitles the non-moving party to relief.” *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991) (quoting *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980)).

In this case, resolving all inferences in favor of the Plaintiffs, and given the lack of any evidence to the contrary, the Court should affirm the decisions of the trial court which denied a summary judgment of dismissal the for Dr. Campbell who decided for his own personal gain to embark upon an illegal marketing program in violation of both state and federal law.

B. Plaintiff's action is not barred by the plain language of the Shorett Settlement Order and Final Judgment

Dr. Campbell claims all class members in *Shorett* gave up all claims based on a fax sent to them by Dr. Sue or CMCS based on the language of the Settlement Order and Final Judgment in *Shorett*. This particular argument misinterprets the Order and relies on no legal authority. As shown herein, the class members did not give up claims with respect to illegal faxes sent to them by Dr. Campbell.

C. Washington law does not recognize that a full and unlimited release of all claims by a Plaintiff releases claims against parties not named in the release

Dr. Campbell argues that Washington courts have held that a settlement dismissing "all claims" means that Dr. Campbell was also released, citing *Metropolitan Life Insurance Co. v. Ritz*, 70 W. 2d 317, 422 P. 2d 78 (1967). In *Metropolitan Life* the only issue was whether or not the release of all claims by the defendants, injured persons, of their lawsuit against a tortfeasor included medical claims, or not. If they did, then their subrogated medical carrier had a right to seek reimbursement for their payments. It was not a case about whether an entity not a party to the underlying litigation was able to "benefit" from the release in that litigation, but instead an analysis of the meaning of terms. The case was

also heavily influenced by the perceived unfairness of the defendants settling their tort claim so as to attempt to deprive the subrogated carrier of its contractual right to reimbursement. Dr. Campbell's conclusion, that the release of all claims by the defendants in *Metropolitan Life* case invokes legal principles applicable to this case, serving to release him even though he was not a party to the settlement agreement, is wrong; Dr. Campbell does not explain the relevance of the *Metropolitan Life* case, other than observing that Dr. Campbell was not named in the settlement in *Shorett* just as the subrogated health care insurer was not named in the settlement agreement and release in *Metropolitan Life*. That alone does not establish that Dr. Campbell may "benefit" from the settlement and release in this case.

Dr. Campbell also argues that the result of *Metropolitan Life* is consistent with the Washington's statutory scheme regarding contribution. It is unclear, however, why *Metropolitan Life* has any connection whatsoever to contribution. Furthermore, RCW 4.22.05 *et seq* deals with "Contributory Fault-Effect-Imputation-Contribution-Settlement Agreements", and deals with tort claims, "action based on fault seeking to recover damages for injury or death to person or harm to property"

(RCW4.22.005). Contribution is governed by RCW 4.22.040 which provides, "A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them." That 4.22.040 applies to joint tortfeasors is shown by 4.22.040(3) which Dr. Campbell does not cite, which states, "The common law right of indemnity between active and passive tortfeasors is abolished." *See also Central Washington Refrigeration, Inc. v. Barbee*, 81 Wash.App. 212, 221, 913 P.2d 836, 840 (1996), *reversed on other grounds* 133 Wash.2d 509, 946 P.2d 760 (1997). ("The statutory right of contribution under RCW 4.22.040 is limited to tort-based claims."). Thus Dr. Campbell bases his entire argument on a statutory scheme that does not apply in this case. Dr. Campbell is not a joint tortfeasor; this action does not sound in tort.

1. The language of the Shorett settlement did not extinguish the liability of any person arising from the faxes at issue in that case, including persons not party to the lawsuit

Dr. Campbell relies on *Pietz v. Indermuehle*, 89 Wn. App. 503, 949 P. 2d 449 (1988) to support his argument. The case, however, is not relevant. The underlying action was for breach of contract and fraud, tortuious breach of the covenant of good faith and fair dealing, and

negligent misrepresentation. The claim in *Pietz* itself sought indemnity under partnership and joint venture law, damages for breach of duty by the other partners, and contribution or indemnification based on **tort liability**. *Pietz* has nothing to do with this case. Here Dr. Campbell hired CMCS to assist him with sending out solicitation facsimiles that were illegal. Dr. Campbell does not, nor could he claim that he was a joint tortfeasor with CMCS, Dr. Sue or Dr. Hansen. In *Pietz* the court observed that the purpose of RCW 4.22.040(2) was to protect the tortfeasor against whom contribution is sought from exposure to double liability from the injured Plaintiffs and the settling tortfeasor. Dr. Campbell makes no claim that he may be exposed to such double liability, even were RCW 4.22.040(2) to apply.

Dr. Campbell misunderstands and misinterprets the language of the settlement agreement, final judgment and other papers in the *Shorett* case ignoring that the plain language of the documents conclusively establish that the releases and settlement covered only the **named** Defendants. Dr. Campbell seeks to skirt this problem by the argument that the settlement in *Shorett* dealt with faxes sent by CMCS only, to any person, and that intention of the court in *Shorett* is to be determined by reading the judgment as a whole, citing *Callahan v. Callahan*, 2 Wn. App. 446, 468 P. 2d 456 (1970).

The Settlement Agreement (CP 85-92) in the *Shorett* litigation expressly was limited to all disputes, claims and controversies that were asserted, or could have been asserted, by and between the parties in that action. The parties were David Shorett, Elizabeth Powell, CMCS Management, Inc., Dr. Hansen, and Dr. Sue. Dr. Campbell was not a party to the action, nor could have any claim been asserted against Dr. Campbell. The class is defined as persons who had received a facsimile which had the names either of Dr. Sue or Dr. Hansen on them. The purpose of the identification was to distinguish such faxes from others that may have been sent by other chiropractors at the instigation of CMCS.

The Settlement agreement provided further that entry of judgment, "... of the Plaintiffs would be fully, finally, and forever settle, release, relinquish and discharge." "**Released Claims**" are defined as all claims, causes of action, or liabilities that have been or could have been pled in this Action [the *Shorett* action] which any and all class members had or may have had as of the date of the filing of the Motion for Preliminary Approval of this settlement." The **Released Claims**, then, did not and could not have included a cause of action against Dr. Campbell.

The Settlement agreement also provided that a notice, approved by Judge Craighead, would be sent to class members, including Exhibit C to the settlement agreement, which was a letter sent to all potential class member (CP 89). That letter advises class members that they may have

received a fax from Dr. Hansen or Dr. Sue and that had they received one, they may participate in the settlement, opt out, or object. If, hypothetically, a facsimile received by a particular class member also included the name of Dr. Campbell, it would have been clear from careful reading of the letter, that a claim against Dr. Campbell was not involved in the litigation. The letter expressly provided that, “Attached to this letter is a facsimile that you may have received, or one like it, either from Dr. Eric Hansen or Dr. Raymond Sue.” The letter provided, further, that “Plaintiffs alleged that the Defendants sent out a facsimile that was, in fact, an advertisement without having first obtained any express permission of the recipients to send this fax to their facsimile machines...” Obviously the letter did not cover any fax from any chiropractor, but only those from Dr. Sue or Dr. Hansen.

The Settlement Order and Final Judgment, paragraph 6
"...dismisses with prejudice all claims with respect to unsolicited facsimile advertisements allegedly sent or caused to be sent by **Defendants** [i.e. CMCS, Dr. Sue, and Dr. Hansen] (emphasis added). Note that Defendant never refers to that paragraph of the Final Judgment. Defendant also never refers to nor appreciates the provision of paragraph 7 of the Final Judgment which provides:

All class members... shall be deemed to have released and forever discharged each **Defendant** [i.e. CMCS, Dr. Sue, or Dr. Hansen)... from (a) any and all liability with respect

to the claims described in the Settlement Agreement; and (b) and any and all other claims, causes of action or liability whatsoever, whether known or unknown, related in any manner to its (the class member's) business dealings with any **Defendant**. (emphasis added).

It is impossible to read the language of the Settlement Order and Final Judgment to confer a benefit on Dr. Campbell, much less to invoke principles of collateral estoppel or *res judicata*. Paragraph 7, which precedes Paragraph 8 which Defendant recites, and which establishes the context for 8, clearly limits the release to claims arising out of dealings with CMCS, Dr. Sue or Dr. Hansen. It says naught about Dr. Campbell for the obvious reason that the *Shorett* litigation was about faxes sent or caused to be sent by Dr. Hansen and Dr. Sue.

Dr. Campbell raises the holding in *Jacobs v. Venaliti, Inc.* 596 F. Supp. 906 (D. Md. 2009) to support in position, a case neither cited nor discussed before the trial court. The District Court in *Jacobs* dismissed a junk fax class action both on the grounds of the application of a prior release by the Plaintiffs and *res judicata*. Dr. Campbell does not rely on *Jacobs* to support his *res judicata* argument in this case because the holding of *Jacobs* clearly demonstrates that Dr. Campbell's argument here fails.

The facts in *Jacobs* are significantly different than our case. To be sure, the Plaintiffs in this case and *Shorett* are the same, and the causes of action arise from the same illegal conduct, the transmission of unlawful

solicitation facsimiles. The critical difference is that Dr. Campbell was in no way affiliated with any of the Defendants in *Shorett*. In *Jacobs*, the District Court found quite differently:

Accordingly, the Vision Lab release is best understood as a general release as it pertains to any and all entities associated with Vision Lab. *See* *912 *Coakley & Williams Const., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349, 353 (4th Cir.1992). Because, according to plaintiffs' own complaint, every defendant named in the present suit was an officer, director, employee, affiliate, or agent of Vision Lab before the release was signed, *see* Md. Compl. ¶¶ 2-16, 25, 28-29, 33, 48, 51, & 55, plaintiffs' claims against these individuals and corporations are barred by the express terms of the release. *Cf. White v. General Motors Corp.*, 541 F.Supp. 190, 194-95 (D.Md.1982) (finding a general release to bar all future claims against related parties not in the original litigation).

596 F.Supp.2d 906, 911 -912

In this case, CMCS was involved in a scheme to sell its services as a marketing resource for chiropractors. It entered into separate marketing agreements with chiropractors who were not related to one another and in fact did not even know of CMCS's marketing arrangements with each other. Part of the CMCS scheme was to facilitate the sending of the junk faxes, disguised as newsletters, by the chiropractors to attorneys that might utilize their services. The chiropractors did not confer with one another

nor plan the timing, content or sending of the faxes. Dr. Campbell decided to use CMCS independently of any other chiropractor and did not confer with Dr. Sue, Dr. Hanson or CMCS as to whether any other chiropractor would be appear on faxes with his name on it. Thus, unlike all of the Defendants in *Jacobs* who were affiliated with one another, Dr. Campbell was operating in isolation from the other chiropractor Defendants although certainly with the aid of CMCS.

2. The Shorett Defendants do not have a contribution right against Dr. Campbell

Dr. Campbell argues that “By forever barring Plaintiffs from bringing any claims based on the faxes at issue, the defendants in *Shorett* retained the right to seek contribution from Dr. Campbell, and hold this right today.” (Opening Brief, p. 20) It is not clear why this claim, even if true, is relevant to this appeal. This argument is not supported by a single citation and relies on the same incorrect reading of the documents in the *Shorett* settlement that infect Dr. Campbell’s entire understanding of this case.

D. Res Judicata Does Not Bar This Action

The doctrine of res judicata does not apply in this case. The doctrine prohibits a party from bringing a claim already litigated, or claim that could

have been litigated in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P. 3d 833 (2000); the doctrine prevents repetitive litigation of the same matters, insuring integrity and finality in the legal system. *Id.* at 71. In this case it is clear that the class could not have brought an action against Dr. Campbell as no faxes involving his illegal contact were included in that prior proceeding.

Dismissal on the basis of *res judicata* is appropriate in cases where the moving party proves a concurrence of identity between the two actions in four respects: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of persons for or against to the claims made. *Rains v. State*, 100 W. 2d 660, 663, 674 P. 2d 165 (1983). Campbell bears the burden of proving that *res judicata* applies and must initially show that there was a “final judgment on the merits” of the claim against him in the prior proceeding. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Campbell has the burden of showing that the prior action (*Shorett and Powell v. CMCS, et al.*) involved the same four matters. *Kuhlman v. Thomas et al*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995) (citations omitted).

1. No Identity of Parties Exists for *Res Judicata* Purposes

Dr. Campbell was not a party in the prior action. The "identity and quality of parties" requirement is better understood as a determination of who is bound by the first judgment: all parties to the litigation as well as persons in privity with such parties (14A Karl B. Tegland, *Washington Practice: Civil Procedure*, paragraph 35.27, at 464 [1st ed. 2007]). A person is bound by prior judgment, when that person was a party, or the person's interest was represented by a party. *Northern Pac. Ry. V. Snohomish County*, 101 Washington 686, 688-89, 172 P. 2d 165 (1983). Dr. Campbell cannot claim there is an exception to the rule that identity of parties must exist before *res judicata* applies, or argue he was in privity with the Defendants in *Shorett*. See, *Loveridge v. Fred Meyer*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995)(emphasis added):

Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property...Privity is established in cases where a person is in actual control of the litigation, or substantially participates in it...

Dr. Campbell cites no Washington authority that the mere fact that he engaged in the same illegal conduct as did the Defendants in *Shorett* amounts to being in privity with those Defendants. Campbell was not involved in the

litigation in the prior action and had no “actual control over the litigation.” Nor were the “same facts” involved. The crucial fact in this case involve whether Dr. Campbell sent illegal faxes to class members. That the illegal conduct was the same as that of Dr. Sue and CMCS does not make the “facts” the same.

2. The Causes of Action and Claims Are Not the Same

Res judicata requires a showing that the causes of action in this case are identical to the causes of action or claims asserted in the *Shorett* action. No identity exists because: (1) the rights or interests established in the *Shorett* action would not be destroyed or impaired by prosecution of this action; (2) the same evidence is not present in the two actions; (3) infringement of the same rights in this case were not involved in the *Shorett* action and (4) the *Shorett* action does not arise out of the same transactional nucleus of facts. That the instant case and the *Shorett* case involve similar conduct cannot be gainsaid. This does not make them identical for purposes of *res judicata*. The rights and interests established in the *Shorett* settlement involved only the claims against the defendants in that case. There was no determination of any of the claims that Plaintiffs assert in the instant case. Nor will the same evidence be presented in this case as the evidence that served as the basis of

the settlement and Court approval thereof in the *Shorett* case. The evidence in *Shorett* was that the named Defendants had sent or caused to be sent illegal faxes to the class. Here, in contrast, the evidence will concern the conduct of Dr. Campbell.

As discussed above the same rights and interests are not involved in this case as those involved in the *Shorett* case, nor do the claims in this case arise out of the same nucleus of operative facts. To be sure, the rights of privacy which are protected and vindicated by enforcement of the Telephone Consumer Protection Act, and its Washington State counterpart are involved in both cases.

This case is not unlike a claim that might be brought against a defendant who had sent a libelous letter to third parties regarding a particular plaintiff. If the plaintiff were to bring an action against that defendant, and settle the claim, the plaintiff would not be barred from bringing the claim against another defendant who, it was discovered, had signed a similar letter regarding the plaintiff. The only possible defense that the second defendant could raise is that the settlement in the first action fully compensated plaintiff for damages, a claim that Dr. Campbell does not make.

This case is also not unlike situations where a motorist is injured by two independent tortfeasors in an automobile accident. That the plaintiff may settle with one defendant does not then alleviate the responsibility of the other defendant. Again, the non-settling defendant might claim that plaintiff has no further damages, but otherwise cannot rely upon the release given to the first defendant.

3. Plaintiffs' Action is not expressly barred by the rule against claim splitting and by RCW 80.36.540

For the first time Dr. Campbell raises the argument that the claims of the Plaintiffs are barred by the rule against claim splitting and application of RCW 80.36.540. Relying, in part, on *Landry v. Luscher*, 95 Wn. App. 115 (1965), Dr. Campbell argues that his conduct was part of the single tort of the transmission of illegal faxes by Dr. Sue. This ignores, in part, that Dr. Campbell likely sent faxes on which the name of Dr. Sue did not appear, and that his separate tortious conduct is not included in the release of claims against Dr. Sue for his tortious conduct.

Dr. Campbell also argues RCW 80.36.540 prevents recovering multiple times for a single claim, and Plaintiffs have been compensated through the Shorett settlement for damages arising from the faxes that name both Sue and Dr. Campbell. In fact, however, Plaintiffs have only been

partially compensated for those faxes which name both chiropractors and not at all for those sent by Dr. Campbell on which the name of Dr. Sue does not appear. Finally, RCW 80.36.540 provides a violation is a per se violation of the Consumer Protection Act, a remedial statute intended to prevent dishonest conduct. There is no public policy vindicated by a determination that a settlement as to Dr. Sue which included injunctive relief that he not violate the law any further serves to protect Dr. Campbell.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the trial court's orders denying his motions for summary judgment and reconsideration.

Dated: April 1, 2011

WILLIAMSON & WILLIAMS



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The undersigned hereby certifies that on the 1st day of April, 2011, she caused a copy of BRIEF OF RESPONDENTS to be served by email and U.S. Mail upon Andrew Kinstler, counsel for Defendant, at Helsell Fetterman, LLP, 1001 Fourth Avenue, #4200, Seattle, WA 98154, akinstler@helsell.com.


Victoria Harrison