

71037-1

71037-1

No. 71037-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 11 PM 4:44

MERLE PINNEY and AMANDA PINNEY, and the marital community
composed thereof,

Plaintiffs/Appellants,

v.

BELFOR USA GROUP, INC., dba BELFOR RESTORATION and/or
BELFOR PROPERTY RESTORATION, a foreign corporation; ROBERT
GALL and JANE DOE GALL, and the marital community composed
thereof; and JERRY MARTIN and JANE DOE MARTIN, and the marital
community composed thereof,

Defendants/Respondents.

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. Millie M. Judge)

BRIEF OF RESPONDENTS

Thomas D. Adams, WSBA No. 18470
Jacque E. St. Romain, WSBA No. 44167
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 223-1313
Attorneys for Defendants/Respondents

TABLE OF CONTENTS

Page

I. INTRODUCTION1

II. STATEMENT OF THE CASE2

III. ASSIGNMENTS OF ERROR5

IV. ARGUMENT.....5

 A. Summary Judgment Standard of Review.....5

 B. Trial Court Correctly Held that Res Judicata Barred the Pinneys’ Action Against Belfor.6

 1. The American Family Lawsuit Ended with a Final Judgment.7

 2. There Was Complete “Identity of Parties” in the Two Actions Filed by the Pinneys.7

 3. Both Lawsuits Have an Identity of Subject Matter.....10

 4. Both Lawsuits Have the Same Quality of Parties.....12

 5. The Alleged “Late Evidence” Did Not Allow the Pinneys to Bring the Same Suit Twice.13

 6. The Pinneys Claimed Need for Discovery Was Raised For the First Time in their Motion for Reconsideration.14

 C. The Trial Court Should Have Entered Summary Judgment on the Ground that the Pinneys’ CPA Claim Fails as a Matter of Law.....15

 1. Belfor Made No Guarantees Related to “Trade”16

 2. The Pinneys Have Failed to Demonstrate Any Public Interest.17

 3. The Pinneys Cannot Show Causation.....18

V. CONCLUSION19

TABLE OF AUTHORITIES

Page

Cases

<i>Burton v. Ascol</i> , 105 Wn.2d 344, 715 P.2d 110 (1986)	17
<i>Carlile v. Harbour Homes</i> , 147 Wn. App. 193, 194 P.3d 280 (2008) 16, 18	
<i>Ensley v. Pitcher</i> , 152 Wn. App. 891, 222 P.3d 99 (2009), <i>review denied</i> , 168 Wn.2d 1028 (2010)	7, 12
<i>Evans v. Pearson Enters., Inc.</i> , 434 F.3d 839 (6th Cir. 2006)	9
<i>Feature Realty v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP</i> , 161 Wn.2d 214, 164 P.3d 500 (2007)	7
<i>Fiumara v. Fireman's Fund Ins. Cos.</i> , 746 F.2d 87 (1st Cir. 1984)	8
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997)	10
<i>Herrion v. Children's Hospital Nat'l Medical Center</i> , 786 F.Supp.2d 359 (D.C. Cir. 2011)	8
<i>In re Estate of Black</i> , 153 Wn.2d 152 (2004)	6
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	6
<i>Jumamil v. Lakeside Casino, LLC</i> , No. 43620-5-II, 2014 Wn. App. LEXIS 468 (Mar. 4, 2014)	16
<i>Kelly-Hansen v. Kelly-Hansen</i> , 87 Wn. App. 320 (1997)	6
<i>Krepps v. Reiner</i> , 377 P.App's 65 (2d Cir. 2010)	8
<i>Kuhlman v. Thomas</i> , 78 Wn. App. 115, 897 P.2d 365 (1995)	7, 10
<i>Lambert v. Conrad</i> , 536 F.2d 1183 (7th Cir. 1976)	9
<i>Lubrizol Corp. v. Exxon Corp.</i> , 871 F.2d 1279 (5th Cir. 1989)	9
<i>Mahoney v. Tingley</i> , 85 Wn. 2d 95, 529 P.2d 1068 (1975)	15
<i>Moritz v. Daniel N. Gordon, P.C.</i> , 895 F. Supp. 2d 1097 (W.D. Wash. 2012)	18
<i>Panang v. Farmer's Insurance Company</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	18, 19

<i>Pelletier v. Zweifel</i> , 921 F.2d 1465 (11th Cir.), <i>cert. denied</i> , 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 131 (1991).....	9
<i>Rains v. State</i> , 100 Wn.2d 660, 675 P.2d 165 (1983).....	11
<i>Rams v. Arnold</i> , 141 Wn. App. 11, 169 P.3d 482 (2007).....	16
<i>Saudi Arabia v. Nelson</i> , 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993).....	8
<i>Spector v. El Rancho, Inc.</i> 263 F.2d 143 (9th Cir. 1959).....	9, 10
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency</i> , 322 F.3d 1064 (9th Cir. 2003).....	11
<i>Thompson v. King County</i> , 163 Wn. App. 184, 259 P.3d 1138 (2011).....	7
<i>Turner v. Crawford Square Apartments III, L.P.</i> , 449 F.3d 542 (3d Cir. 2006).....	8
<i>Wendle v. Farrow</i> , 102 Wn.2d 380, 382, 686 P.2d 480 (1984).....	15
<i>Williams v. Leone & Keeble, Inc.</i> , 171 Wn.2d 726 (2011).....	6

Other Authorities

14A KARL B. TEGLUND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27 (1st ed. 2007)	12
Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 WASH. L. REV. 805, 812–13 (1985).....	10
<i>Restatement (Second) of Judgments</i> § 51 (1982).....	12

I. INTRODUCTION

Appellants Merle Pinney and Amanda Pinney (“Appellants” or “Pinneys”) appeal from the trial court’s order granting summary judgment to Respondents Belfor USA Group, Inc. d/b/a Belfor Restoration and/or Belfor Property Restoration; Robert Gall and Jane Doe Gall; and Jerry Martin and Jane Doe Martin (collectively, “Respondents” or “Belfor”). For the reasons that follow, the trial court correctly held that Appellants’ claims against Belfor were barred by the doctrine of res judicata.

Prior to suing Belfor, the Pinneys filed a separate lawsuit against American Family Insurance Company (“American Family”) involving the same pellet stove smoke loss at issue here. As the Pinneys’ insurer, American Family engaged Belfor to assist in remediation efforts and the Pinneys authorized the engagement. That lawsuit ended in a final judgment. The Pinneys present case against Belfor involves the same facts, same issues and effectively the same parties as the their first action against American Family. Accordingly, this Court should affirm the trial court’s order entering summary judgment on the ground that the Pinney’s action against Belfor is barred by res judicata.

Apart from res judicata, the trial court’s decision should be affirmed because the Pinneys cannot establish their sole claims under the

Consumer Protection Act claim as a matter of law. Although the trial court declined to enter summary judgment for Belfor on this ground, it is a separate basis in support of the dismissal order.

II. STATEMENT OF THE CASE

On May 26, 2010, a wood pellet stove in the Pinneys' home malfunctioned. Smoke from the stove spread through much of the home and permeated furnishings, clothing, and other property. The Pinneys submitted a claim to their insurer, American Family. CP 506.

The Pinneys elected to take part in American Family's optional "Homeowner Repair Program," to facilitate the necessary repairs and restoration although they had the option to hire a contractor of their own choosing. Belfor was an approved contractor within the Program and the Pinneys signed a Work Authorization allowing Belfor to perform the work. *Id.*

Belfor removed most of the affected contents from the Pinneys' home between June 15 and June 23, 2010, for cleaning. The Pinneys' clothing was taken to a separate location by a dry cleaner retained by American Family (not Belfor). The clothing was dry cleaned by the vendor at least twice then taken to Belfor where it was cleaned again using other techniques. *Id.*

The Pinneys accepted some of the treated clothing but refused to accept other items (which they valued at approximately \$73,000), even after a panel of consultants was brought together to inspect and perform a “smell test” of the disputed items alongside the Pinneys. Other than these items of clothing in dispute, the restoration and repair was essentially complete. The Pinneys signed Belfor’s Certificate of Completion on August 26, 2010. *Id.*

Finding themselves at an impasse over the non-salvageable clothing, the Pinneys filed a lawsuit against American Family in December 2010, which American Family removed to the United States District Court for the Western District of Washington, Cause No. 2:11-cv-00175-MJP. The Pinneys alleged claims against American Family under the Insurance Fair Conduct Act and the Consumer Protection Act. *Id.*; CP 399–428. Belfor was not a party in the American Family lawsuit.

American Family compelled an appraisal while the lawsuit was pending. A three-appraiser panel determined the value of the Pinneys’ unsalvageable content and issued a “Contents Appraisal Award.” The Award set the replacement cost of the contents at \$5,865.93 (the depreciated, or actual cash value, was \$2,932.96). American Family paid

the Award, less amounts paid previously to the Pinneys, and the District Court confirmed the Award over the Pinneys' objections. CP 507.

The remaining dispute between the Pinneys and American Family was settled in March of 2012 for \$15,000. As part of the settlement, the Pinneys released claims against American Family but excepted Belfor from the release. The Pinneys' claims were dismissed with prejudice and a final judgment was entered. CP 465–66.

On May 23, 2012, the Pinneys then brought a second action in Snohomish County Superior Court arising from the same smoke loss. This time the Pinneys sued Belfor and the two project leaders who managed Belfor's efforts, Jerry Martin and Robert Gall. CP 468–72. The only claim alleged by the Pinneys' was for violation of Washington's Consumer Protection Act ("CPA"). *Id.*

On July 18, 2013, Belfor filed a Motion for Summary Judgment, arguing that the Pinneys' claims against Belfor were barred under the doctrine of res judicata because of the Pinneys' previous lawsuit against American Family. CP 504–16. In addition, Belfor argued that the Pinneys' allegations, as a matter of law, did not support a CPA claim. *Id.* At the summary judgment hearing held September 3, 2013, the Court

granted Belfor's motion on grounds of res judicata and dismissed the Pinneys' lawsuit. CP 219–21.

Subsequently, on September 13, 2013, Appellants filed a motion for reconsideration, which the trial court denied on September 25, 2013. CP 4–5; 15–22.

III. ASSIGNMENTS OF ERROR

The issues before this Court are:

1. Whether the trial court correctly held that the Pinneys' claims were barred by res judicata where the same claims, the same subject matter, the same alleged damages and the same issues were fully and fairly litigated against essentially the same party in the previous American Family suit; and
2. Alternatively, whether the trial court should have dismissed the Pinneys' claim on the ground that the Pinneys cannot establish a CPA violation as a matter of law.

IV. ARGUMENT

A. Summary Judgment Standard of Review.

An appellate court reviews an order entering summary judgment de novo, applying the standard of CR 56, and viewing the facts submitted in the light most favorable to the nonmoving party. *Indoor*

Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

B. Trial Court Correctly Held that Res Judicata Barred the Pinneys' Action Against Belfor.

The Pinneys' lawsuit against American Family in 2010 was based on the same underlying facts and raised, or could have raised, the same subset of issues as the 2012 suit against Belfor. The Pinneys chose to proceed against American Family and not against Belfor. The doctrine of res judicata precludes them from re-litigating their claim now. Under established Washington law, the Pinneys are not entitled to two bites at the same apple.

Res judicata is a doctrine of claim preclusion. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 731 (2011). It applies “where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication.” *Id.*; *In re Estate of Black*, 153 Wn.2d 152, 170 (2004). Res judicata bars not only claims that were actually litigated previously, but all matters which “could have been raised, and in the exercise of reasonable diligence should have been raised in the prior proceeding.” *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 328–29 (1997).

1. *The American Family Lawsuit Ended with a Final Judgment.*

Initially, for res judicata to apply, there must be a final judgment on the merits in the prior suit. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *review denied*, 168 Wn.2d 1028 (2010). There is no question that the American Family action resulted in a final judgment following the appraisal confirmation, the settlement, and the Pinneys' voluntary dismissal of their claims. A voluntary dismissal stipulation is treated a final judgment for res judicata purposes. *See Thompson v. King County*, 163 Wn. App. 184, 190, 259 P.3d 1138 (2011).

2. *There Was Complete "Identity of Parties" in the Two Actions Filed by the Pinneys.*

Res judicata also requires an "identity of parties." Under Washington law, the necessary identity exists between parties who share a kind of privity, e.g., employer/employee or partners in a single entity. *See Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995) (employer/employee); *Feature Realty v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 164 P.3d 500 (2007) (Defendant's partner was "substantially the same party" for purposes of res judicata). Here, American Family and Belfor were in privity because Belfor acted as American Family's agent in carrying out the smoke remediation and

restoration. The Pinneys cannot deny the agency connection. In the American Family action, the Pinneys themselves urged this characterization. CP 476. Indeed, in opposing American Family’s summary judgment motion, the Pinneys alleged “the misconduct of the Defendant *and its agent Belfor . . .*” *Id.* (emphasis added). Moreover, this agency relationship was expressly accepted by the District Court in its ruling:

Even though Belfor is not a party in this action, Belfor acted as American Family’s agent or servant concerning a matter within the scope of the agency or employment.

CP 433.

Notably, “privity” has been held to exist for res judicata purposes where there is a principal/agent relationship potentially-labile parties. In *Herrion v. Children’s Hospital Nat’l Medical Center*, 786 F.Supp.2d 359, 371 (D.C. Ct. 2011), the Court held that “a decision on the merits in a prior action involving the principal or the agent precludes a subsequent action against the other party to the agency relationship if the prior action concerned a matter within the scope of the agency.” *Id.*¹

¹ The District of Columbia court is not alone in finding privity between principals and their agents. *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 376, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993) (Kennedy, J., concurring in part, dissenting in part); *Fiumara v. Fireman’s Fund Ins. Cos.*, 746 F.2d 87, 92 (1st Cir. 1984); *Krepps v. Reiner*, 377 P.App’s 65, 68 (2d Cir. 2010); *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 547 n. 11 (3d Cir. 2006); *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288–

In sum, the Pinneys themselves urged the District Court in the first action to treat Belfor as American Family's agent and the District Court did exactly that in the course of evaluating the very same loss that is at issue here. Because of this agency relationship, Belfor and American Family acted in privity for purposes of applying res judicata.

The Pinneys attempt to distinguish the lawsuits by arguing that the present action is based on specific statements made by Belfor employees, i.e., that Belfor guaranteed that the Pinneys' property would be "fresh and neutral." The Pinneys' argument lacks merit. This is precisely the same contention they raised as to Belfor in the American Family suit and which the District Court rejected:

Plaintiffs' continued argument as to whether the items are now "neutral and fresh," as promised by Belfor, is inapposite. Although Plaintiffs remain dissatisfied, an appraisal occurred and an appraisal is conclusive as to the amount of loss.

CP 434.

The undisputed facts demonstrate that Belfor was alleged, and held, to have acted as American Family's agent in the first lawsuit and all related claims were resolved in that lawsuit which ended in a final

89 (5th Cir. 1989); *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 850 n.5 (6th Cir. 2006); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976); *Spector v. El Rancho, Inc.* 263 F.2d 143, 145 (9th Cir. 1959); *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir.), *cert. denied*, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 131 (1991)).

judgment. The Pinneys are not entitled to prosecuted the same claim again. *See Spector v. El Rancho Inc.*, 263 F.2d 143, 145 (9th Cir. 1959) (“Where, as here, the relations between the two parties are analogous to that of principal and agent, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon grounds equally applicable to both, is to be accepted as conclusive against the plaintiff’s right of action against the other.”); Cf. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995) (res judicata applies where the initial suit was brought against the employer and the subsequent suit was brought against the employee).

3. *Both Lawsuits Have an Identity of Subject Matter.*

Res judicata also requires an “identity of subject matter.” In considering this factor, the focus should be on “the nature of the claim or cause of action and the nature of the parties.” *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997) (citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 812–13 (1985)). Here, both actions by the Pinneys are based on the identical smoke loss. In both cases, the Pinneys alleged fault by Belfor and the breach of an alleged guarantee. The subject matter underlying both lawsuits is identical.

The Pinneys may not avoid summary judgment by re-casting their claim against Belfor as being somehow different than their claims alleged in the American Family action when American Family's alleged liability was, at least in part, based on Belfor's efforts. The "identity of claims" requirement is a rule of substance, not form. An imaginative attorney cannot avoid preclusion by attaching a different legal label to a claim in subsequent suit that was, or could have, been litigated in a prior suit. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077–78 (9th Cir. 2003) ("It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought.") See also *Rains v. State*, 100 Wn.2d 660, 664, 675 P.2d 165 (1983) (substantial identity of claims is all that is required).

The present action is an attempt by the Pinneys to re-litigate against Belfor the same claim, for many of the same damages, they sought or could have sought from American Family. This is precisely the sort of "claim splitting" and duplicative litigation that res judicata is intended to prevent. The Pinneys argued in the first action that American Family, acting through Belfor, breached its duty to the Pinneys by failing to return textiles to a "neutral and fresh" condition. CP 434 (Order, p. 5). This is

substantially the same the argument the Pinneys make here. Indeed, they invoked the CPA in the American Family action just as they have here.²

4. *Both Lawsuits Have the Same Quality of Parties.*

The final element of res judicata requires a determination of which parties in the second suit are bound by the judgment in the first suit. *Ensley*, 152 Wn. App. at 905 (citing 14A KARL B. TEGLUND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27 (1st ed. 2007) (explaining that the “identify and quality of parties” requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus persons in privity with them). As the *Ensley* court noted:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

Id. at 906 (citing *Restatement (Second) of Judgments* § 51 (1982)).

Because American Family and Belfor are in a principal/agent relationship or otherwise in privity, they satisfy the “quality of

² In opposing Belfor’s summary judgment motion, the Pinneys acknowledged that in the American Family case “Judge Pechman found that American Family was neither unreasonable nor deceptive under IFCA and the CPA.” CP 283.

parties” requirement for purposes of applying res judicata under *Ensley*.

5. *The Alleged “Late Evidence” Did Not Allow the Pinneys to Bring the Same Suit Twice.*

The Pinneys rationalize the non-joinder of Belfor in the American Family suit by arguing that they did not receive a certain “Case Forensics” report, or an American Family claim log containing Belfor notes, until later in that case. (App. Br., at pgs. 18–19. This is inaccurate. The Case Forensics report now portrayed as vital was not only disclosed in the American Family case but referenced by the District Court in a manner seemingly unfavorable to the Pinneys.³ In any event Case Forensics was retained by American Family, not Belfor, and the Pinneys do not explain why Belfor is accountable for American Family’s handling of the Case Forensics report. Moreover, the Pinneys made no attempt to amend their Complaint in the American Family action to include Belfor as a party or, had they done so, why it would have made a difference. In sum, the Pinneys have not offered legally sufficient grounds to avoid the preclusive effect of the prior American Family action.

³ “American Family retained Case Forensics to test the items.” ... “Case Forensics tested the items and determined there was no remaining smoke odor.” CP 435.

6. *The Pinneys Claimed Need for Discovery Was Raised For the First Time in their Motion for Reconsideration.*

Following the entry of summary judgment for Belfor, the Pinneys moved for reconsideration, arguing for the first time that they were deprived of a reasonable opportunity to conduct discovery related to res judicata. CP 18. If the Pinneys believed they needed additional time for discovery they could and should have timely invoked CR 56(f) so that Belfor, and the Court, could have fairly evaluated the argument. See *Butler v. Joy*, 116 Wn. App. 291, 299 65 P.3d 671 (2003). Raising the point on a motion for reconsideration is simply insufficient. Moreover, the argument falls flat in light of the facts. Belfor's motion was filed July 18, 2013. The hearing was held September 3, 2013. At no point in the intervening period did the Pinneys suggest they needed additional discovery in order to respond to motion.

The Pinneys also complain that Belfor failed to plead res judicata as an affirmative defense in its Answer. (Opening Brief at 11–17.) This argument fails too. The Pinneys raised no objection to the res judicata defense in opposing Belfor's motion. Instead, they raised it for the first time on reconsideration. Under Washington law, a failure to plead an affirmative defense is "harmless" where there is no surprise or prejudice to the opposing party. *Mahoney v. Tingley*, 85 Wn. 2d 95, 100, 529 P.2d

1068 (1975). Moreover, a failure to comply with a civil rule “is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense.” *Id.*, at 100–01.⁴ The Pinneys were not prejudiced by the omission of the res judicata defense from Belfor’s Answer and, in any event, have waived any right to argue the omission by failing to raise it until the reconsideration stage.

C. The Trial Court Should Have Entered Summary Judgment on the Ground that the Pinneys’ CPA Claim Fails as a Matter of Law.

Aside from res judicata, the trial court also should have granted Belfor’s motion on the ground that the Pinneys’ CPA claim failed as a matter of law for the reasons Belfor articulated. This Court may sustain a trial court’s judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

To maintain a private CPA action, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive

⁴ The Pinneys waived their objections to Belfor’s affirmative defense of res judicata by arguing the merits of the defense in the summary judgment hearing. Res judicata is not waived as an affirmative defense if the parties try the defense by “implied

acts and the injury suffered by the plaintiff.” *Carlile v. Harbour Homes*, 147 Wn. App. 193, 194 P.3d 280 (2008). The Pinneys cannot satisfy all five of these elements.

1. *Belfor Made No Guarantees Related to “Trade”.*

First, “[t]he term ‘trade’ as used by the [CPA] includes only the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided. Claims directed at the competence of and strategies employed by a professional are essentially allegations of negligence and are exempt from the Consumer Protection Act. *Id.* at 213 (citing *Rams v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007)). The Pinneys’ claim against Belfor targets the alleged inadequacy of their cleaning work, not the entrepreneurial aspect of Belfor’s business. A statement that smoke damaged items will be made “neutral and fresh” is a statement pertaining to the quality of work to be performed, not a statement about the manner in which Belfor conducts business. The claim amounts to an allegation of negligence that is not actionable under the CPA.

consent.” See *Jumamil v. Lakeside Casino, LLC*, No. 43620-5-II, 2014 Wn. App. LEXIS 468, __ Wn. App. __ (Mar. 4, 2014)(publication ordered)

2. *The Pinneys Have Failed to Demonstrate Any Public Interest.*

The Pinneys also cannot satisfy the “public interest” requirement. The Pinneys’ claim is primarily based on the argument that Belfor did not remediate all of the smoke odor in some of their clothing. This is a particularized claim based on the specific facts of this loss. It is analogous to a dissatisfied party’s claim against a contractor which, under Washington law, is not a proper subject for a CPA claim absent proof of a protracted course or pattern of unfair or deceptive conduct. *See Burton v. Ascol*, 105 Wn.2d 344, 715 P.2d 110 (1986) (“The fact that a contractor has failed satisfactorily to perform construction contracts on more than one occasion does not necessarily signify that he is engaged in a protracted course or pattern of unfair or deceptive conduct. Burton’s actions may have been improper, but they did not constitute the kind of generalized conduct which so impacts the public interest as to give rise to a violation of the Consumer Protection Act.”). The Pinneys claim is, at most, a unique and fact-specific private dispute with Belfor. It does not impact the public interest simply because Belfor strived to return the clothes to a “neutral and fresh” condition.

3. *The Pinneys Cannot Show Causation.*

Finally, the Pinneys cannot satisfy the causation element of a CPA claim. To establish causation, a party must show that, but for defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Moritz v. Daniel N. Gordon, P.C.*, 895 F. Supp. 2d 1097, 1114 (W.D. Wash. 2012) (citing *Carlile*, 147 Wn. App. at 213). Here, there is no evidence that "but for" Belfor's actions, the Pinneys would not have sustained damage. The goods were damaged by the smoke, not by anything that Belfor did or said in the aftermath. A commitment by Belfor to return items to a "neutral and fresh" state does not change the fact that the smoke damage had already occurred.

Moreover, there is no evidence the Pinneys even relied on a "neutral and fresh" representation in authorizing Belfor to work on the job. The Pinneys testified that Belfor was chosen because they felt it would facilitate the handling of the remediation by American Family. CP 501-03. The Pinneys hired Belfor at American Family's suggestion, without doing any research on Belfor or any of its competitors, despite knowing they were free to choose their own contractor. *Id.*

The Pinneys cite *Panang v. Farmer's Insurance Company*, 166 Wn.2d 27, 204 P.3d 885 (2009), for the point that a CPA violation can be

found even where no direct consumer relationship existed. However, even *Panang* recognizes that the CPA requires a party to causally connect an alleged act to the alleged harm:

What is necessary, and does constitute the needed link between the plaintiff and the actor, is that the violation cause injury to the plaintiff's business or property as required by RCW 19.86.090 . . .

Id. at 39. *Panang* clearly does not obviate the need for proof of causation and the Pinneys have no evidence that generalized statements by Belfor about returning smoke-damaged good to a “neutral and fresh” condition caused them harm.

Based on the foregoing, the Pinneys cannot satisfy elements (2), (3), and (5) of a CPA claim. There was no promise or representation made in the course of trade; the relationship between the Pinneys was a “private transaction” that did not impact the public interest; and there is no evidence causally connecting the Pinneys’ damage to a statement or action by Belfor. The Pinneys’ CPA claim, the only claim alleged, should have been dismissed by the trial court on this ground.

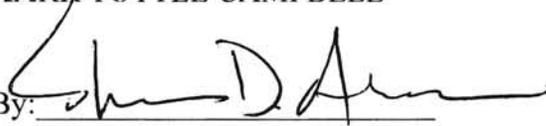
V. CONCLUSION

Belfor respectfully requests that decision of the trial court be affirmed insofar as it dismisses the Pinney’s claim based on the doctrine of res judicata. In the alternative, Belfor requests that the order of dismissal

be upheld for the reason that the Pinneys' have cannot establish one or more of elements necessary to maintain a claim under the Consumer Protection Act.

RESPECTFULLY SUBMITTED this 11th day of March, 2014.

KARR TUTTLE CAMPBELL

By: 

Thomas D. Adams, WSBA No. 18470
Jacque E. St. Romain, WSBA No. 44167
Attorneys for Defendants/Respondents

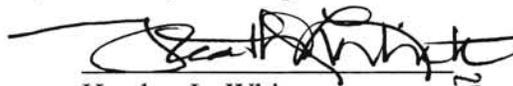
CERTIFICATE OF SERVICE

The undersigned certifies that on Tuesday, March 11, 2014, I caused to be served the foregoing document to:

Eugene N. Bolin, Jr.
Law Offices of Eugene N. Bolin, Jr.
144 Railroad Ave., Ste. 308
Edmonds, WA 98020
206-527-2700
425-582-8165
eugenebolin@gmail.com
Counsel for Plaintiffs/Appellants

- via hand delivery via ABC Legal Messengers.
- via first class mail, postage prepaid.
- via email.

I declare under penalty of perjury under the laws of the state of Washington on Tuesday, March 11, 2014, at Seattle, Washington.



Heather L. White

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 11 PM 4:45