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N.A.R., Inc. v. Aubrie Vermillion : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

N.A.R., INC., Appellant, **vs.** AUBRIE VERMILLION, Appellee.	**Appellate Court No. 20101043 -CA** Trial Court No. 070908175

BRIEF OF THE APPELLEE

(Oral Argument Requested)

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY, HON. ROBERT K. HILDER

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The Appellee Aubrie Vermillion concurs in the Appellant's Jurisdictional Statement.

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

At issue in this appeal is whether the Appellant Baird is precluded by a settlement agreement between the collection agency he retained, NAR, Inc., and the Appellee Vermillion where that settlement agreement resolved all claims, including claims for attorney fees, between the parties. The specific issues to be resolved are:

1. Whether the Appellant Baird's retention of NAR to collect his 50% interest in the Vermillion dental account, coupled with his written grant of authority to NAR to file a collection action against the Appellee Vermillion to enforce that 50% interest, invested NAR with authority to represent the Appellant Baird's interest in that collection action.

Standard of Review: [A] trial court's interpretation of the words of an unambiguous, integrated contract is a question of law, which is reviewed on appeal for correctness. *Elm, Inc. v. M.T. Enterprises, Inc.,* 968 P.2d 861, 863 (Utah App. 1998).

Preservation of the Issue Below: AR 935-938; 986-991.

2. Whether the three requirements for claim preclusion (i.e., same parties or privies, a claim that was raised or should have raised in the prior action, a final judgment on the merits) were present when the trial court ruled that the Appellant Baird's attorney fees claim was precluded by the settlement.

Standard of Review: The issue of claim preclusion is legal question which is reviewed for correctness granting no deference. *Dennis . Vasquez*, 2003 UT App 168, ¶¶ 3-9, 72 P.3d 135 (Ut. App. 2003).

Preservation of the Issue Below: AR 1041-1043; 1075-1077.

3. Whether the fact that a written settlement agreement was never executed by the parties or the Appellant Baird negates the settlement.

Standard of Review: The interpretation of unambiguous contracts is also a question of law, "and on such questions we accord the trial court's interpretation no presumption of correctness." *Ward v. Ihc Health Serv.*, 2007 UT App 362, ¶ 7, 173 P.3d 186 (UT App 2007).

Preservation of the Issue Below: AR 938-940.

V. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The constitutional provisions, statutes, ordinances, rules and regulations that pertain to this appeal are identified in the Table of Authorities and are fully set forth

in the body of this brief or in the addendum.

VI. STATEMENT OF THE CASE

This appeal concerns litigation commenced by the collection agency NAR, Inc. at the specific request of the Appellant Baird, AR 865-866, ¶¶ 1, 8, to collect one of his dental accounts on a 50% commission (leaving 50% for the Appellant Baird), AR 868, and his demurrer to NAR's settlement agreement with the Appellee Vermillion which disposed of the Appellant Baird's claim to attorney fees – a settlement agreement which could only be entered into by NAR with the Appellant Baird's prior approval. AR 866, ¶ 9. The Appellant Baird, who throughout the litigation before the trial court retained a 50% ownership of the collection account being sued upon, AR 868, was present in the courtroom when the issue of settlement was first raised at the commencement of the trial of the action on July 7, 2009. AR 1042, ¶ 4. When the possibility of settlement was put before the trial court, a short recess in the trial was ordered and the parties, including the Appellant Baird, adjourned to the small conference rooms immediately adjacent to the courtroom for settlement discussions. Id.

After an agreement on settlement was reached, the settlement agreement was recited into the record by the parties. AR 1110, pp. 3-10. The Appellant Baird was present in the courtroom during the recitation of the settlement agreement. AR 1042,

¶ 4. Shortly after his return to his office on July 7, 2009, the Appellant Baird informed his legal counsel of the settlement agreement. AR 1042, ¶ 6. No written settlement agreement was ever signed by the parties. Instead, in executing the settlement agreement the parties have relied upon a transcript of the proceedings before the trial court. The Appellant Baird does not contest the terms of the settlement agreement and has never moved to set aside or amend that settlement agreement. AR 1043, ¶ 9. The Appellant Baird made no further inquiry regarding the settlement agreement, but did not renew his claim for attorney fees until after the parties had fully performed the settlement agreement. AR 1043, ¶¶ 7, 8.

The Appellant contends that the settlement agreement cannot be applicable to him, otherwise he cannot vindicate his claim to attorney fees from the Appellee Vermillion and her legal counsel. His claim for more than $10,000.00 in attorney fees is based on his objection to the subpoena duces tecum served upon him by the Appellee Vermillion within three weeks after NAR commenced its collection action on behalf of Dr. Baird (the Vermillion collection action). The Appellant at first responded to that subpoena, and had extensive discussions with the Appellee Vermillion's legal counsel about responding to that subpoena, AR 607-608, but then retained legal counsel.

The Appellant Baird's legal counsel, Mr. Coulter, faxed a letter to Plaintiff's counsel on the afternoon of Thursday, June 28, 2007 expressing concern regarding

the scope of the Defendant's subpoena and requesting a conference. AR 610. The following Monday, July 2, 2007 Defendant's counsel contacted Mr. Coulter's office to confer regarding the subpoena. AR 591. Mr. Coulter's office informed Defendant's counsel that Mr. Coulter was out of the office until after July 5, 2007. AR 614. On Tuesday, July 3, 2007 Mr. Coulter's office served Defendant's counsel with a Motion to Quash the subpoena, id, thus prematurely cutting off the opportunity for counsel to confer, as required by Rule 26(c), prior to that motion to quash being filed.

Mr. Coutler's June 28, 2007 letter was a written objection to the Defendant's subpoena to the Appellant Baird. Because his evidence was at the core of the Appellee Vermillion's defense of the Vermillion collection action, Defendant needed to take his deposition. *Ut. R. Civ. P.* 30(a)(1) provides that the attendance of a non-party witness may be compelled pursuant to Rule 45. Rule 45(c)(2)(C) provides that in the event of a written objection (i.e., Mr. Coulter's June 28, 2007 letter) to a subpoena, the documents subpoenaed need not be produced until further order of the court issuing the subpoena. Id. To obtain such an order, the Rule provides that the party serving the subpoena may bring a motion to compel compliance with the subpoena. Id.

As required by Rule 45(c)(2)(C), on July 23, 2007 the Appellee Vermillion responded to the Appellant Baird's written objection by filing a motion to compel Dr. Baird's compliance with the subpoena. AR 56. The trial court denied that motion. AR

178.

On September 11, 2007, the trial court granted the Plaintiff summary judgment on its collection claim. AR 180. The Defendant filed a Rule 59 motion, AR 223, seeking reversal of that order, which the trial court granted. AR 309. However, because the Appellee Vermillion had mis-captioned her Rule 59 motion as a "Motion to Compel Discovery and Motion for Sanctions," on October 19, 2007 the Appellant Baird filed a memorandum opposing Defendant's Rule 59 motion and then sought attorney fees for his involvement in the litigation before the trial court. AR 240, 245-246. Shortly before it was filed, the Appellant Baird's memorandum was faxed to the Appellee Vermillion on October 19, 2007, AR 616, and her counsel immediately faxed a letter, AR 618, to Mr. Coulter explaining that the motion, AR 223, was mis-captioned (note that the supporting memorandum was properly captioned as a Rule 59 memorandum, AR 207), and that the body of the motion and its supporting memorandum were directed solely to relief under Rule 59 as a result of the trial court's summary judgment ruling. AR 618-619.

At this point the Appellant Baird's alleged claim for attorney fees – based on the erroneous claim that he was wrongfully compelled to defend himself against Defendant's subpoena, and that he was wrongfully compelled to defend himself against the Defendant's Rule 59 motion, was $720.00. AR 743-744. As a result of successive voluntary interventions by the Appellant Baird into the litigation, during

which he repeatedly pressed for sanctions against the Appellee Vermillion and her legal counsel, his claim for attorney fees mushroomed to over $10,000.00. The history of that intervention and the Appellant Baird's claim for sanctions is detailed at AR 892-908.

VII. STATEMENT OF FACTS

The underlying litigation in the trial court concerned the debt collector NAR's attempt to collect for Neal Baird, D.D.S., a dental account which the Defendant, Aubrie Vermillion, protested grossly exceeded the explicit amount agreed to with the Appellant Baird for the dental work he performed on her teeth. Ms. Vermillion contended that once she had paid the agreed fee of $1,080.00 (which reflected a 10% discount for cash) she had paid to Dr. Baird all that she agreed to pay. AR 186, 659-660. As well, Ms. Vermillion defended the Vermillion collection action on the basis that the account was also not owing because Dr. Baird had failed to complete his work by not placing a crown on one tooth he had reduced, and because the other crown he had placed on one of Ms. Vermillion's teeth had repeatedly fallen off and needed to be redone. AR 187-189.

The Appellee Vermillion had become a patient of the Appellant Baird as a result of receiving from his office an auto-dialer recorded solicitation on her telephone for a free tooth cleaning. AR 662-663. The Appellee Vermillion had one of

her children attend for a tooth cleaning at the Appellant Baird's office, and subsequently attended for root canals and crowns on her own teeth. AR 185, 662-663

Prior to having that work done, the Vermillions attended at the Appellant Baird's office to inform him that, due to her husband's reduced hours at work because of injuries he received in an automobile accident, they could not proceed with the dental work on the Appellee Vermillion unless it was covered by her husband's dental insurance through Aetna. In response, Dr. Baird's staff advised the Vermillions that Dr. Baird's charges would not exceed the amount paid by Aetna by more than $50.00. The Vermillions advised that with that assurance as to the cost of the Appellant Baird's dental services they would proceed with the dental work on the Appellee Vermillion's teeth. AR 185-186, 659-660.

The Appellant Baird's agreement for his services stated that payment was not due until his dental work was complete. AR 103.

There were problems with Dr. Baird's dental work on the Appellee Vermillion's teeth. After performing a root canal and reducing one tooth so that it could receive a crown, the Appellee Vermillion was still feeling significant pain in that tooth. AR 187. She was informed by the Appellant Baird that she needed to see a specialist (i.e., an endodontist) to ensure that the root canal had eliminated the entire nerve in that reduced tooth. Id.

The Appellee Vermillion advised that she could not afford to see a specialist at

that time. Id. The Appellant Baird removed the crown from her tooth, leaving the reduced tooth exposed, and advised the Appellee Vermillion to see a specialist. This occurred in November of 2006. AR 188-189. During the time the Appellee Vermillion was still attempting to resolve her billing dispute with the Appellant Baird's office, the Vermillion account was referred to NAR for collection. AR 190. Ms. Vermillion then tried to resolve her billing dispute with NAR, and while waiting for a response from it, she was advised that the Olson law firm was filing a legal action. AR 191-192.

When the Appellee was able to see an endodontist, he advised that the exposed tooth had decayed to the point that it must be extracted, and that the Appellee must pay for an implant or bridge. AR 192-193.

For these reasons, the Appellee Vermillion contested the NAR collection action, and then later amended her pleading and counterclaimed against NAR under the Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-1 et seq. AR 344-352.

At the trial of the action on July 7, 2007 the parties settled all claims, including claims regarding the parties, their officers, agents, Dr. Baird, his officers, agents, and attorneys. AR 1110, pp.4:20-5:4. The Appellant Baird was present throughout these proceedings. AR 1042, ¶ 4. Shortly after his return to his office on July 7, 2009, the Appellant Baird informed his legal counsel of the settlement agreement. AR 1042, ¶

6.

VIII. SUMMARY OF THE ARGUMENT

The Appellant Baird repeatedly asserts that other than acting as a witness, he had no involvement in the prior litigation. But he offers no evidence to support this assertion. The only evidence before the trial court and before this Court proves that he retained NAR to collect on a dental account he claimed was owing to him from the Appellee Vermillion. His agreement with NAR provided that the Appellant Baird would pay NAR a 50% commission for bringing the collection action, and that he would retain 50% for himself. The agreement specifically provided that the Appellant Baird was authorizing NAR to bring the collection action, that he could withdraw the action if he so chose, and that the action could not be settled without his approval. The Appellant Baird has never provided any proof that the settlement by NAR disposing of his claim to attorney fees was entered into without his approval.

By investing NAR with the authority to collect the dental account from the Appellee Vermillion, the Appellant Baird made NAR his privy. The attorney fees claim that is the motivation for this appeal was specifically disposed of by that settlement agreement. A final judgment was entered on the merits disposing of that attorney fees claim. It is undisputed that the attorney fees claim the Appellant Baird wishes to continue litigating involves the same parties and was the same attorney fees

claim resolved by the settlement agreement. Thus, all three requirements for claim preclusion have been met and the Appellant Baird's claim for attorney fees is precluded by the final judgment entered as a result of the settlement.

Settlements are strongly favored in Utah law, and the fact that the settlement agreement was merely recited into the record of the trial court and was never translated into a formal written agreement signed by the parties does not, under controlling legal precedent, lessen its effectiveness. In short, the only evidence is that the Appellant's claim for attorney fees was settled pursuant to an agreement approved by him, he is bound by that settlement agreement, and his appeal should be denied on this basis.

IX. ARGUMENT

A. DR. BAIRD WAS IN PRIVITY WITH NAR.

i. The Appellant Baird Retained a 50% Interest in the Collection Action.

The Appellant Baird recites in isolation text from paragraph 1 of the Assignment Agreement between the Appellant and N.A.R. to argue that he retained no interest in the Vermillion dental account. Aplt. Br., p. 10. However, a few sentences from an agreement cannot be considered in isolation but must be read in the context of the entire agreement. *Elm, Inc. v. M.T. Enterprises, Inc.,* 968 P.2d 861, 863 (Utah App. 1998) (a "contract should be read as a whole, in an attempt to harmonize

and give effect to all of the contract provisions." (internal citations omitted)).Based on his unconventional reading of this particular text, the Appellant Baird mistakenly argues that he appeared in the action solely as a disinterested witness.

In fact, a full reading of the Assignment Agreement discloses just the opposite. The Appellant Baird:

1. Assigned over a 33.34% to50% interest in his dental accounts to NAR for the "purpose of collection" (but not to transfer fee simple ownership), thus invoking the provisions of Utah Code Ann. § 12-1-8 ("Any collector having complied with the provisions of this chapter, may receive accounts, bills or other indebtedness, take assignments for the purpose of collections, and at the direction of the assignor bring suit as assignee . . . ."); AR 865, ¶ 1

2. Retained a 50% interest in his dental accounts in the event they went to litigation and NAR's "commission" was increased to 50%; AR 868

3. Retained the right to to instruct NAR not to proceed to litigation in collecting any particular dental account; AR 866, ¶ 8.

4. Retained control over NAR's reduction, settlement or compromise of an assigned dental account – including the Vermillion account and the settlement at issue in this appeal; AR 866, ¶ 9.

5. Retained the right to withdraw from collection by NAR any dental account the Appellant Baird had sent to NAR for collection. AR 866, ¶ 10. In the event NAR

had filed a collection action on a Baird dental account, the Appellant Baird was required to reimburse NAR for attorney fees and costs it had incurred to the date of withdrawal. Id.

6. Received payment for an assigned dental account only in the event NAR collected on the account; AR 866, ¶¶ 6, 7.

7. Agreed to indemnify and hold harmless NAR from any counterclaim that a defendant debtor, like the Appellee Vermillion, filed against NAR. This indemnification also required the Appellant Baird to "pay the costs, fees and expenses incurred by NAR and/or the NAR Parties in connection with Defending against any such Claim." Thus, when the Defendant Vermillion filed her counterclaim against NAR, the Appellant Baird was required by the terms of the Assignment Agreement to pay the legal fees NAR incurred in defending the Appellee Vermillion's counterclaim. AR 865-866, ¶ 5.

Note that the assignment in issue concerned a collection account. A collection account has a very limited scope – the recovery of a specified amount of money from the alleged account debtor. That is the sum and substance of a collection account. In relation to the Vermillion account, the Appellant Baird retained a 50% interest in any money recovered from her in NAR's collection action. The only damages sought in the Vermillion collection action were money damages, and the Appellant Baird retained a 50% interest in those damages. Consequently, the Appellant Baird retained

a full 50% interest of the collection account assigned to NAR, and the Appellant had – at the least – an equal interest with NAR in the collection action. Arguably, because he retained such a large degree of control over the Vermillion dental account, he had a greater than 50% interest.

ii. The Appellant Baird Invested NAR with Authority to Collect the Vermillion Account for the Appellant.

Moreover, the Vermillion collection action was assigned to NAR for the specific purpose of investing NAR with authority to collect the Appellant Baird's 50% interest for him. Under the Restatement (Second) of Judgments:

> § 41(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
> **********
> (b) Invested by the person with authority to represent him in an action . . . .
> **********
> (2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action is not served with process, or is not subject to service of process.

Restatement (Second) Judgments § 41 at 393 (1982).

Further, NAR only filed the collection action after the Appellant Baird approved of its filing, he had the option to withdraw the Vermillion account from litigation, and that collection action could not be settled without "prior approval" by the Appellant, which is additional confirmation that the Appellant Baird invested NAR with authority to collect on the Vermillion dental account for him. AR 865-868.

Clearly, the Appellant Baird not only retained a full 50% interest in the NAR collection action, he directly controlled the decision to commence the collection action against the Appellee Vermillion, and directly controlled the decision to settle the NAR collection action with the Appellee Vermillion.

Although the text recited by the Appellant Baird, in isolation, appears to refer to a fee simple assignment to NAR, the sentence preceding that text recites that dental accounts are assigned "for the purpose of collection" and the sentence following that text recites that the assignment was "subject to the limitations contained herein . . . ." Thus, this text invokes the provisions of Utah Code Ann. § 12-1-8, which provides that a debt collector can take an assignment of a debt from the creditor and file a legal action on that debt as assignee, so long as the creditor directs the debt collector to "bring suit as assignee." Id. And as is shown above, the contractual limitations in the Assignment Agreement, AR 865-867, disclose that the Appellant Baird retained almost total control over the dental accounts assigned, subject to NAR's 33.34% or 50% commission, and subject to NAR's right to reimbursement for costs, attorney fees, and counterclaims successfully alleged against it in collecting one of the Appellant Baird's dental accounts. Id.

The facts recited above belie the Appellant Baird's assertion that he was a mere witness that did not have any control over, interest in, or involvement in the Vermillion collection action. The sole support for these assertions is the Appellant's

idiosyncratic construction of an excerpt from paragraph 1 of the Assignment Agreement, and as a matter of law that construction is erroneous.

iii. The Appellant Baird's Status as an Owner of the Collection Account, Not his Status as a Witness, Makes Him a Privy to NAR.

In *Baxter v. Dept. Of Transp.*, 705 P.2d 1167 (Utah 1985) the court rejected the assertion that a party could be collaterally estopped merely because it had been a witness in the prior litigation. Id at 1168-1169. But the court went on to note that some of the cases cited by UDOT involved situations where the party precluded was not merely a witness in the prior litigation. One of the cases cited by *Baxter*, *Terry & Wright of Kentucky v. Crick*, 418 S.W.2d 217 (Ky. 1967) followed the rule adopted in *Baxter* at 1168-1169 that acting as a witness in prior litigation did not preclude a party from proceeding on the same claim in subsequent litigation. *Terry & Wright* at 219. But the court in *Terry & Wright* distinguished its prior case authority refusing to preclude a party who had acted as a witness in a prior proceeding, because in the case before the court the party to be precluded not only acted as a witness, but his damages claim was also fully litigated in the prior action. Id.

Admittedly, *Baxter* concerns a claim of collateral estoppel or issue preclusion, and it is claim preclusion which is at issue in this appeal. See *Brigham Young v. Tremco Consultants, Inc.*, 2005 UT 19, ¶ 32, 110 P.3d 678 (Utah 2005) (noting that "the concept of privity based on a nonparty's control of litigation is applicable to the doctrine of issue preclusion, but not to the doctrine of claim preclusion."). But *Baxter*,

and the *Terry & Wright* decision it cites, nevertheless establish that a monetary interest in the prior litigation will preclude a party in subsequent litigation.

Baxter also noted that in: "*Searle Brothers v. Searle*, Utah, 588 P.2d 689 (1978), we adopted the test set forth in *Bernhard v. Bank of America National Trust & Savings Association*, 19 Cal.2d 807, 122 P.2d 892 (1942), to determine when a party is collaterally estopped from litigating an issue . . . ." Another California decision, *Stafford v. Yerge*, 129 Cal.App.2d 165, 276 P.2d 649 (1954) applied the holding in *Bernhard* to find that the assignee of an leasehold interest in an oil and gas well was a privy of his assignor and so was precluded by prior litigation involving his assignor. *Stafford* at 170. The court summed up its holding that the plaintiff in the action was precluded by finding that:

> [I]t appears that at all times during the [prior] litigation plaintiff was the owner of a substantial interest in the subject matter of that action. Although not a party plaintiff therein, he obviously exercised certain control and direction of that litigation through the plaintiffs for he had a financial interest in any favorable judgment plaintiffs might have obtained.

Id at 173. Although under *Tremco* at ¶ 32 the "control of litigation" element is not a requirement in cases involving claim preclusion, nevertheless the fact that the *Stafford* court inferred control because the plaintiff had a financial interest in the prior litigation demonstrates that a financial interest in the prior litigation is a critical element in finding that a party is precluded.

Here, the Appellant Baird retained NAR for the specific purpose of collecting

on his 50% interest in the Vermillion dental account, he reserved to himself specific authority to approve the commencement of any litigation regarding that account, he retained authority to withdraw that account from litigation, and he held sole control over the approval of the settlement agreement NAR entered into with the Appellee Vermillion. Obviously, the Appellant Baird's financial interest in the Vermillion dental account placed him in privity with NAR when it concluded the settlement with Ms. Vermillion.

iv. The Appellant Baird Specifically Invested NAR with Authority to Bring the Collection Action on His Behalf.

Turning again to *Searle Bros.,* it went on to hold that:

> The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property. Our Court has said that as applied to judgments or decrees of court, privity means "one whose interest has been legally represented at the time."

Id at 691. (footnotes omitted). This legal definition closely parallels the definition in § 41 of the Restatement (Second) of Judgment, quoted above. In deciding the arguments regarding issue preclusion placed before it, *Tremco* repeatedly cites to the Restatement (Second) of Judgments provisions, §§ 39 and 43(1), on claim and issue preclusion to reach its decision, Id at ¶¶ 29 -32, and cited to ch. 4 of the Restatement generally. Id. Section 41 is part of ch. 4 of the Restatement, and in light of *Tremco's* citation to Chapter 4 of the Restatement, it seems fair to conclude that § 41 should

also be recognized as authoritative.

In re Cosmopolitan Aviation Corp., 69 B.R. 602 (Bkrtcy.E.D.N.Y. 1987) applied § 41 of the Restatement (Second) of Judgments to preclude an assignee of a lease from re-litigating claims litigated by its assignor in a prior civil action. At issue was a provision in the assignment which gave the assignor full authority "to appear in and defend any action or proceeding arising under, growing out of or in any manner connected with the Lease . . . ." Id at 608. The court applied § 41 to this provision to hold that because the assignee had invested its assignor with authority to litigate issues on behalf of the assignee, see § 41(1)(b), it was bound by that prior litigation even though it had never received formal notice of the commencement of the prior litigation and did not know of its commencement until some two years later. Id at 604. In so holding the court applied § 41(2) which states:

> A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action is not served with process, or is not subject to service of process.

Id.

The holding and rationale of *In re Cosmopolitan Aviation Corp.* fully applies to the Appellant Baird. He explicitly assigned to NAR dental accounts "for collection" and granted NAR "full power to . . . in any manner . . . enforce the collection thereof,"AR 865, ¶ 1, and then further provided to NAR authority to commence legal action "if NAR determines legal action is required to collect an

Assigned Account," AR 866, ¶ 8, so long as NAR first notified Dr. Baird of its intent to commence a legal action on a dental account and subject to his prompt notification that legal action was not to be commenced against the account. Id. Thus, the Appellant Baird invested NAR "with authority to represent him in [the Vermillion] action." Restatement (Second) Judgments § 41(1)(b). Further, Dr. Baird's assertion that he was never named as a party in the Vermillion collection action and his errant assertion that he did not know of the settlement are irrelevant to the determination of whether he was in privity with NAR. See Restatement (Second) Judgments § 41(2).

In short, the above analysis and the cases recited above confirm that the Appellant Baird was in privity with NAR on the Vermillion collection account.

v. The Appellant Baird Has Not Provided Any Evidence to Support His Claimed Non-Involvement in the Settlement.

Although Dr. Baird's opening brief attempts to gainsay his alleged non-involvement by repeatedly asserting, without proof, that he did not have a direct and immediate financial interest in the Vermillion collection action, and that he did not assert any control over that litigation, the Assignment Agreement rebuts these assertions. AR 865-867. Indeed, paragraph 9 of the Assignment Agreement gave the Appellant Baird complete approval authority over the settlement he now contests, but the Appellant failed – despite ample opportunity to do so – to file an affidavit in the trial court, or otherwise adduce evidence, demonstrating that NAR was in breach of that term of the Assignment Agreement. Dr. Baird provides no proof on this issue,

only his own unsupported assertions. Of course, those unsupported assertions are not evidence. Accordingly, the only evidence before this Court is that the Appellant Baird specifically approved of or ratified the settlement he now contests in this appeal.

This conclusion becomes even more compelling when the timing of the Appellant Baird's challenge of the parties' settlement is considered. On July 7, 2009, the settlement agreement was stated on the record during the trial of the action. Then, on October 2, 2009, after the settlement check had been cashed, the Appellant Baird renewed his spurious motion for attorney fees which, in effect, asserted that the Appellant Baird was not bound by the settlement . The Appellant Baird was present during the settlement negotiations between the parties and heard the settlement agreement recited into the record before the trial court. Yet, at no time has the Appellant Baird adduced any evidence to show that NAR proceeded to execute on the settlement in violation of paragraph 9 of the Assignment Agreement.

Such evidence lies exclusively within the control of the Appellant Baird, but in the nine months of post-settlement litigation before the trial court he failed to adduce any evidence demonstrating that NAR was not in complete compliance with paragraph 9 of the Assignment Agreement. Stated differently, the Appellant Baird entirely failed to adduce any evidence that NAR settled the Vermillion collection action "without prior approval from [Dr. Baird]." AR 866, ¶ 9. This creates an adverse evidentiary inference that if that evidence was adduced, it would be contrary

to the Appellant Baird's present assertion that he is not bound by the settlement. *Cf. Gerard v. Young,* 432 P.2d 343, 20 Utah 2d 30, 35 (Utah 1967) where Justice Ellet in his concurring opinion ruled:

> In McCormick on Evidence, page 163, § 80, the following statement is found: Under familiar principles an unfavorable inference may be made against a party not only for destroying evidence, but for the mere failure to produce witnesses or documents within his control. No showing of wrong or fraud seems to be required as a foundation for the inference that the evidence if produced would have been unfavorable. Why should not this same conclusion be drawn from the party's active interposing of a privilege to keep out the evidence?

Id.

The Appellant Baird's own agreement with NAR required that he affirmatively approve the settlement between NAR and the Appellee Vermillion, and in the absence of evidence to the contrary paragraph 9 is itself evidence that the Appellant Baird approved NAR's settlement with the Appellee Vermillion:

> "There is a presumption that the written contract correctly evidences the agreement of the parties. Reformation of such an instrument will not be granted upon a probability and usually not upon mere preponderance of the evidence, but only upon certainty of the error."

Forrester v. Cook et al, 77 Utah 137, 144, 292 P. 206 (1930). But, by analogy, the Appellant Baird, in effect, asks this Court to presume – all the while withholding evidence on this issue and despite the specific term in the Assignment Agreement to the contrary – that NAR settled the Vermillion collection action without the Appellant Baird's approval.

In that light, it is apparent that the Appellant Baird's assertion that he "was never a party to the litigation,"Aplt. Br., p.2, is true only if it is taken to mean that he was never a named party in the Vermillion collection action. The Assignment Agreement provides ample evidence that the Appellant Baird was fully represented by NAR in the lawsuit, and no evidence to the contrary had been provided by Dr. Baird. Similarly, his assertion that neither he "nor his counsel received a copy of the settlement Agreement," ignores the fact that the only settlement agreement was the one recited into the record when the Appellant Baird was present in the courtroom. There was never any written agreement beyond the transcript of that recitation. Further, Dr. Baird was present during the settlement negotiations. Although the Appellant Baird attaches as Addendum 1 to his brief that part of the trial transcript reciting the terms of the settlement agreement (i.e., the settlement agreement), he is careful not to say when he first acquired a copy of that transcript.

On these facts, the Appellant Baird's status as a privy of NAR cannot be reasonably disputed, because "privity depends mostly on the parties' relationship to the subject matter of the litigation." *Press Pub. Ltd. v. Matol Botanical Intern. Ltd.,* 2001 UT 106, ¶ 20, 37 P.3d 1121, (Utah 2001) (internal citations omitted). Because the assignment left the Appellant Baird with a 50% interest in the subject matter of the litigation, compelled him to indemnify NAR for its attorney fees, costs and counterclaim liability incurred in the Vermillion collection action, and provided him

with an active, controlling hand in the commencement of the Vermillion collection action, and in its settlement, his relationship to the subject matter of the Vermillion collection action was even closer than that of NAR. Not only was he closely related to the Vermillion collection litigation, that litigation was conducted to directly benefit him financially, which proves he was in privity with NAR.

vi. The Bodell Construction Decision Does Not Decide the Issue of Privity

The Appellant cites to and relies upon *Bodell Construction Company v. Robbins*, 2009 UT 52, 215 P.3d 933 (Utah) to argue that the Appellant Baird could not be bound by a settlement agreement which he did not sign (in point of fact, no one in the case below signed a settlement agreement). But *Bodell* does not dispose of and has no bearing on the issue of privity. *Bodell* does not address and does not purport to dispose of the issue of whether a settlement agreement will bind a privy of a party to the settlement agreement.

By arguing the issue of privity in Part II of his brief, the Appellant Baird implicitly acknowledges the limited scope of *Bodell's* holding. If, as the Appellant Baird asserts, *Bodell* must be over-read as an all-inclusive negation of the application of settlement agreements to non-signatories to the agreement, then there is no need to argue the issue of privity. However, a fair reading of *Bodell* discloses that it addresses only the narrow issue of whether a paragraph in a settlement agreement releasing named defendants from the plaintiff's claims should be broadly construed as

an accord and satisfaction. The limited scope of *Bodell's* holding is vouched for by the fact that in analyzing the issue of accord and satisfaction the *Bodell* court made particular reference to its refusal to consider any alternative theory for preclusion of Bodell's claims against non-parties to the settlement agreement.

Thus, not only is *Bodell* devoid of any reference by the court to any theory, other than accord and satisfaction, under which the plaintiff Bodell would be precluded from claiming against the defendants Bank One or Robbins, at footnote 17 the court makes it abundantly clear it is refusing to consider any issue other than accord and satisfaction. Id at fn17. There, the court categorically refused to consider any of the seven alternative theories referred to by Bank One because these alternative theories were "presented to, but were not reached, by the district court," Id, and because "the district court is in a better position than we are at this time to rule on Bank One's alternative theories." Id.

Clearly, *Bodell* is limited to the narrow issue of whether the settlement agreement in issue released only the named parties or whether it should be broadly construed as an accord and satisfaction which also acquitted from liability the non-signatory third parties. By expressly reserving judgment on alternative theories for extending the settlement agreement's reach to non-signatory third parties, the court refused to decide whether alternative theories – such as privity – might apply to make binding upon a non-signatory, like the Appellant Baird, a settlement agreement. In

short, *Bodell* is not dispositive – for either party to this appeal – of the issue of privity.

B. THE APPELLANT BAIRD IS PRECLUDED FROM RE-LITIGATING HIS ATTORNEY FEES CLAIM

So long as the other two requirements of claim preclusion are met, then the Appellant Baird's claim for attorney fees is precluded. Claim preclusion applies when three requirements are met:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Press Pub. Ltd. v. Matol Botanical Intern. Ltd., 2001 UT 106, ¶ 19.

The Appellee Vermillion has shown above that NAR was in privity with the Appellant Baird. Turning to the second requirement for claim preclusion, the Restatement (Second) of Judgments § 24(1) (1982), generally prohibits a plaintiff's splitting of its cause of action by providing:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Id. Essentially, for res judicata purposes the Restatement equates a party's claim with the "transaction or occurrence" test of the federal joinder rules. See 18 Wright and Miller at Section 4407, p.62. Under this approach, a party who has asserted a right to relief arising out of a particular transaction or occurrence must join all claims it has

arising from that transaction, or the omitted claims will be barred by the doctrine of res judicata.

In *Seale v. Gowans*, 923 P.2d 1361, 1364 (Utah 1996) the court held that "'[A] plaintiff may not split his cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another.'; see also Restatement (Second) of Judgments §§ 24-26 (1982)," thereby ratifying § 24 of the Restatement (Second) of Judgments, and also ratifying § 25, titled "Exemplifications of General Rule Concerning Splitting," which provides:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action.

More important, in *Mack v. Utah State DOC*, 2009 UT 47, ¶ 30, 221 P.3d 194 (Utah 2009), the court affirmatively adopted the transactional rule in the Restatement by holding:

> Claims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction. See Restatement (Second) of Judgments § 24 (1982).

Id. In so holding the court observed that:

> Previously we have held that two causes of action are the same if they rest on the same "state of facts," and the evidence "necessary to sustain the two causes of action" is of the same kind or character. Schaer v. State, 657 P.2d 1337, 1340 (Utah 1983). More recently, however, we have moved toward the transactional theory of claim preclusion

espoused by the Restatement (Second).

Id.

Not only could the Appellant Baird's claim for attorney fees have been brought in the trial court, it was heavily litigated in the trial court. Accordingly, there is no real issue regarding the second requirement for claim preclusion.

The third requirement is that there be a final judgment on the merits. The District Court's November 19, 2010 order incorporates the terms of the court's July 6, 2010 order and disposes of all outstanding motions and issues before the trial court, which operates as a dismissal of the action on the merits. *See Dennis . Vasquez*, 2003 UT App 168, ¶¶ 7-10, 72 P.3d 135 (Ut. App. 2003) (a dismissal of an action on terms precluding further litigation of the claims in the action is a dismissal on the merits).

C. IN UTAH SETTLEMENTS ARE STRONGLY FAVORED

"It is a basic rule that the law favors the settlement of disputes. Such agreements under the proper circumstances may be summarily enforced." *Goodmansen v. Liberty Vending Systems, Inc.*, 866 P.2d 581, 584 (Utah Ct. App. 1993) (quoting *Mascaro v. Davis*, 741 P.2d 938, 942 (Utah 1987)).

The policy of Utah courts favoring settlement agreements is based on the benefits accruing to the parties and the courts:

> ¶12 The Utah Supreme Court has stated that '[i]t is a basic rule that the law favors the settlement of disputes.' Mascaro, 741 P.2d at 942. Such '[s]ettlements are favored in the law, and should be encouraged, because of the obvious benefits accruing not only to the parties, but also to the

> judicial system.' Tracy-Collins Bank & Trust Co. v. Travelstead, 592 P.2d 605, 607 (Utah 1979). Moreover, the Court noted, 'so simple and speedy a remedy serves well the policy favoring compromise, which in turn has made a major contribution to its popularity.' Id. at 609 (internal quotations and citation omitted). Thus, 'the trial court has power to summarily enforce on motion a settlement agreement entered into by the litigants while the litigation is pending before it.' Id. (internal quotations and citation omitted).
> ¶13 The determination of whether to enforce a settlement agreement is governed by 'basic contract principles.' Mascaro, 741 P.2d at 942. The Mascaro Court noted that 'whether a court should enforce such an agreement does not turn merely on the character of the agreement.' Id. Rather, a settlement agreement 'constitutes an executory accord. Since an executory accord "constitutes a valid enforceable contract," basic contract principles affect the determination of when a settlement agreement should be so enforced.' Id. (footnotes and citations omitted)."

In re Adoption of E.H., 2004 UT App 419, ¶¶ 12-13, 103 P.3d 177 (UT App 2004)

The Appellant repeatedly asserts that it never signed a settlement agreement. But no one in the action below signed a settlement agreement because the settlement agreement was recited into the trial court record and stipulated to by the parties. In that regard, "[i]t is of no legal consequence that the parties have not signed a settlement agreement." *Mascaro v. Davis*, 741 P.2d at 941, n.2. And, in any event, "Utah law simply does not require settlement agreements to be written to be enforceable." *Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478, 482 (Utah Ct. App. 1989). Thus, the Appellant Baird's assertion that he never signed the settlement agreement not only ignores his status as a privy of NAR, it has nothing to do with whether the settlement agreement is enforceable against him.

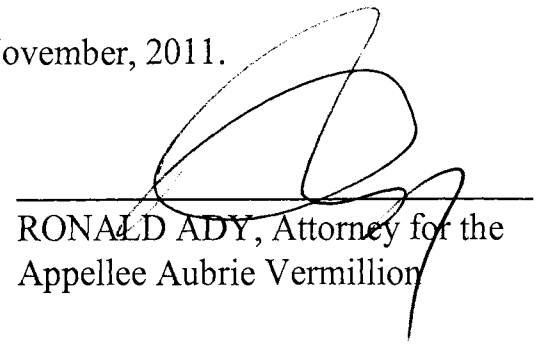
X. CONCLUSION AND RELIEF SOUGHT

The Appellant Baird claims the settlement agreement entered into by his privy NAR should not be enforced against him because he has an attorney fees claim against the Appellee Aubrie Vermillion and her legal counsel. But as was shown above, that settlement agreement could only have been entered into with the express permission of the Appellant Baird. And his attorney fees claim is based on the notion that despite the fact that his counsel failed to confer with the Appellee's counsel to resolve a discovery dispute, as required by the former *Ut. R. Civ. P.* 26(c), he should be awarded attorney fees. Further, that discovery dispute ceased to exist as of September 17, 2007.

The claim for attorney fees the Appellant Baird wished to litigate is the same claim for attorney fees specifically settled by the parties on July 7, 2009. A final judgment on the merits was entered terminating the prior action on the basis of that settlement. Accordingly, as a privy of NAR the Appellant Baird is precluded from again prosecuting the same claim for attorney fees against the same parties.

The Appellant Aubrie Vermillion respectfully requests that an order issue from this Court dismissing the within appeal.

DATED this 2nd day of November, 2011.



RONALD ADY, Attorney for the
Appellee Aubrie Vermillion

CERTIFICATE OF SERVICE

I certify that on the 7th day of November, 2011 I deposited a true copy of the foregoing Appellants' Brief in the United States mail, first-class postage pre-paid to:

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Law Office of Derek A. Coulter
11576 South State Street, Ste. 503
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Salt Lake City UT 84109

Secretary

ADDENDUM

A. July 7, 2007 Transcript of Settlement Agreement

B. Restatement (Second) of Judgments, § 41 (1982)

C. Assignment Agreement

Addendum A

SALT LAKE CITY, UTAH; TUESDAY, JULY 7, 2009, 2:30 P.M.

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[Excerpt of proceedings.]

THE COURT: Okay. Everyone go ahead and be seated, please. We are back on the record with the jury present in the jury box. Counsel also present.

MR. ADY: I believe we would like to approach, Your Honor.

THE COURT: Oh, sure. Come on up.

(Discussion at bench.)

THE COURT: We need to excuse you for one more very quick issue. It should help. Okay? Take them back, Elaine.

(Whereupon, the jury exited the courtroom.)

THE COURT: Go ahead and be seated.

We are on the record. Let me know where you are on this, counsel. Who would like to speak?

MR. ADY: I understand that what we've got is plaintiff will pay the defendant $1,000. The debt will be – or the claim for the debt will be extinguished and expunged from Ms. Vermillion's credit reports, all credit reporting agencies to which the debt has been – the claimed debt has been reported will be expunged forthwith. There will be a confidentiality provision as to the $1,000 only, that neither party will disclose it to any other third party.

They can talk about the settlement; they can't talk about the $1,000.

And that there will be no – it will not be characterized as a forgiveness of debt, for tax purposes. There's not going to be any form sent to my client saying that they've been – I forget the tax number, it escapes me, of the IRS form.

THE COURT: It's sort of like a 1099, isn't it? Or a –

MR. SCOFIELD: 1099.

MR. ADY: Yeah, 1099. There we are. There won't be a 1099 sent to them. And – and we're also going to release Dr. Baird from any claims as well.

THE COURT: All right.

MR. ADY: Is there anything else?

THE COURT: Is that the agreement, Mr. Scofield?

MR. SCOFIELD: Let me just clarify my understanding on the confidentiality of the $1,000 payment. It's no reference to there being a payment, not necessarily just the amount. And the release would be as to NAR, its officers, agents, Dr. Baird, his officers, agents and both of their attorneys. And, likewise –

THE COURT: It's meant to be – it's meant to be – includes that he was meant to –

MR. SCOFIELD: All the investment as well as the

other way, yeah.

THE COURT: All claims both ways.

MR. ADY: Yeah.

MR. SCOFIELD: Right. And then with respect to clearing up the credit, I don't know that I necessarily agree with the "forthwith," but I would say —

THE COURT: That one struck me. As soon as you reasonably can. You won't get it done forthwith. Forthwith is when they put you in handcuffs and take you through that door.

MR. ADY: Right.

THE COURT: That's forthwith.

MR. SCOFIELD: Right. Well, we'll do is as soon as reasonably practicable. And I think we should be able to get a check to them —

MR. ADY: I think the language on the credit, if I may just interpose, NAR does not directly control the database of credit reporting agencies. All they can do is make requests. Either they're — they're requested, but there aren't any requests (inaudible). The language in the agreement needs to reflect that that is their obligation to make this request.

MR. SCOFIELD: Your Honor, the issue is not to force Experian —

THE COURT: But you'll make the request in the —

in the most effective form you –

MR. ADY: Absolutely.

MR. SCOFIELD: What NAR does, it submits a form called a UDF or an AUDF, Uniform Data Form, to the credit furnisher to the credit reporting agency. And if they send in – I don't know if they use – I would imagine they're using Metro 2 and doing the AUDFs. If you're doing the Metro 2 format, you simply have to indicate on there that there is no debt and –

MR. ADY: Right. But they don't have to (inaudible) occasionally that, but once –

THE COURT: You're not guaranteed what they do.

MR. ADY: Yeah. And we're not going to guarantee Experian's performance. We can only guarantee that NAR will go through the proper channels, commercially reasonable channels, that it will use the same format that they normally use. There's no reason – NAR doesn't want this on their – on Ms. Vermillion's credit. They want to comply. But there's no reason to saddle any obligations –

THE COURT: Mr. Saxton seemed to have a concern. I don't know if they've resolved the point that you're –

MR. SAXTON: The funds you're referring to, Mr. Ady, are outdated. We don't use those any more. It's an electronic submission now.

MR. ADY: (Inaudible).

MR. SAXTON: It's an electronic submission, not necessarily that, but it is an electronic submission. And we'll electronically submit it to have it updated.

MR. ADY: Okay. And if – and I guess – you know, my understanding is they can take it off. You know, if they – and our position is that if it doesn't come off, there's not a settlement; is that right?

THE COURT: Well, I'm not going to go down that road. They can only do what they can do. If they don't submit, there's not a settlement. That would be a failure of consideration. But since they don't control the other end...

MR. ADY: Well, that's – that's where the difference is.

THE COURT: Then let's bring the jury in. Because they can only do what they can do.

MR. SCOFIELD: Well, and then one thing –

MR. ADY: Well, I'm just saying, Chip – Chip, if I call you, you'll help me, right? If I call you and say, "Hey, these guys are being butts; will you – will you make a phone call for me?"

MR. SAXTON: What I do know – what my experience is, Mr. Ady, I can't direct you as to your – your client directly. But my experience is that, if there is some sort of an issue like that, that it's fairly easily cleared up

with the credit reporting agencies. The person affected just needs to contact the credit reporting agencies, file a dispute, the dispute comes back to NAR, and they say, "Hey, what's going on?" And they say, "No, take it off. Take it off." And so then it's – it's all done.

MR. SCOFIELD: I think what we can agree to do is everything that can be – can be done to notify a credit reporting agency that there's no debt.

THE COURT: Well, that's what –

MR. ADY: I still won't act, then the remedy comes under the Fair Credit Reporting Act, I think, because they're reporting a debt that doesn't exist anymore, so –

MR. SAXTON: And –

MR. ADY: Because it's later debt. And so you're –

THE COURT: And you think that's going to happen.

MR. ADY: And the reporting cycle's every 30 days. So you're going to submit it within the next –

MR. SAXTON: We can do it electronically, manually, on demand. So –

MR. ADY: Okay.

MR. SAXTON: – if this happens, I'll call my office on the way back, tell them to delete it and they'll electronically submit it to have it deleted.

MR. ADY: And there's going to be transparency for

us so that we can see what you've done and submitted?

MR. SCOFIELD: We'll send you –

MR. SAXTON: We can send – we can send a notice that says we've done it.

MR. SCOFIELD: Whatever we have consented.

MR. SAXTON: Yeah, we can. We can do that, you bet.

THE COURT: So do we have an agreement now?

MR. ADY: All right.

THE COURT: Mr. Scofield, anything else you need to add?

MR. SCOFIELD: Just when can we get them a check and how do you want it made out?

MR. ADY: Just to me in trust.

MR. SCOFIELD: You in trust for a thousand.

And the only other point would be those are all the payments; otherwise, everyone bears their own attorneys fees, costs and expenses.

THE COURT: Absolutely. It's got to be that.

MR. SCOFIELD: And that's my understanding of the agreement, Your Honor.

THE COURT: Let me ask Mr. Saxton, as president of NAR and (inaudible): Are you willing to abide by this agreement as stated, sir?

MR. SAXTON: Yes, I am.

THE COURT: The plaintiff – the party is Ms. Vermillion, but I'd like to hear from both of you if you're willing to abide by this.

MR. ADY: Yes, Your Honor.

THE COURT: Ms. Vermillion, you accept it? That's a yes, but I – I note – I'm pretty sure no one's happy. I also think you've all done the right thing. And I'm sorry things had to get to this point.

I'll approve the settlement. I'll look forward to concluding documents.

Are you going to draft those, Mr. Scofield?

MR. SCOFIELD: I'd be happy to, Your Honor.

THE COURT: Thank you.

May I release the jury?

MR. SCOFIELD: You may.

MR. ADY: You may, sir.

THE COURT: Thank you.

MR. SCOFIELD: Thank you, Your Honor.

(Whereupon, the hearing was concluded at 2:39 p.m.)

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CERTIFICATE

STATE OF UTAH]

] ss.

COUNTY OF SALT LAKE]

I, JERI KEARBEY, Official Court Transcriber in and for the State of Utah, do hereby certify that the foregoing electronically-recorded proceedings were transcribed by me from an audio file furnished by the Third Judicial District Court in and for Salt Lake County, State of Utah;

That pages 1 through 10, both inclusive, represent a full, true and correct transcript of the proceedings held on July 7, 2009, and that said transcript contains all of the evidence, objections of counsel and rulings of the Court and all matters to which the same relate.

DATED this 21st day of October 2009.

JERI KEARBEY, OCT

I hereby affirm that the foregoing transcript was prepared under my supervision and direction.

Carolyn Erickson, CSR

Addendum B

REPORTER'S NOTE

(§ 84, Tent.Draft, No. 2.) This Section is new, having no counterpart in the first Restatement. A stipulation or other agreement to be bound by another's action can be viewed as essentially a matter of contract law. An express agreement between the parties to be bound by the outcome of another action is effective according to its terms to foreclose the parties' opportunity to litigate. See, e.g., Sampson v. Sony Corp. of America, 434 F.2d 312 (2d Cir. 1970); Boyd v. Jamaica Plain Co-op Bank, 7 Mass.App. 153, 386 N.E.2d 775 (1979). Arrangements under which the resolution of issues in a pending action will be treated as determinative in parallel litigation may, however, be reached not only through bilateral agreement of the parties but also through agreement involving the court itself, often as a concommitant of a ruling by the court concerning consolidation or severance of cases or trial schedules. Whether such an agreement has been reached depends on the circumstances, and cannot properly be inferred simply from the fact that the party in question requested or acquiesced in a trial schedule designed to accommodate other related litigation. See Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964) (alternative holding); Chitwood v. Myers, 60 Tenn.App. 1, 443 S.W.2d 827 (1969); see Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), cert. denied, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307 (1974), on remand, 396 F.Supp. 908 (S.D.Ohio 1975); cf. Council Bros. v. Ray Burner, Inc., 473 F.2d 400 (5th Cir. 1973).

In some instances, preclusion has been imposed apparently on the basis of implied agreement, but in circumstances of considerable ambiguity. See Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967), cert. denied, 389 U.S. 1009, 88 S.Ct. 571, 19 L.Ed.2d 606 (1967). The holding in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), on remand, 418 F.2d 21 (7th Cir. 1969), rev'd, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), reh. denied, 401 U.S. 1015, 91 S.Ct. 1247, 28 L.Ed.2d 552 (1971), indicates that doubt should be resolved against imposing preclusion. At any rate, the question is more clearly posed in these terms rather than through an unexplicated concept of "privity," e.g., United States v. Burlington Truck Line, Inc., 356 F.Supp. 582 (W.D.Mo.1973); Proctor & Gamble Co. v. Byers Transportation Co., 355 F.Supp. 547 (W.D.Mo.1973), or "control" of the first litigation, cf. Spargur v. Dayton Power & Light Co., 152 N.E.2d 918 (C.P.Ohio 1958), aff'd, 109 Ohio App. 37, 163 N.E.2d 786 (1959). Doing so helps avoid unwarranted extension of preclusion to a party who, though similarly situated to a party with whom he is collaborating, has nevertheless preserved his right to present his case for himself. Humphreys v. Tann, supra; see Edward Petry & Co. v. Greater Huntington Radio Corp., 245 F.Supp. 963 (S.D.W.Va. 1965) Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4453; Note, 56 Calif.L.Rev.Harv.L.Rev. 1485 (1974). But cf. Vestal, Res Judicata/Preclusion: Expansion, 47 So.Calif.L.Rev. 357 (1974).

§ 41. Person Represented by a Party

(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

Exceptions to this general rule are stated in § 42.

Comment:

a. Rationale. A person whose interests are drawn into litigation may be afforded the opportunity to be heard concerning those interests through the medium of a representative. The representative may be constituted upon the occasion of the litigation for the purpose of protecting the interests of a person who cannot legally or practicably participate in the litigation

Addendum C

NORTH AMERICAN RECOVERY

10 WEST BROADWAY, SUITE 610 • SALT LAKE CITY, UTAH 84101 TELEPHONE: (801) 364-0777 • TOLL FREE: 1-800-364-6445 • FAX: (801) 364-0784

ASSIGNMENT AGREEMENT

his Agreement dated Dec 13 2006, between N.A.R., Inc. (North merican Recovery), hereafter referred to as Agency, and Neil G Baird D.D.S. hereafter referred to as Client. NAR nd Client are sometimes referred to as the "Parties" or a "Party" as the context may require.

IAR is in the business of collecting past due accounts, and desires to assist Client in collecting ast due accounts; and Client desires that NAR assist Client in collecting past due accounts. IOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby cknowledged, the Parties agree as follows:

. Client agrees to periodically assign, at its sole discretion, accounts to NAR for the purpose f collection. Accordingly, Client hereby transfers, assigns and sets over to NAR, Client's laims and demands against all debtors assigned together with all of Client's rights, title and nterest therein, and the demands represented thereby, and all rights of action accrued or to ccrue. Client further grants to NAR, subject to the limitations contained herein, full power to ollect, compromise, reassign, or in any other manner enforce the collection thereof.

. Assignments shall be made by forwarding collection accounts to NAR. Each time NAR eceives accounts from Client, NAR will send Client an Acknowledgment Report. Appearance of n account on the Acknowledgment Report or appearance of the account on a Statement or tatus Report shall evidence that the account has been validly assigned ("Assigned Account") ursuant to the terms of this Agreement.

. Client represents and warrants that each Assigned Account represents a legal and lawful ebt which is in fact due and owing to Client. Client further represents and warrants that, /ith respect to each Assigned Account, all amounts which Client has sought to recover on any uch account, and all amounts which Client represents to NAR are due and owing at the time ne account is assigned to NAR, are in fact legally and lawfully owed to Client pursuant to the greement between Client and the person(s) owing the debt, and/or pursuant to applicable IW.

. NAR will indemnify and hold harmless Client from and against any and all claims, ounterclaims, liabilities or demands arising from errors, omissions, or any unlawful acts by AR ("NAR Caused Claims"). NAR further agrees to defend Client against any and all NAR aused Claims. NAR shall be entitled to select counsel of its own choosing to defend Client gainst any and all NAR Caused Claims. Notwithstanding NAR's right to select counsel under iis paragraph, Client shall have the right to reject the counsel chosen by NAR, and to retain ounsel of Client's choosing to defend Client against any NAR Caused Claims. However, in the /ent Client, for any reason, rejects the counsel selected by NAR, and/or in the event Client elects counsel other than the counsel chosen by NAR, to defend Client against any NAR aused Claims, NAR will be relieved of any, and will have no further obligation to indemnify, old harmless or defend Client from and against any and all NAR Caused Claims.

Client will indemnify and hold harmless NAR and its owners, members, shareholders, ficers, directors, employees, attorneys or other agents (collectively referred to as "NAR arties") from and against any and all claims, liabilities or demands arising from errors, nissions, or any unlawful acts by Client and/or Client's employees, independent contractors agents (the "Client Parties"), or arising from the falsity or breach of

any of Client's representations or warranties. In the event any person(s) from whom NAR seeks to collect on an Assigned Account asserts any claims, counterclaims, liabilities or demands against NAR or the NAR Parties based on the conduct of Client and/or the Client Parties ("Client Caused Claims"), Client agrees to indemnify and hold NAR and the NAR Parties harmless from, and agrees to defend NAR and the NAR Parties against, any and all such Client Caused Claims. NAR and the NAR Parties shall be entitled to select counsel of their own choosing to defend against any such Client Caused Claims, and Client agrees to pay the costs, fees and expenses incurred by NAR and/or the NAR Parties in connection with defending against any such Claim.

5. Client authorizes NAR to endorse for deposit, and collect such negotiable instruments as NAR may receive that are made payable to Client. In the event Client receives payment from a debtor on an Assigned Account, Client shall, within 48 hours of the receipt of any such payment, notify NAR of all such payments in order to comply with the Fair Debt Collections Practices Act or other applicable law.

7. NAR will provide Client with a monthly Status Report on or about the 15th of each calendar month. This report will list all active accounts, the current balance, and the most recent collection notes made while attempting to collect the account. All monies due Client from NAR will be paid to Client by the 15th of each month following the month collected. In the event NAR makes a payment to Client based upon a check received from, or on behalf of, a debtor, and in the event the check that resulted in the payment from NAR to Client is returned unpaid to NAR, Client agrees to reimburse NAR the amount of money received by Client and which is derived from or attributable to any such returned check.

. NAR shall use its best efforts to attempt to collect, without legal action, each Assigned Account. In the event NAR's efforts to collect an Assigned Account without legal action are not successful, and if NAR determines legal action is required to collect an Assigned Account, NAR may commence legal action to collect such an Assigned Account. Accordingly, before commencing any legal action to collect an Assigned Account, NAR shall provide Client with notification of NAR's decision to commence legal action. Upon receipt of such notification Client shall promptly notify NAR if Client does not desire to commence legal action. In the event Client does not promptly notify NAR after receipt of notice from NAR that NAR intends to commence legal action, Client shall be deemed to have authorized NAR to commence legal action, and NAR may then commence such legal action as NAR deems appropriate. In the event Client notifies NAR that Client does not want NAR to commence legal action, NAR will not commence legal action but NAR may, and NAR's discretion, continue other efforts to collect the Assigned Account.

NAR shall not enter into any agreement for the reduction, settlement or compromise of an Assigned Account without prior approval from Client

). Client will not be billed for attorneys fees, court costs, process service fees, commissions any other amounts unless an Assigned Account is withdrawn, canceled or settled by Client after it has been validly assigned. In the event Client withdraws an Assigned Account at any time, Client will reimburse NAR for all attorneys fees, court costs, process service fees and other costs and expenses incurred by NAR in connection with attempting to collect on the withdrawn account. Client will also pay NAR a commission at the applicable commission rate set forth in

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he Commission Schedule below. Client shall be obligated to pay NAR said commission egardless of whether NAR or Client has collected or otherwise received any money or ayment from the debtor in connection with the withdrawn account; and Client shall pay to IAR all monies due under this paragraph within thirty (30) days after notifying NAR that an ccount is being withdrawn by Client.

1. All payments received by NAR and/or Client will be applied in the following order: court osts, service of process fees and other costs and expenses associated with commencing and ursuing legal action, attorneys fees, damages, interest, and principal balance. NAR shall be ntitled to retain and/or receive all attorneys fees, court costs, service of process fees and ther costs and expenses associated with commencing and pursuing legal action, interest, nd/or damages collected by NAR and/or Client while an account is assigned to NAR.

2. Either Party may terminate this Agreement by providing sixty (60) days advance written otice to the other Party. Upon termination of the Agreement, Client shall have the option to a) leave all Assigned Accounts with NAR, which NAR shall continue to attempt to collect under ne terms of this Agreement, or (b) withdraw all Assigned Accounts and pay NAR the ommissions on such withdrawn accounts at the corresponding commission rate at the time of uch termination, together with all costs, expenses and attorneys fees incurred in connection ith the withdrawn accounts.

3. NAR shall have the absolute right to reject or otherwise refuse to accept the assignment f any account and/or cancel back to Client any Assigned Account. In the event NAR cancels n account back to Client, NAR shall provide written notice to Client that an Assigned Account being canceled. The cancellation of any Assigned Account by NAR to Client, regardless of hether such reassignment is done voluntarily by NAR or at the request of Client, shall not elieve either NAR or Client of any other obligations they may have under this Agreement, cluding without limitation, the obligations relating to indemnification and duty to defend. In ne event any Assigned Account is canceled back to Client for any reason, NAR shall be ntitled to retain all monies relating to said account which NAR may have collected or may ave been paid under this Agreement at time of the cancellation.

4. In the event of a dispute over or relating to the terms of this Agreement or any Party's erformance under this Agreement, the prevailing party in any proceeding brought in nnection with the dispute shall be entitled to recover from the other party its costs, cluding reasonable attorneys fees, whether incurred in litigation or otherwise.

5. The Parties agree and acknowledge that this Agreement constitutes the entire agreement tween the Parties, and that this Agreement supersedes and replaces all prior negotiations, oposed agreements, agreements or representations, whether written or oral, between the rties. This agreement also covers every Assigned Account regardless of when the account is assigned. The Parties agree that their relationship is contractual only, and that nothing in s Agreement shall be interpreted or construed to create a fiduciary relationship between the rties. The Parties expressly acknowledge and agree that NAR is not, and shall not be emed to be, acting as a fiduciary for and on behalf of Client.

6. Any written notices to Client under this Agreement shall be provided to Client at the dress and facsimile number set forth below. Any written notices to NAR under this reement shall be provided to NAR at the address and facsimile number listed below.

NORTH AMERICAN RECOVERY

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COMMISSION RATE SCHEDULE

A. DEFINITIONS

. **Assigned Amount:** the original amount assigned to NAR for collection as listed on the Acknowledgment Report.

i. **Regular Account:** any Assigned Account with respect to which legal action has not been commenced, and which has not been forwarded to an out of state agency for collection.

ii. **Other Account:** any Assigned Account (a) with respect to which legal action has been initiated, (b) which has been forwarded by NAR to an out of state agency for collection, or (c) which is involved in a bankruptcy proceeding involving a debtor.

3. COMMISSION RATES

. Regular Accounts: 33.34% of all monies collected and applied to the Assigned Amount.

i. Other Accounts: 50.00% of all monies collected and applied to the Assigned Amount.

Neil G. Baird D.D.S.
ompany Name (Client)

53 W. 10600 S.
ddress

SANDY, UT 84092
ity State Zip

Toni Hakes Financial Coordinator
ontact name and title

none #: 801-576-9725

ax #: 801-576-9726

Toni Hakes
uthorized Client Signature

TONI HAKES Financial Coordinator
ease print name and title here

N.A.R., Inc.
Attn: David J. Saxton
10 West Broadway, Suite 610
Salt Lake City, Utah 84101
Facsimile No. (801) 364-0784

Signature for N.A.R., Inc.