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State of Washington
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Case #: 1029985

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. ____________

No. 84849-6

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JONATHAN WESLEY EBBELER and
ELIZABETH ASHLEY EBBELER, husband and wife,

Plaintiffs-Respondents,

v.

WFG NATIONAL TITLE COMPANY OF WASHINGTON, LLC, a Washington limited liability company;
DANI LEGGETT and JANE/JOHN DOE LEGGETT, believed to be married persons,

Defendants-Petitioners.

PETITION FOR DISCRETIONARY REVIEW

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I. <u>IDENTITY OF PETITIONERS</u>

Petitioners are WFG National Title Company of Washington, LLC ("WFG") and its employee Dani Leggett (collectively "Petitioners"), Respondents in Division I of the Washington Court of Appeals under cause No. 84849-6-I, and Defendants in the Superior Court of King County, Cause No. 21-2-15237-2 SEA.

II. <u>CITATION TO COURT OF APPEALS DECISION</u>

Petitioners seek review of the Division I unpublished opinion in *Jonathan Wesley Ebbeler and Elizabeth Ashley Ebbeler v. WFG National Title Company of Washington, LLC and Dani Leggett*, No. 84849-6-I, filed March 25, 2024 (attached hereto at Appendix A).

III. <u>ISSUES PRESENTED FOR REVIEW</u>

1. Whether the Court of Appeals' opinion conflicts with this Court's precedent and therefore warrants review under RAP 13.4(b)(1) because it misinterprets this Court's holding in

Reninger v. State Dept. of Corrections, 134 Wn.2d 437, 951 P.2d 782 (1998)?

2. Whether the Court of Appeals' unpublished opinion conflicts with Court of Appeals, Division I precedent and therefore warrants review under RAP 13.4(b)(2) because it misinterprets the published decision of *Lemond v. State, Dept. of Licensing*, 143 Wn. App. 797, 804 180 P.3d 829 (2008) where the *Lemond* court stated, "Collateral estoppel, or issue preclusion, is the applicable preclusive principle when 'the subsequent suit involves a different claim but the same issue?'"

3. Whether the Court of Appeals' opinion conflicts with this Court's precedent and therefore warrants review under RAP 13.4(b)(1) because it misinterprets this Court's holding regarding procedural due process in *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004)?

IV. STATEMENT OF THE CASE

The claims of Respondents Jonathan and Elizabeth Ebbeler ("the Ebbelers") are barred by collateral estoppel. The

Ebbelers continue their search for a scapegoat regarding a failed real estate transaction. In the end, however, as found by *two* trial courts and affirmed once through the appellate process, responsibility for the failed real estate transaction – the common issue driving these cases – falls entirely on the Ebbelers.

A. *Ebbeler I*

The Ebbelers were plaintiffs in the original lawsuit, *Ebbeler v. the Estate of Andrews*, King County Superior Court No. 19-2-14509-9 SEA ("*Ebbeler I*"). *Ebbeler I* centered upon the Ebbelers' failed purchase of a residential home after an embittered sale process between them and the Estate represented by Mr. Anderson (collectively, "Seller"). CP 370. *Ebbeler I* was fully litigated through a bench trial before the Honorable Sean O'Donnell of the King County Superior Court. CP 535. The Ebbelers made the strategic decision not to sue WFG and its employee Dani Leggett (collectively, "Escrow Defendants"). However, Ms. Leggett and Autumn Bray, both employees of WFG, were deposed in their professional capacities in *Ebbeler I*.

Ebbeler I determined: (1) what caused the transaction to fail; and (2) who was liable for such failure. Judge O'Donnell resolved both questions in a manner unfavorable to the Ebbelers, but consistent with Washington law. The Ebbelers then attempted to rename and re-litigate the same issues in this new lawsuit ("*Ebbeler II*").

At the conclusion of the bench trial in *Ebbeler I*, Judge O'Donnell ruled emphatically that "[t]he [Ebbelers] did not perform under the [Real Estate Purchase and Sale Agreement ("REPSA")] contract because they did not pay the full purchase price on or before closing." CP 370. Regarding the cause of the failed transaction, Judge O'Donnell was unequivocal: "…the money to complete the sale should have been there at closing and it was not. ***That responsibility lay entirely with the Ebbelers and it is the ultimate failure for this purchase not happening***." CP 372 (emphasis added). Simply put, the Ebbelers failed to deposit the full purchase price on or before the day of closing. CP 368.

The Ebbelers appealed to Division I of the Court of Appeals ("Division I"). *See Ebbeler*, 2022 WL 594121, at *1-15. Division I similarly ruled in favor of the Seller, finding that Judge O'Donnell's factual findings and conclusions of law were supported by substantial evidence. *Id*. The Ebbelers then petitioned the Washington Supreme Court for discretionary review, which denied the petition. *Ebbeler v. Andrews*, 199 Wn.2d 1024, 512 P.3d 901 (2022).

B. *Ebbeler II*

Following the failure of *Ebbeler I*, the Ebbelers filed the underlying lawsuit in this matter, *Ebbeler v. WFG Nat'l Title Co. of Washington*, King County Superior Court No. 21-2-15237-2 SEA ("*Ebbeler II*"). *Ebbeler II* was filed against the intermediary Escrow Defendants who provided title and escrow services for the failed transaction. *Id.* Despite a complete absence of new facts or other information coming to light, the Ebbelers asserted a variety of claims rooted in the same facts and circumstances as *Ebbeler I*.

The same factual and legal issues came before the trial court in *Ebbeler II*, and Judge Jason Poydras granted a motion for summary judgment based upon issue preclusion on January 14, 2023. CP 1090-92. Having lost their second successive lawsuit, the Ebbelers appealed the decision of Judge Poydras to Division I.

Division I reversed, finding: (1) the identicality requirement was not satisfied; and (2) it would be unjust, under these circumstances, to not allow a real estate purchaser to maintain a separate cause of action against the seller and escrow company for damages.

C. Prior to The Ebbelers' Failures

The subject matter of both *Ebbeler I* and *Ebbeler II* is a residential property located in The Highlands neighborhood at 31 NW Cherry Loop in Shoreline, Washington ("Property"). CP 354. Seller listed it for sale in 2019. CP 354-55. On March 28, 2019, the Ebbelers forwarded a Real Estate Purchase and Sale Agreement ("REPSA") to the Seller, offering to purchase the

Property for $2,000,000. CP 355. In their offer, they chose the form of contract, closing date, title company, "time of the essence" clause, and other material terms. CP 355, 388-406. Seller made a counteroffer of $2,625,000, and included two additional forms: (1) an addendum with a form of deed to be used in closing; and (2) Form 17 disclosures. CP 355, 386-87. The Form 17 disclosures informed the Ebbelers that the Property was not connected to a public sewer and that The Highlands required the sewer system to be upgraded and connected to public utilities. CP 358. The Ebbelers accepted the modifications to the REPSA and settled on a purchase price of $2,300,000. CP 356.

The REPSA required that the Ebbelers "shall pay the Purchase Price, including the Earnest Money, in cash at closing," specified the closing date was May 29, 2019, and that "Buyer and Seller agree that all contingencies are deemed to be waived." CP 356. The REPSA also included a "time of the essence" clause: "This sale shall be closed by the Closing Agent on the Closing Date." CP 356. At trial, Judge O'Donnell found that

Mr. Ebbeler clearly understood that the REPSA contained a "time of the essence clause." CP 357.

> Mr. Ebbeler is an intelligent, sophisticated entrepreneur who studiously follows the contracts he enters. He is unafraid of seeking advice when something is unclear. The meaning of this term was not lost on him.

CP 357. Judge O'Donnell also determined that the Ebbelers waived all contingencies by May 3, 2019. CP 358.

D. The Failure to Agree

The parties to the REPSA continued negotiating the issue of the Property's sewer connection. CP 358-59. The sewer District planned to perform the sewer work later in the summer of 2019, after the transaction's anticipated closing date. *Id*. The Ebbelers and the District's General Manager acknowledged that "closing with holdover" was acceptable. *Id*. The amount of the holdover, however, was undetermined and hotly contested between the Ebbelers and the Seller. *Id*. The dispute between the parties continued to fester. *Id*.

E. The Failure to Fund

The Ebbelers pursued financing for $2,100,000 through WaFed. CP 359-60. On April 24, 2019, WaFed sent a "notice of incompleteness" to the Ebbelers advising them of incomplete Prior To Documents ("PTD") Conditions. CP 360. On May 13, 2019, WaFed sent an email to the Ebbelers further advising that PTD Conditions must be met by May 20, 2019. CP 360. It is unclear whether these PTD Conditions were ever met by the Ebbelers prior to closing. CP 361, 410-21.

WFG sent various loan funding documents to the Ebbelers, including the promissory note, deed of trust, and disclosures ("Loan Documents"), and WFG arranged a mobile notary to execute the Loan Documents. CP 360. A Statutory Warranty Deed was included, instead of a Personal Representative Deed. When completing their Loan Documents, the Ebbelers signed and verified that they had "READ AND APPROVED" the Statutory Warranty Deed. CP 363. The

Ebbelers did not return the Loan Documents until May 28, 2019, just one day before closing. CP 361.

Upon receipt of the Loan Documents, WFG transmitted them to WaFed. CP 361. WaFed began reviewing the Loan Documents at approximately 7:00 p.m. on May 28, 2019. CP 361. Upon reviewing the Loan Documents that WFG prepared and the Ebbelers completed, WaFed discovered that they contained at least 13 errors and/or omissions by the Ebbelers. CP 361, 410-21. The Ebbelers' errors included but were not limited to, missing notary stamps, missing names, missing addresses, and missing signatures. CP 361, 410-21.

With Mr. Ebbeler's knowledge regarding real estate, it is unclear why the Loan Documents were not properly completed in a more timely manner. CP 355, 357. WaFed communicated these errors to the Ebbelers' mortgage broker, Phil Mazzaferro, at 10:58 a.m. on the day of closing. CP 361, 410-21. WaFed also expressly advised that the loan would not be funded at closing if the errors remained. CP 361, 410. WFG began

correcting the Ebbelers' errors; however, some errors required performance from the Ebbelers, including signatures on various Loan Documents. CP 362, 410.

Issues remained on closing day: the sewer issue was not resolved; errors and omissions remained on the Loan Documents; and WFG was informed a Personal Representative Deed was required to replace the Statutory Warranty Deed. CP 366.

Despite WFG's request that the Seller appear for signing before 11:00 a.m., the Seller appeared between 2:17 and 2:48 p.m. All documents were then signed, except for the Statutory Warranty Deed, which was signed at 3:51 p.m. Division I made the following ruling regarding the delay related to the execution of the Personal Representative Deed:

> [T]he evidence supports the findings that the Estate was ready, willing and able to execute a personal representative's deed in time for conveyance documents to be recorded on May 29, 2019, and the delay in executing the personal representative's deed did not cause this transaction to fail.

CP 707.

Not everyone performed as required. The Ebbelers only deposited $690,000 of the $2,300,000 purchase price with their closing agent. CP 368. Judge O'Donnell made the following conclusion of law regarding the Ebbelers' failure to fund the transaction: "The [Ebbelers] did not perform under the REPSA contract because they did not pay the full purchase price on or before closing." CP 370. With the relationship between the Ebbelers and the Seller fatally embittered over the sewer hookup issue, a closing extension was denied by the Seller, and the Ebbelers filed suit the next day, on May 30, 2019. CP 369.

V. ARGUMENT - REVIEW SHOULD BE ACCEPTED

A. Collateral Estoppel Precludes Re-litigation of The Ebbelers' Claims.

Collateral estoppel, or issue preclusion, takes effect when the following elements are met:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and

> (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004); *see also Sprague v. Spokane Valley Fire Dept.*, 189 Wn.2d 858, 899, 409 P.3d 160 (2018). Washington law allows a nonparty to the prior litigation to rely on collateral estoppel. *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 95 P.3d 321 (2001); *see also State v. Mullin-Coston*, 152 Wn.2d 107, 113-14, 95 P.3d 321 (2004).

Collateral estoppel is not novel to Washington. Indeed, the United States Supreme Court has applied issue preclusion:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on **an issue identical in substance** to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

Christensen, 152 Wn.2d at 307; *quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) (emphasis added).

The elements in contention here are: (1) the issue decided in *Ebbeler I* was identical to the issue presented in *Ebbeler II*; and (2) the application of issue preclusion does not work an injustice against The Ebbelers.

1. The issue decided in *Ebbeler I* is the same as decided in *Ebbeler II*

The issue in both cases is clear: Who is responsible for the failed sale? Answer: The Ebbelers. Their new *claims* are irrelevant to proper issue preclusion.

"Collateral estoppel, or issue preclusion, is the applicable preclusive principle when 'the subsequent suit involves a different claim but the same issue.'" *Lemond v. State, Dept. of Licensing*, 143 Wn. App. 797, 804 180 P.3d 829 (2008); *quoting* Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV. 805 (1985) (emphasis added). "Thus, '[w]hen an issue of fact or law is

actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, *whether on the same or a different claim*.'" *Id.*; *citing* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (alteration in original) (emphasis added).

"Thus, application of collateral estoppel is limited to situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and 'where the controlling facts and applicable legal rules remain unchanged.' *Id.*; *quoting Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) (internal quotation marks omitted) (citations omitted). "Further, issue preclusion is only appropriate if the issue raised in the second case 'involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,' even if the facts and the issue are identical." *Id.* (citations omitted).

Here, we have the same issue, the same controlling facts, and the same bundle of legal issues. *Ebbeler I* examined what caused the transaction to fail, including the actions of the Seller, the intermediatory Escrow Defendants, and the Ebbelers. Judge O'Donnell (affirmed by Division I) held that the Ebbelers breached the REPSA because they did not pay the full purchase price on or before closing. CP 370, 707. Division I held that the delay caused by the Escrow Defendants (mistake in executing the personal representative's deed) did not cause this transaction to fail. CP 707.

Causation for the failure lay entirely with the Ebbelers. Judge O'Donnell unequivocally ruled: "…the money to complete the sale should have been there at closing and it was not. ***That responsibility lay entirely with the Ebbelers and it is the ultimate failure for this purchase not happening***." CP 372 (emphasis added).

"[C]ollateral estoppel extends only to ultimate facts, *i.e.*, those facts directly at issue in the first controversy upon which

the claim rests, and not to evidentiary facts which are merely collateral to the original claim." *McDaniels v. Carlson*, 108 Wn.2d 299, 738 P.2d 254 (1987) (citations omitted) (internal quotations omitted).

"To determine which issues in a prior litigation amount to ultimate facts, courts consider whether a rational jury could have grounded its verdict upon an issue other than that which the party seeks to foreclose from consideration." *Medicraft v. Washington*, No. 21-CV-1263-BJR, 2023 WL 3599554, at *4 (W.D. Wash. May 23, 2023) (unpublished).[1] In other words, "collateral estoppel precludes a jury from reaching a directly contrary conclusion rather than a conclusion reached by a prior jury." *State v. Eggleston*, 164 Wn.2d 61, 74-75, 187 P.3d 233 (2008); *citing Dowling v. U.S.*, 493 U.S. 342, 348, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)) (emphasis added).

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[1] Cited pursuant to GR 14.1(b). A copy of the opinion for this case is attached hereto as Appendix B.

The "ultimate facts" of the failed transaction have already been judicially determined. CP 354-69. This includes items related to the administration of the Ebbelers' Loan Documents. These Loan Documents were sent to the Ebbelers' Maryland home for them to complete, sign, and have notarized. CP 360. The Ebbelers returned their Loan Documents to WFG incomplete, missing signatures, and requiring additional notarizations. CP 361, 410-21. The Ebbelers' broker was made directly aware of these errors, yet, at trial, they were unable to establish that the errors were corrected, or that corrected Loan Documents were provided to WaFed. CP 362-63. Moreover, WaFed expressly advised the Ebbelers via email that the loan would not be funded if the errors were not remedied. CP 361, 410. Much of the Ebbelers' angst, currently misdirected at the Escrow Defendants, appears more justly directed toward themselves or their own lender.

WFG concedes (and has never disputed) that its employees initially prepared an incorrect Statutory Warranty

Deed instead of a Personal Representative Deed, as required by the addendum to the REPSA. However, both the trial court and Division I found that any delay associated with the initial incorrect deed did not cause the transaction to fail. CP 707.

The ultimate question, and the main fact at issue, previously resolved in *Ebbeler I*, is: What caused this transaction to fail?

Division I's application of the facts has causation arising out of a different context. It stated "[t]he sole issue in *Ebbeler I* was whether the Ebbelers or the Estate breached their duties under the REPSA." Division I believes the new "issues raised in *Ebbeler II* concern whether the Escrow Defendants' breach of their separate contractual and tort duties caused the Ebbelers to breach the REPSA and, as a result, forfeit their earnest money and lose the opportunity to purchase the home."[2]

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[2] Appendix A: *Ebbeler v. Andrews*, No. 84849-6-I, slip op. at 9 (Wash. Ct. App. Mar. 25, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/848496orderandopin.pdf.

This assertion that WFG somehow prevented WaFed from funding the transaction is, however, merely the same issue that was previously decided in *Ebbeler I*. Moreover, it is clear from the record that the Ebbelers' inability or failure to properly complete the Loan Documents rendered WaFed unable to fund the transaction. Further, all relevant facts regarding WFG's involvement in preparing the Loan Documents, communicating with the parties, and preparing the deeds were identified and litigated in *Ebbeler I*. CP 361, 363-64, 366-67, 707. At the conclusion of that trial, such facts were determined by Judge O'Donnell *not* to be the cause of the failed transaction. *Id*. Critically, Mr. Ebbeler "could have paid cash" for the Property at any point prior to closing. CP 355. This would have obviated any administrative issues related to the loan.

The purpose of *Ebbeler I* and *Ebbeler II* are identical; the Ebbelers seek to recover the lost earnest money. *See Christensen*, 152 Wn.2d at 310; *see also State v. Williams*, 132 Wn.2d 248, 257, 937 P.2d 1052 (1997) (discussing that courts

should consider the "purpose" of the different proceedings). The Ebbelers attempt to conflate the issues by asserting new claims against the Escrow Defendants for alleged breach of contract and good faith, but the "purpose" of this lawsuit is identical. As such, collateral estoppel applies to prevent re-litigation of ultimate facts and issues addressed in *Ebbeler I*.

Courts have before blurred the lines between issue preclusion and claim preclusion. But the two must remain separate for proper application. Causation of the failed transaction was the underlying issue in *Ebbeler I*. Both trial courts and (initially) Division I have acknowledged the same, and the issue remains unchanged. The only change is differently worded claims against new defendants.

The Ebbelers may argue a separate proximate cause resulted from WFG's alleged failure to provide proper instructions when it allegedly received conflicting instructions from the Seller. However, this argument is unpersuasive for two reasons.

First, there is no evidence that the Seller provided conflicting instructions. Instead, the record shows Seller signed the corrected deed at 3:51 p.m. on closing day. CP 367. To be clear, Judge O'Donnell found the Seller was ready, willing, and able to execute the necessary closing documents. CP 707.

Second, the court of appeals held that the delay in preparation of any deeds did not cause the transaction to fail. CP 707. In the end, the Ebbelers alone caused the sale to fail.

2. No Injustice From Issue Preclusion

Division I incorrectly ruled the Ebbelers would suffer injustice from application of issue preclusion.[3] This ruling is incorrect, according to Washington law:

> The injustice factor is generally concerned with procedural regularity: whether the first forum presented an equally full and fair opportunity to litigate, and whether a disparity of relief reduced a party's reason for vigorously litigating an issue in the first proceeding. *Id*. at 309, 96 P.3d 957.

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[3] Appendix A: *Ebbeler v. Andrews*, No. 84849-6-I, slip op. at 9 (Wash. Ct. App. Mar. 25, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/848496orderandopin.pdf.

<u>Injustice is a nonissue when the first and second forum, and the relief available, were the same</u>.

Matter of Wilson, 17 Wn. App.2d 72, 87 484 P.3d 1 (2021); *quoting Christensen*, 152 Wn.2d at 308, 96 P.3d 957 (2004) (emphasis added).

Generally, issue preclusion should not work an injustice on the party against whom it is applied. *See Christensen*, 152 Wn.2d at 307. Issue preclusion requires "that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum." *Christensen*, 152 Wn.2d at 309; *see also Hadley v. Maxwell*, 144 Wn.2d 306, 344, 27 P.3d 600 (2001) (discussing that there "must be sufficient motivation for a full and vigorous litigation of the issue"); *Reninger*, 134 Wn.2d at 464-5 (discussing the Washington Supreme Court's holding that collateral estoppel would not work an injustice when the plaintiffs attempted to bring an employment action in court after losing their appeal regarding the same matter before an administrative tribunal).

"Factors recognized under this fourth prong of collateral estoppel include: whether the first judgment was appealable, whether there have been factual changes since the first proceeding, and whether the first determination was manifestly erroneous." *Brownfield v. City of Yakima*, 178 Wn. App. 850, 871, 316 P.3d 520 (2014); *citing* Trautman, *supra*, at 805, 841–42.

Our case satisfies the above requirements. Here, the first and second forum, and the relief available in each, are the same. The judgment in *Ebbeler I* was appealable, and it was affirmed by the Court of Appeals. This Court refused to review *Ebbeler I* after affirmation by the Court of Appeals. There is no record of any factual changes occurring since the first proceeding. The first decision was not manifestly erroneous.

The Ebbelers are not strangers to *Ebbeler I* – they were the plaintiffs. No argument may be made that the Ebbelers did not have a full and fair opportunity to litigate these issues in *Ebbeler I*. In fact, the record clearly demonstrates that they extensively

litigated causation issues surrounding the involvement of the Escrow Defendants. *See, e.g., Ebbeler*, 2022 WL 594121, at *1-15. WFG's participation in preparing the Loan Documents, communicating with the parties, and preparing the deeds was identified and litigated in *Ebbeler I*. CP 361, 363-64, 366-67, 707.

Here, the Ebbelers made a strategic decision to not identify the Escrow Defendants as defendants in *Ebbeler I*, and should be required to live with such a decision. New claims cannot now resuscitate extensively litigated and subsequently decided issues. While Mr. Andrews, Mr. Ebbeler, and Mrs. Ebbeler *were not* deposed in *Ebbeler I* prior to trial, both Dani Leggett and Autumn Bray of WFG *were*. CP 612-613. Then the parties in *Ebbeler I* stipulated to admit Ms. Leggett's and Ms. Bray's deposition transcripts, in their entirety, at trial. Consequently, the Ebbelers were fully aware of the facts related to their claims against the Escrow Defendants in this lawsuit, however unsupported, when they litigated *Ebbeler I*. For the Ebbelers to argue now that they

had no incentive to explore whatever knowledge or information WFG employees maintained regarding the underlying transaction is inconsistent with the record.

Division I believes "issue preclusion here would work an injustice against the Ebbelers because it would deprive them of their opportunity to obtain relief against the Escrow Defendants."[4] Division I then picks fractions of sentences from the trial court's findings to support the notion the trial court may have "point[ed] the finger at the Escrow Defendants for causing the Ebbelers to fail to secure funding from WaFed." *Id.* However, Judge O'Donnell was clear in *Ebbeler I*; the Ebbelers were the sole cause of the transaction's failure. CP 372. Even if the Ebbelers new claims are true, causation fails for the reasons provided by both trial courts – the facts and issues remain unchanged. The Ebbelers were the cause of the failed sale.

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[4] Appendix A: *Ebbeler v. Andrews*, No. 84849-6-I, slip op. at 9 (Wash. Ct. App. Mar. 25, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/848496orderandopin.pdf.

Reninger v. State Dept. of Corrections, 134 Wash.2d 437 951 P.2d 782 (1998) is instructive.

> Reninger and Cohen displayed no lack of incentive to litigate in the administrative arena. They vigorously opposed their demotions: they argued their case to a hearing examiner; they appealed the hearing examiner's findings against them to the PAB; and they attempted to appeal the PAB's findings to the superior court…
>
> It was only after their lack of success in the administrative arena that they relabeled their claims as wrongful discharge and tortious interference, and relitigated the identical issues before a jury in a civil trial. The same bundle of operative facts was before both the PAB and the jury: did Reninger and Cohen fail to secure the shotguns, or were they "set up" by their superiors?

Id. at 454.

Here, the Ebbelers vigorously litigated who was responsible for the failed sale; they appealed the trial court's findings; they attempted to appeal to this Court. It was only after their lack of success against the Seller that they relabeled their breach of contract and tort claims against new defendants to relitigate the identical causation issue to another court.

"The normal rules of collateral estoppel apply here to prevent successive and vexatious litigation." *Id*. "Reninger and Cohen were entitled to one bite of the apple, and they took that bite. That should have been the end of it." *Id*. Here too, the Ebbelers were entitled to one bite at the apple, and they took that bite. That should be the end of it.

Accordingly, the Court of Appeals' unpublished opinion warrants review under RAP 13.4(b)(1) as well as RAP 13.4(b)(2).

VI. <u>CONCLUSION</u>

Defendant-Petitioner requests that this Court grant review of the Court of Appeals' decision as to its holding regarding issue preclusion.

I certify that this document contains 4,534 words in compliance with RAP 18.17 (excluding the Title Sheet/Caption, Tables of Contents/Authorities, Certificate of Compliance/ Service, and Signature Block), as calculated by the word processing software used to prepare this document.

RESPECTFULLY SUBMITTED this 24th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be served on the following parties and counsel of record via the Washington State Appellate Courts' Portal:

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DATED this 24th day of April, 2024, at Seattle, Washington.

Sandra V. Brown, Legal Assistant

NO. 84849-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

APPENDIX A
TO
DEFENDANTS-PETITIONERS
WFG NATIONAL TITLE
COMPANY OF WASHING, LLC'S
AND DANI LEGGETT'S

PETITION FOR REVIEW

Unpublished Opinion filed on March 25, 2024

APPENDIX A

FILED
3/25/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JONATHAN WESLEY EBBELER AND ELIZABETH ASHLEY EBBELER, husband and wife, Appellants, v. WFG NATIONAL TITLE COMPANY OF WASHINGTON, LLC, a Washington limited liability company; DANI LEGGETT and JANE/JOHN DOE LEGGETT, believed to be married persons, Respondents.	No. 84849-6-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Jonathan and Elizabeth Ebbeler (the Ebbelers) appeal the trial court's summary judgment order dismissing their claims against WFG National Title Company of Washington, LLC (WFG), and its Limited Practice Officer, Dani Leggett (collectively, the Escrow Defendants), based on issue preclusion principles.[1] We reverse.

[1] Although Washington courts and litigants often refer to this doctrine as "collateral estoppel," it is "modernly referred to as issue preclusion." *Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 594, 416 P.3d 1261 (2018). The U.S. Supreme Court has noted that the modern terminology has "replaced" the prior terminology, which it described as "a more confusing lexicon." *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5, 128 S. Ct. 2161 (2008).

I

This appeal arises out of the Ebbelers' failed attempt to purchase a home in Shoreline, Washington. The home was previously owned by Alison Andrews, who died in February 2018. Andrews' son, Sidney Andrews, acting as the personal representative of her estate (the Estate), listed the home for sale. The Ebbelers attempted to purchase the home from the Estate, but the transaction failed to close. The Ebbelers sued the Estate and lost. That was the Ebbelers' first lawsuit relating to the property and is referred to herein as *Ebbeler I.*

On appeal in the first lawsuit, our court summarized the failed attempt to purchase the property, starting with the negotiations on price, as follows:

> On March 28, 2019, the Ebbelers offered to purchase the property for $2 million, using the Northwest Multiple Listing Service (NWMLS) real estate purchase and sale agreement form (REPSA). On March 30, Andrews extended a counteroffer for $2.625 million, offered a personal representative's deed in lieu of a statutory warranty deed, and required that any and all contingencies, both financing and inspections, be waived within 30 days of mutual acceptance. . . .
>
> On March 31, 2019, the parties settled on a purchase price of $2.3 million. The REPSA contained the Estate's proposed 30-day contingency period clause:
>
>> Buyer shall have 30 days from mutual acceptance to conduct all inspections, document reviews, financing approval, etc. . . . After 30 days, Buyer and Seller agree that all contingencies are deemed to be waived and will proceed to closing as specified in the agreement. Buyer may elect, before the 30 days has expired, to terminate the agreement with written notice and Earnest Money will be refunded to the Buyer.
>>
>> Upon removal of Buyer's contingencies or after thirty (30) days from mutual acceptance and delivery of the Residential Real Estate Purchase and Sale Agreement, whichever is sooner, the Earnest Money shall become a non-refundable deposit applicable toward the Purchase Price and no longer Earnest Money. If this transaction fails to close for any reason

other than default by Seller, the non-refundable deposit shall remain the property of Seller.

The parties agreed on a closing date of "on or before" May 29, 2019. They also agreed to use WFG National Title (WFG) as the closing agent. Once they agreed to these final terms, the Ebbelers deposited $65,000 in earnest money with WFG.

. . . .

The Ebbelers allowed the contingency period to lapse and all contingencies were, at that point, waived. . . .

The Ebbelers, residents of Maryland, worked with a mortgage broker to obtain a $1.6 million loan from Washington Federal (WaFed) to purchase the property. WaFed prepared loan documents and forwarded them to WFG for the Ebbelers to execute. WFG arranged for a traveling notary to meet the Ebbelers to execute the loan and closing papers on Saturday, May 25, 2019, four days before the scheduled closing date.

WFG mistakenly provided the Ebbelers with a draft statutory warranty deed, rather than a personal representative's deed, to approve. The Ebbelers approved the deed form, signed what they believed to be all remaining documents, and returned them via overnight mail to WFG.

WFG received the Ebbelers' signed closing documents on the morning of May 28 and forwarded them to WaFed to review. The same day, the Ebbelers wired a $690,000 down payment to WFG.

Just before 6 p.m. that evening, Dani Leggett, the closing agent, emailed Andrews and asked him to arrive at WFG's Seattle offices at 11 a.m. the next day to sign closing documents so she could "send documents to the lender prior to their funding cutoff." Leggett informed Andrews that "[t]he buyer's lender requires reviewing a portion of the seller signed documents prior to funding their loan and releasing us to record." The following morning, Andrews told Leggett that he would come in to execute the closing documents but that she did not have the authority to distribute any documents to the Ebbelers' lender until he provided written authorization for her to close.

At approximately 11 a.m. on May 29, WaFed notified WFG that it had discovered at least 13 errors in the Ebbelers' signed loan documents that needed to be corrected before it would wire funds for closing.

> At 1 p.m., [the attorney for the Estate, Lisa] Peterson notified Leggett that the Estate would not authorize her to send copies of signed documents to anyone unless and until all funds had been deposited. Leggett responded that the only documents she wanted to send were the signed escrow instructions, the "closing disclosure," and the statutory warranty deed. When Peterson received this email, she told Leggett that the proper deed form should be a personal representative's deed, not a statutory warranty deed, and that she would not authorize WFG to distribute a signed deed before funds were on hand to close. She also informed Leggett that Andrews would be there by 2:30 p.m. to sign the closing documents.
>
> Leggett then sent an email notifying everyone involved in the transaction that once Andrews arrived to sign the documents and she had the "green light" to move forward with the closing, she would let everyone know. She further stated that it was her belief that the lender's cutoff to fund the loan was 2 p.m. and suggested that the parties would need to extend the REPSA. At 1:40 p.m., the Ebbelers' mortgage broker, Phil Mazzaferro, sent an email to the parties indicating that WaFed wanted more changes to the loan documents. Barbara Otero, WaFed's loan manager, testified that the bank could not and would not fund the loan until these items were corrected.
>
> Nothing in the record indicates if or when the errors in the Ebbelers' loan documents were corrected. Neither WaFed nor the Ebbelers ever deposited the balance of the purchase price with WFG.
>
> Andrews arrived at WFG's offices at 2:17 p.m. and learned that WFG had prepared, and the Ebbelers had approved, the incorrect deed form. He immediately notified his attorney of the error and she sent WFG a personal representative's deed for WFG to finalize. WFG asked its lawyer to approve the revised deed. Andrews signed all the closing documents, except the deed, by 2:48 p.m. He signed the correct deed form at 3:51 p.m. Because the King County Recorder's Office closes at 3:30 p.m., WFG would have been unable to record the deed that day.
>
> When the Ebbelers realized the transaction would not close, they asked Andrews to extend the closing date. Andrews refused because the Ebbelers had failed to tender the purchase proceeds.

Ebbeler v. Andrews, No. 82225-0-I, slip op. at 3-7 (Wash. Ct. App. Feb. 28, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/822250.pdf (footnotes

omitted).

In *Ebbeler I*, the Ebbelers sued the Estate for recovery of the earnest money, claiming the Estate (1) breached the REPSA by failing to execute and deliver a deed in a timely manner and (2) breached its duty of good faith and fair dealing by preventing the Ebbelers from funding the loan. *Id.* at 7. The Estate filed a counterclaim alleging the Ebbelers had breached the REPSA. *Id.* Following a bench trial, the trial court found that the Ebbelers had breached the REPSA by failing to timely pay the purchase price by the closing date and therefore had forfeited the earnest money. *Id.* at 7-8. Critical here, the trial court's findings of fact and conclusions of law indicates as follows: (1) "[t]he Ebbeler's [sic] failure to perform caused the closing to fail"; and (2) "responsibility [for timely payment at closing] lay entirely with the Ebbelers and it is the ultimate failure for this purchase not happening."[2] On appeal, we affirmed the trial court's ruling in all respects, and the Supreme Court denied review. *Id.* at 1; *Ebbeler v. Andrews*, 199 Wn.2d 1024, 512 P.3d 901 (2022).

After the judgment in *Ebbeler I* became final, the Ebbelers filed the instant action against the Escrow Defendants, which is referred to herein as *Ebbeler II*. The Ebbelers asserted four claims: (1) breach of contract; (2) professional negligence; (3) tortious interference with contract; and (4) violation of the Washington Consumer Protection Act, RCW 19.86 (the CPA). Whereas the contract at issue for purposes of the tortious interference claim is the REPSA

[2] We refer to these statements as "findings" even though the first appears in the trial court's conclusions of law (in what is incorrectly numbered paragraph 98) and the second in the trial court's "order of the court" (in paragraph 7). Whether the statements are properly characterized as findings, conclusions, or a judicial decree is not material to our analysis.

between the Ebbelers and the Estate, the contract at issue for purposes of the breach of contract claim is the Closing Agreement and Escrow Instructions (the Escrow Instructions) between and among the Ebbelers and the Escrow Defendant.

Relevant here, the Escrow Instructions include the following provisions:

> **Documents.** The closing agent is instructed to select, prepare, complete, correct, receive, hold, record and deliver documents as necessary to close the transaction.
>
> . . . .
>
> **Instructions from Third Parties.** If any written instructions necessary to close the transaction according to the parties' agreement are given to the closing agent by anyone other than the parties or their attorney, including but not limited to, lenders, such instructions shall be deemed to have been accepted and agreed to by the parties.
>
> **Disclosure of Information to Third Parties.** The closing agent is authorized to furnish, upon request, copies of any closing documents, agreements or instructions concerning the transaction to the parties' attorneys and to any real estate agent, lender or title insurance company involved in the transaction.
>
> . . . .
>
> **Inability to Comply With Instructions.** If the closing agent receives conflicting instructions or determines, for any reason, that it cannot comply with these instructions by the date for closing specified in the parties' agreement or in any written extension of that date, it shall notify the parties, request further instructions, and in its discretion: (1) continue to perform its duties and close the transaction as soon as possible after receiving further instructions, or (2) if no conflicting instructions have been received, return any money or documents then held by it to the parties that deposited the same, less any fees and expenses chargeable to such party, or (3) commence a court action, deposit the money and documents held by it into the registry of the court, and ask the court to determine the rights of the parties.

At bottom, the Ebbelers claim that the Escrow Defendants breached these specific contractual requirements and that their breach of contract, as well as their tortious conduct, ultimately caused the closing to fail.

Because the trial court in *Ebbeler I* expressly found that "[t]he Ebbeler's [sic] failure to perform caused the closing to fail," the Escrow Defendants filed a motion for summary judgment to dismiss the Ebbelers' claims, arguing that the claims are barred by issue preclusion because each claim "possesses a causation element that has already been judicially determined" in *Ebbeler I*. The trial court granted the motion and dismissed the Ebbelers' claims. Its order explains: "the issue of causation in this case is collaterally estopped based on the Findings of Fact and Conclusion of Law issued in [*Ebbeler I*]." The trial court then awarded attorney fees and costs to the Escrow Defendants. The Ebbelers appeal.

II

The principal issue before us is whether the trial court erred in dismissing the Ebbelers' claims on summary judgment on the basis of issue preclusion. "Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Weaver v. City of Everett*, 194 Wn.2d 464, 472, 450 P.3d 177 (2019) (citing CR 56(c)). "We review summary judgment orders de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.* We likewise review a trial court's application of issue preclusion de novo. *Id.* at 473.

Issue preclusion is an equitable doctrine that "bars relitigation of particular *issues* decided in a prior proceeding." *Id.* The party asserting issue preclusion must establish four elements: "(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom [issue preclusion] is asserted was a party to, or in privity with a party to, the earlier proceeding; and

(4) application of [issue preclusion] does not work an injustice on the party against whom it is applied." *Id.* at 474. The Ebbelers assert that elements (1) and (4) have not been satisfied and that the decisive causation issue was not actually decided in *Ebbeler I*. We agree.

The first requirement to apply issue preclusion—identicality—limits issue preclusion to "situations where the issue presented in the second proceeding is *identical in all respects* to an issue decided in the prior proceeding, and where the controlling facts and applicable legal rules remain unchanged." *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974)). Courts only extend issue preclusion to "'ultimate facts,' *i.e.*, those facts directly at issue in the first controversy upon which the claim rests, and not to 'evidentiary facts' which are merely collateral to the original claim." *McDaniels v. Carlson*, 108 Wn.2d 299, 305-06, 738 P.2d 254 (1987) (quoting Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 833 (1985)); *see also State v. Eggleston*, 164 Wn.2d 61, 74, 187 P.3d 233 (2008) ("An 'ultimate fact' is a fact 'essential to the claim or the defense.'" (quoting BLACK'S LAW DICTIONARY 629 (8th ed. 2004)). The identicality requirement is not satisfied "[w]here an issue arises in two entirely different contexts." *McDaniels*, 108 Wn.2d at 305. Additionally, "[a]n important clarification of the first requirement that an issue was 'decided' in the earlier proceeding is that the issue must have been 'actually litigated and necessarily determined' in that proceeding." *Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 595, 416 P.3d 1261 (2018) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987)).

Applying these legal principles here, the identicality requirement is not satisfied. The Escrow Defendants' causal responsibility for the failed transaction was not actually litigated and necessarily decided in *Ebbeler I* because the causation issue in *Ebbeler I* arose in a different context. The sole issue in *Ebbeler I* was whether the Ebbelers or the Estate breached their duties under the REPSA, and the trial court concluded—in the context of that dispute—the Ebbelers breached. In contrast, the issues raised in *Ebbeler II* concern whether the Escrow Defendants' breach of their separate contractual and tort duties caused the Ebbelers to breach the REPSA and, as a result, forfeit their earnest money and lose the opportunity to purchase the home. Addressing that issue, the Ebbelers allege the Escrow Defendants breached the Escrow Instructions by (1) failing to correct the errors in WaFed's loan documents, (2) failing to provide the correct deed form to the Ebbelers and the Estate before WaFed's wiring cutoff at 2 p.m. on the closing date, (3) erroneously informing Andrews that he could sign the closing documents after WaFed's wiring cutoff, (4) failing to notify the Ebbelers that the Estate had given conflicting instructions to WFG to withhold the Estate's signed closing documents from WaFed until further authorization from the Estate, and (5) failing to provide the Estate's signed closing documents to WaFed notwithstanding the Estate's instructions. The Ebbelers further allege that the Escrow Defendants breached their duty to provide reasonably prudent escrow services, tortiously interfered with the contractual relationship between the Ebbelers and the Estate, and violated the CPA. None of these issues was decided by the trial court in *Ebbeler I* because it was limited to resolving the dispute between the Ebbelers and

the Estate. Therefore, the issues presented in *Ebbeler II* are not identical to those decided in *Ebbeler I*.

Moreover, even if the identicality requirement were satisfied here, the fourth element—"application of [issue preclusion] does not work an injustice on the party against whom it is applied" (*Weaver*, 194 Wn.2d at 474 (quoting Christiansen v. Grant County Hospital Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004))—also has not been satisfied. In determining whether applying issue preclusion will work an injustice on the party against whom it is applied, "Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue." *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 725, 346 P.3d 771 (2015) (quoting *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001)). While the purposes of issue preclusion are "to promote judicial economy by avoiding relitigation of the same issue, to afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to litigants," these purposes must be "balanced against the important competing interest of not depriving a litigant of the opportunity to adequately argue the case in court." *Lemond*, 143 Wn. App. at 804.

Applying issue preclusion here would work an injustice against the Ebbelers because it would deprive them of their opportunity to obtain relief against the Escrow Defendants. Moreover, declining to apply issue preclusion would not prejudice the Escrow Defendants because, as nonparties to *Ebbeler I*, they did not face liability from or expend substantial resources in defending against the prior litigation between the Ebbelers and the Estate. Instead, in that case the Ebbelers primarily litigated whether their own actions or those of the Estate prevented the

transaction from closing. Because the Ebbelers have not yet had a full and fair hearing to adjudicate their claims against the Escrow Defendants, it would be unjust to apply issue preclusion in this case.

Indeed, the potential for injustice is heightened in this case because the trial court in *Ebbeler I*, to the extent it addressed the Escrow Defendants' causal responsibility for the failure of the transaction, indicated that the Ebbelers' claims against the Escrow Defendants may be meritorious. The court found that the "administrative work" in completing WaFed's loan documents that WFG arranged for the Ebbelers to sign "appears to have directly impacted the loan being funded," although the court did not specify who was responsible for completing this administrative work. The purportedly corrected loan documents that WFG sent to WaFed still contained multiple errors and may have been sent after the closing deadline. And Leggett apparently did not know that WaFed had a 2 p.m. cutoff to wire the loan proceeds to WFG, nor did Leggett communicate this deadline to Andrews when scheduling his signing appointment. These findings seemingly point the finger at the Escrow Defendants for causing the Ebbelers to fail to secure funding from WaFed by the closing date and ultimately breach the REPSA.

Likewise, the trial court in the instant case recognized that "it's clear that the [Ebbelers] and the [Escrow Defendants] had entered into a contract where WFG had certain duties" and that "[i]t's also clear from the record that WFG breached some of those duties." The court further noted that the *Ebbeler I* trial court's finding that the Ebbelers were ultimately at fault for the failure of the transaction "seems to acknowledge impliedly that there was fault on behalf of others, including WFG, that were involved in this transaction." In fact, Leggett testified in her deposition

during discovery in *Ebbeler II* that "there was nothing that [the Ebbelers] could have done differently to make the transaction go through." Thus, rather than foreclose claims against the Escrow Defendants, the findings from *Ebbeler I* instead open the door to a finding in *Ebbeler II* that the Escrow Defendants caused the Ebbelers to breach the REPSA and incur damages. On this record, applying issue preclusion would be unjust.

The Escrow Defendants' contrary arguments are unpersuasive. They rely heavily on the discrete findings in *Ebbeler I* without properly considering the context in which those findings were made. While the trial court in *Ebbeler I* found that "[t]he Ebbeler's [sic] failure to perform caused the closing to fail" and responsibility to supply the funds at closing to complete the sale "lay entirely with the Ebbelers and it is the ultimate failure for this purchase not happening," the identicality element is not satisfied where, as here, "an issue arises in two entirely different contexts." *McDaniels*, 108 Wn.2d at 305. The *Ebbeler I* court could not, and did not, decide whether the Escrow Defendants caused the transaction to fail because they were not parties to the suit and their responsibility for the failed transaction was not material to the outcome of that litigation. To the extent the trial court's findings in *Ebbeler I* addressed the Escrow Defendants' causal responsibility for the failure of the transaction, those findings were not "ultimate facts" with preclusive effect because they were not essential to the claims or defenses raised in the prior action. *See id.*; *Eggleston*, 164 Wn.2d at 74.

The Escrow Defendants' reliance on our unpublished opinion in *Sullivan v. Skinner & Saar*, No. 77516-2-I (Wash. Ct. App. Jan. 28, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/775162.pdf, is misplaced. In *Sullivan*,

property owners began building a fence near their boundary line after their attorney incorrectly advised them that they did not share an easement with their neighbors. *Id.* at 2. The attorney later discovered the easement and informed the owners of its existence, but they nevertheless continued building the fence into the easement. *Id.* at 3. When the neighbors filed an action to quiet the owners' title to the easement, the court determined the owners had abandoned the easement by continuing to construct their fence after their attorney notified them of its existence. *Id.* at 5-6. In the owners' subsequent malpractice action against their attorney for damages based on their loss of the easement, our court applied issue preclusion on appeal to bar their claims because the initial action "resolve[d] the issue of causation of the Sullivans' loss of their easement" by "attribut[ing] abandonment of the easement to the Sullivans' actions . . . after being advised [by their attorney] that an easement was recorded." *Id.* at 10. The circumstances here are vastly different. Whereas the trial court in the initial action in *Sullivan* absolved the owners' attorney of blame and found the owners entirely responsible for their loss of the easement, the trial court in *Ebbeler I* implied that the Escrow Defendants may be at least partially to blame for the failure of the transaction. Accordingly, *Sullivan* does not support the Escrow Defendants' argument that the trial court correctly dismissed the Ebbelers' claims on issue preclusion grounds.[3]

Lastly, the Escrow Defendants contend that applying issue preclusion to bar the Ebbelers' claims would not be unjust because the Ebbelers could have named the Escrow Defendants as parties to *Ebbeler I*. This argument is unpersuasive

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[3] Furthermore, we are not bound by *Sullivan* because it is an unpublished opinion with no precedential value. *See* GR 14.1(a).

because Washington law permits a purchaser in a real estate contract to maintain separate causes of action against the seller and the escrow company for damages incurred in connection with the real estate transaction. *See Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 444, 423 P.2d 624 (1967). The Escrow Defendants' attorney appropriately acknowledged at oral argument that the Ebbelers were not required to join the Escrow Defendants as necessary parties to *Ebbeler I* under CR 19. Thus, the Ebbelers' decision to not name the Escrow Defendants as parties to *Ebbeler I* does not require us to apply issue preclusion in *Ebbeler II*.

In sum, the issues in *Ebbeler I* and *II* are not identical with regard to the critical causation issues in the two lawsuits, and applying issue preclusion here is unjust. For these reasons, the causation findings in *Ebbeler I* as set forth in paragraph 98 of the trial court's conclusions of law and paragraph 7 of its order of the court (*see supra* at footnote 2) are not entitled to issue preclusive effect in *Ebbeler II*. The trial court thus erred in dismissing the Ebbelers' claims based on issue preclusion principles.[4]

[4] In granting summary judgment solely on the basis of issue preclusion, the trial court did not address the Escrow Defendants' additional arguments regarding the independent duty doctrine, lack of intent or improper purpose for the tortious interference claim, and public interest impact for the CPA claim. Given the lack of sufficient briefing on these issues and our dispositive ruling regarding issue preclusion principles, we decline to reach these other arguments. *See Christian v. Tohmeh*, 191 Wn. App. 709, 727-28, 366 P.3d 16 (2015) ("[T]his court does not review issues not argued, briefed, or supported with citation to authority.") (citing RAP 10.3(a)(6)); *Clark County v. W. Wash. Growth Mgmt. Hr'gs Review Bd.*, 177 Wn.2d 136, 146-47, 298 P.3d 704 (2013) (appellate courts "retain wide discretion in determining which issues must be addressed in order to properly decide a case on appeal" and "must address only those claims and issues necessary to properly resolving the case as raised on appeal by interested parties"). We express no opinion on these additional issues, nor do we express any opinion on whether other findings in *Ebbeler I* also are not entitled to preclusive effect in light of our ruling herein.

III

Because we reverse the trial court's summary judgment ruling in favor of the Escrow Defendants, we also vacate the trial court's award of prevailing party attorney fees and costs because the Escrow Defendants are no longer prevailing parties. For similar reasons, we decline to award appellate attorney fees to either party. *See Wash. Fed. v. Gentry*, 179 Wn. App. 470, 496, 319 P.3d 823 (2014) ("Because a prevailing party has not yet been determined and will not be determined until after [further proceedings] on remand, we decline to award fees now. That determination may be made by the trial court at such time as it makes an award of reasonable attorney fees.").

Reversed and remanded.

Feldman, J.

WE CONCUR:

Birk, J.

Smith, C.J.

NO. 84849-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

APPENDIX B TO DEFENDANTS-PETITIONERS WFG NATIONAL TITLE COMPANY OF WASHING, LLC'S AND DANI LEGGETT'S

PETITION FOR REVIEW

Medicraft v. Washington,
No. 21-CV-1263-BJR, 2023 WL 3599554, at *4
(W.D. Wash. May 23, 2023) (unpublished)

2023 WL 3599554
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

James and Shaylee MEDICRAFT, et al., Plaintiffs,
v.
The State of WASHINGTON, et al., Defendants.

Civil Action No. 21-cv-1263-BJR
|
Signed May 23, 2023

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ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE STATE

BARBARA J. ROTHSTEIN, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Plaintiffs are parents who claim they were wrongfully separated from their children by the State of Washington's Department of Children and Families ("DCYF"). Defendants are the State of Washington, DCYF, state contractor Phoenix Protective Services ("Phoenix"), individual State defendants Derek P. Leuzzi, Tanessa Sanchez, Tabitha Culp, Elizabeth Sterbick, Tabitha Pomeroy, Ross Hunter, and Bonnie White, and individual Phoenix defendant Lufti Al Marfadi—all of whom were allegedly involved in either the children's separation or their time in State custody. Plaintiffs moved for partial summary judgment against the State.[1] Having reviewed the motion, the opposition thereto, and the relevant legal authorities, the Court will deny Plaintiffs' motion for partial summary judgment against the State. The reasoning for the Court's decision follows.

II. BACKGROUND

During the relevant period, Plaintiffs James and Shaylee Medicraft were the parents of five minor children who ranged from one to nine years old. Dkt. 55 ¶ 20. The children had lived with one or both of their parents until the State removed the children from their custody on April 25, 2019. Dkt. 143-2 at 3 ¶ 7. The children were returned on April 30, 2019, but removed again on December 19, 2019. *Id.* The children remained in the State's or foster parents' custody until October 22, 2020, when Washington Superior Court Judge Susan Amini ordered that they be returned to Plaintiffs following a 17-day dependency trial. *See* Dkt. 143-3.

The State's justification for the initial removal of the children was based on a protective order that Ms. Medicraft sought against Mr. Medicraft in October 2018, when the family lived in New York (the "No-Contact Order"). *See* Dkt. 143-2 at 2 ¶ 5; Dkt. 165-2. Ms. Medicraft's request for the order alleged that Mr. Medicraft was "verbally abusive toward [the] children," and that he had yelled at and ridiculed her in front of the children. Dkt. 165-2 at PDF 3-4. Among other things, the New York court ordered that Mr. Medicraft "shall not have parenting time with the children unless he ... [c]omplete[s] a psychiatric evaluation ... a 26-week anger management

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course." *Id.* at PDF 20. The No-Contact Order was to remain in effect until March 11, 2021.

Plaintiffs moved to Washington sometime in 2019. *See* Dkt. 143-2 at 3 ¶ 6. Shortly thereafter, the New York family court entered an order declining jurisdiction over enforcement of the No-Contact Order and determined that the Washington Superior Court was the most appropriate forum. *Id.* After consulting with the attorney appointed to handle the case in New York, the State assumed responsibility for enforcing the No-Contact Order. *See* Dkt. 165-4 at PDF 4-6. Social worker Teresa Sanchez was in charge of the State's initial investigation of the family. Sanchez discovered that Mr. and Ms. Medicraft were communicating and having physical contact, in violation of the No-Contact Order. *Id.* at PDF 8-9. Sanchez also observed what she thought was inappropriate discipline of the children by both parents. Dkt. 164 at 4-5. Sanchez also noted that the children "had behavior issues in school, being disruptive in class, using foul language and having physical interactions with other children." *Id.* at 4 (citing Dkt. 165-4 at 73-75; Dkt. 165-5). Defendants state that "[a]s a result of the on-going no contact order violations, the mother's apparent parental deficits, and inability to manage the children's behavior, DCYF filed dependency petitions on these children." *Id.* at 5.

***2** Initially, the children were placed in shelter care with Ms. Medicraft. *Id.*; Dkt. 165-8. Beginning in May 2019, the children and their mother were to reside at a domestic violence shelter and not have any contact with Mr. Medicraft. Dkt. 164 at 5; Dkt. 165-8. However, in November 2019, Sanchez observed Mr. and Ms. Medicraft together with several of the children "at a store one evening." Dkt. 164 at 5; Dkt. 165-4 at 117-18, 125. As a result of this apparent violation of the shelter-care conditions and the No-Contact Order, the State sought an order removing the children from their parents' custody entirely and placing them in foster care. Dkt. 165 at 5-6. Arguing before the state court, the State also justified the removal based on its "concerns about all the information received from the school, serious allegations of domestic violence, ... and the risk of flight." Dkt. 165-10 at 2. On December 9, 2019, the court placed the children entirely in the State's custody, with both parents having visitation rights. *Id.* at 3. The No-Contact Order was vacated by the superior court on February 5, 2020, but the children remained in State custody until October 2020 based on the other stated grounds for removal. Dkt. 143-10.

Both parties acknowledge that the children exhibited serious behavioral issues while in the State's custody. These led to escalating problems at school, multiple psychiatric hospitalizations, and physical altercations with social workers and Phoenix security guards. *See* Dkt. 140 at 9; Dkt. 164 at 6-9; *see also* Dkt. 143-2 at 6. The parties also agree that the State's efforts to find stable placements for the children were largely unsuccessful. *See* Dkt. 140 at 21-22; Dkt. 164 at 6-9. However, the parties have starkly different understandings of what caused these problems. Plaintiffs claim that the State was unable or unwilling to care for the children and that they suffered severe neglect and intentional harm. The State, in contrast, asserts that Plaintiffs actively "encouraged," "approv[ed]," and even "direct[ed]" the children's violent and unruly behavior to "sabotage" the State's custody and placement efforts. Dkt. 164 at 6, 21 ("James Medicraft created an alternative reality for his children, one in which anyone other than the parents is dangerous to the children."). The parties presented these disparate views to Judge Amini during a dependency trial conducted in October 2020. *See* Dkt. 143-2.

A. Dependency Trial

The State filed a dependency petition pursuant to RCW § 13.34.030(6)(c), alleging that the children had "no parent ... capable of adequately caring [for them]" such that they were "in circumstances which constitute[d] a danger of substantial damage ... to their psychological development." Dkt. 143-2 at 2. The State had the burden of proving this fact by a preponderance of the evidence. *Id.* The court found that the State failed to carry its burden and that the children were not dependent. *Id.*

Judge Amini heard the testimony of thirteen witnesses, beginning with Ms. Medicraft. *Id.* at 1. Ms. Medicraft testified that she and Mr. Medicraft were experiencing difficulties in their marriage—and were living separately—when she sought a protective order in 2018. *Id.* at ¶ 5. Ms. Medicraft stated that she feared Mr. Medicraft "was going to take her children out of state and interfere with her custody of the children at that time." *Id.* When she went to the courthouse in New York to obtain an order preventing Mr. Medicraft from taking the children out of the state, "she was told that th[e] only way to get such an order was to file for a domestic violence order of protection." *Id.* Ms. Medicraft testified that she felt pressured by court employees to file for an order of protection because, if she did not, "[Child Protective Services] would get involved with her children." *Id.* Judge Amini noted that the documents Ms. Medicraft filed

with the court were only partially in her handwriting and that she testified she had tried unsuccessfully to lift the order several times. *Id.* Judge Amini concluded that Ms. Medicraft's testimony regarding the No-Contact Order was "plausible." *Id.*

Judge Amini heard the testimony of several social workers who had been assigned to the Medicrafts and noted that virtually all of them reported positive interactions between the parents and the children. *See id.* at 3-4. DCYF had conducted several investigations into the family in 2019 and in each case determined that the allegations that initially prompted the investigations were "unfounded." *Id.* at 3 ¶ 11. Several of the social workers involved in these investigations "testified to [one or both parents'] ability to care for the children." *Id.* at 3-4.

***3** The State's dependency case was largely based on the testimony of two witnesses: Tabitha Culp, a "social service specialist,"[2] and Dr. Joanne Solchany, a psychiatrist who evaluated three of the children. *See id.* at 4 ¶ 21. The court gave "very little weight" to Dr. Solchany's testimony. *Id.* at 8 ¶ 38. Judge Amini noted that Dr. Solchany evaluated the children at a time when "their behavior was significantly elevated" because of a "very unstable placement situation" that, in the court's view, had been created by DCYF. *Id.* at 7 ¶ 34. Specifically, the children had been in night-to-night lodging for two months and had been awoken in the early hours of the morning to travel several hours to the appointment. *Id.* at 7. Judge Amini also noted that one of the children had been assaulted the day before. *Id.* Dr. Solchany apparently did not know of these circumstances when she evaluated the children. *Id.*

The court likewise found Culp's testimony "vague at best and contradictory most of the time." *Id.* at 6 ¶ 30. Judge Amini noted that the only purported evidence of parental unfitness Culp had observed was Mr. Medicraft's criticizing DCYF in front of the children during visitations. *Id.* at 5 ¶¶ 25-26. The court found that "[o]bjecting to DCYF's care of your children and believing DCYF's actions are harmful to your children is not a basis for a dependency," particularly because the parents had made "significant efforts" to assist DCYF in caring for their children despite their disagreement with DCYF's decision to remove them. *Id.* at 6 ¶ 27.

The remainder of Culp's testimony—and indeed much of the DCYF's case—stemmed from "attempt[s] to make connections between the children's [poor] behavior and the parents' visitation." *Id.* at 6 ¶ 30, 9 ¶ 48. After examining the behavior cited by DCYF, Judge Amini found that "the timeline of the behaviors actually shows that the behaviors began and worsened as Department intervention increased [and that] DCYF was not able to appropriately manage the behaviors ... after the children were removed from Ms. Medicraft." *Id.* at 9 ¶ 48. The court further stated that "the evidence was overwhelming that the children's behavior was better when they were in the care of their mother." *Id.* at 11 ¶ 63.

Based in part on these findings, the court concluded that there was insufficient evidence that Plaintiffs were not capable of adequately caring for the children and thus that there was no basis for a dependency. *Id.* at 3, 4, 11. Apart from Culp's and Dr. Solchany's testimony and documents they referred to, DCYF does not appear to have presented significant additional evidence. Judge Amini noted that, despite the apparent importance of the No-Contact Order, no New York witnesses had been called to testify.

III. DISCUSSION

A. Summary Judgment

"Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact" and the movant is entitled to judgment as a matter of law. *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017) (quoting *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162 (9th Cir. 2016)); Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of identifying portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each claim." *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657 (9th Cir. 2020). "If the moving party meets this burden, the opposing party must then set out specific facts showing a genuine issue for trial to defeat the motion." *Id.*

B. Collateral Estoppel

(1) Legal Standard

***4** The doctrine of collateral estoppel prevents the relitigation of facts that have been determined in a prior proceeding. *Hicks v. King Cnty Sherriff*, 143 Wn. App. 1050,

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2008 WL 921842, at *8 (2008) ("Collateral estoppel is concerned only with limiting the relitigation of factual issues. The rule has nothing to do with restricting arguments on pure issues of law." (citation omitted)). Collateral estoppel applies only when:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

State v. Cleveland, 58 Wn. App. 634, 549 (1990) (quoting *Beagles v. Seattle–First Nat'l Bank*, 25 Wn. App. 925, 929 (1980)). The relevant issue must have been "actually ... litigated and determined; [collateral estoppel] 'does not operate as a bar to matters which could have ... been raised [in prior litigation] but were not.' " *McDaniels v. Carlson*, 108 Wn. 2d 299, 305 (1987) (en banc) (citing *Davis v. Nielson*, 9 Wn. App. 864, 874 (1973)). Furthermore, "collateral estoppel extends only to 'ultimate facts,' i.e., those facts directly at issue in the first controversy upon which the claim rests, and not to 'evidentiary facts' which are merely collateral to the original claim." *Id.* at 305-06; *Kevin F. v. Skinner & Saar, P.S.*, 7 Wn. App. 2d 1030, 2019 WL 355725, at *4 (2019).

To determine which issues in a prior litigation amount to "ultimate facts," courts consider "whether a rational jury could have grounded its verdict upon an issue other than that which the [party] seeks to foreclose from consideration." *United States v. Sikes*, 15 F.3d 1094, 1994 WL 1260, at *2 (9th Cir. 1994) (citation omitted). For example, the Ninth Circuit affirmed a district court's refusal to apply collateral estoppel when a jury in the prior litigation had been given two possible theories of liability, and the theory on which the verdict was based was ambiguous. *Hardwick v. Cnty of Orange*, 980 F.3d 733, 742 (9th Cir. 2020) ("Given that [plaintiff's] state jury returned special verdicts finding that [defendants] violated her right to familial association *or* her right to privacy, we cannot conclude that the jury actually decided that [plaintiff's] right to familial association was violated." (emphasis in original)). [3]

(2) Analysis

Plaintiffs argue that Defendants are collaterally estopped from relitigating any facts that Judge Amini found in Plaintiffs' favor during the dependency trial. [4] In Plaintiffs' view, these facts alone, if taken as undisputed, entitle them to summary judgment on their negligent investigation, substantive due process, assault, battery, and failure to report claims. Defendants argue that collateral estoppel does not apply because the instant case does not involve the same issues as those litigated in the dependency trial.

***5** As noted above, collateral estoppel requires that the issues in the previous action and the instant case be identical. The "issues" are defined as the "ultimate facts" determined by the fact-finder in the previous action. Ultimate facts are those which were necessarily determined by the fact-finder, as opposed to "evidentiary facts" that may have contributed to the decision but were not indispensable to it.

Plaintiffs do not dispute the dependency court's finding: that Plaintiffs' children were not dependent, and that the State had failed to prove, by a preponderance of the evidence, that Plaintiffs' children were dependent—i.e., that they had "no parent ... capable of adequately caring [for them]" such that they were "in circumstances which constitute[d] a danger of substantial damage ... to their psychological development." Dkt. 143-2 at 2; Dkt. 173 at 6. Plaintiffs also do not claim that this ultimate fact is identical to any issue in the present action, nor do they cite it as support in their summary judgment motion. Rather, Plaintiffs argue that Washington law has "evolved" to relax the ultimate-facts standard, such that evidentiary facts like those found by Judge Amini are within the ambit of collateral estoppel. Dkt. 173 at 7. Plaintiffs do not cite any case in support of their analysis of Washington law. Their interpretation is based on extrapolation from a 1985 law review article and a historical analysis of the Restatement (2d) of Judgments, which documents a "change in common law." *Id.* However, the Court's review of recent collateral estoppel cases finds no support for Plaintiffs' characterization of the law and no indication that Washington has relaxed the distinction between ultimate facts and evidentiary facts. *E.g.*, *State v. Eggleston*, 164 Wn.2d 61, 74-75 (2008) (en banc); *Kevin F. v. Skinner & Saars, P.S.*, 7 Wn.App.2d 1030, 2019 WL 355725, at *4-5 (Jan. 28, 2019); *In re Marriage of Akon*,

160 Wn.App. 48, 63 (2011); *Hick v. King Cnty Sherriff*, 143 Wn.App. 1050, 2008 WL 921842, at *8 (Apr. 7, 2008).

Plaintiffs next argue that, even if collateral estoppel is limited to the ultimate facts found during the dependency action, the dependency court necessarily determined whether the children were wrongly removed—a fact that is essential to Plaintiffs' negligence claims in this action. Plaintiffs are incorrect. The dependency court was not tasked with—and did not make—an affirmative finding that Plaintiffs were capable parents or that the children were wrongfully removed from their custody. Rather, the court found that the State had failed to carry its burden of proving that Plaintiffs were not capable parents. Additionally, even if Judge Amini had made an affirmative finding that the children were wrongfully removed, that would merely have been one of many different grounds on which her ultimate dependency finding could have been based. That is precisely the type of fact that is considered "evidentiary" under Washington law. *E.g.*, *Eggleston*, 164 Wn.2d at 74-75 (jury could have reached verdict without determining motive); *Hardwick*, 980 F.3d at 742 (jury had multiple possible grounds for verdict); *C.f. Sikes*, 1994 WL 1260, at *2 (jury's verdict necessarily implied defendant lacked intent).

Likewise, Plaintiffs' motion cites other statements by Judge Amini that clearly represent "evidentiary facts" not necessary to the court's decision. For example, Plaintiffs quote Judge Amini's statement that "the [State's] investigation wasn't done correctly or thoroughly." Dkt. 140 at 14. As an initial matter, Judge Amini did not expressly find that the State was negligent in its investigation, and the quoted statement alone would not be enough to satisfy any element of Plaintiffs' negligence claims. Judge Amini observed an apparent lack of thoroughness in the investigation as she reviewed the State' evidence, but the trial was not directed at the appropriateness of the State's conduct. Furthermore, even if Judge Amini's statements could be construed as finding that the State's investigation was negligent, that finding would merely serve as an evidentiary fact supporting her dependency decision. There is no indication that Judge Amini's decision hinged on the State's negligent investigation, as she cited "overwhelming" evidence of Plaintiffs' parental fitness that had nothing to do with the investigation. Similarly, Plaintiffs' citing Judge Amini's finding that "DCYF's witnesses repeatedly contradicted themselves" is clearly an evidentiary fact to which collateral estoppel does not apply. Dkt. 140 at 14, 20.

***6** The Court recognizes that the dependency action and the instant case have overlapping facts and evidence because they are based on the same underlying events, and that many of Judge Amini's findings are highly relevant to this action. This order decides only that the relevant testimony, records, and findings brought out during the dependency action are evidentiary facts which, under Washington law, Defendants cannot be collaterally estopped from litigating.

C. Plaintiffs' Claims

Plaintiffs argue that even if collateral estoppel does not apply, there is no genuine dispute as to any material fact with respect to their claims against the state. The Court will consider each claim in turn.

1. Negligent Investigation

(1) Legal Standard

Washington recognizes a negligent investigation cause of action against DCYF when, in the course of investigating suspected child abuse or neglect, the agency "gather[s] incomplete or biased information that results in a harmful placement decision." *Desmet v. State*, 200 Wn. 2d 145, 160 (2022) (en banc) (quoting *M.W. v. Dep't of Social & Health Servs.*, 149 Wn. 2d 589, 602 (2003)). A "harmful placement decision" includes "removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id.* A plaintiff must also establish that "the Department's negligent investigation was a proximate cause of the harmful placement decision." *Rae*, 2022 WL 16549052, at *5; *McCarthy v. Cnty of Clark*, 193 Wn. App. 314, 329 (2016). Whether a defendant's conduct amounted to negligence is a question of fact generally decided by a jury. *See Desmet*, 200 Wn. 2d at 162 ("At the initial summary judgment stage of the proceedings, it is not for this court to decide whether the Department committed actionable negligence [in their investigation].").

RCW 4.24.595 grants DCYF and its employees limited immunity (1) from negligence in emergent placement investigations (prior to a shelter care hearing), except when DCYF engages in gross negligence and (2) from harm proximately caused by "acts performed to comply with ... court orders," such as shelter care placement and dependency orders. *See Desmet*, 200 Wn. 2d at 160-61.

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(2) Analysis

Plaintiffs argue that no reasonable jury could find that Defendants were not negligent. Plaintiffs first rely on statements (quoted above) by Judge Amini during the dependency trial criticizing the State's investigation. Judge Amini's order indeed criticized the State's investigation but did not make a finding that the State was negligent or that the children were wrongly removed. Judge Amini found only that Plaintiffs were capable parents and that their custody of the children should be restored. Furthermore, the Court has found that Judge Amini's findings do not amount to undisputed facts in this case and do not support summary judgment.

Plaintiffs also attempt to support their claim by noting that DCYF failed to hold a Family Team Decision Making ("FTMD") meeting prior to removing the children. Dkt. 140 at 15. Plaintiffs cite a DCYF policy manual that says an FTMD meeting must be held prior to children being placed in shelter care. *Id.* at 15 n.11 (citing https://www.dcyf.wa.gov/1700-case-staffings/1720-family-team-decision-making-meetings). However, Plaintiffs do not point to any statute or decision holding that a failure to hold an FTMD meeting amounts to per se negligence.

Furthermore, Defendants have made specific allegations disputing Plaintiffs' characterization of the investigation. Defendants assert that they had observed Plaintiffs violating the No-Contact Order, in addition to other allegedly concerning behavior by the parents toward their children. A jury could find that Defendants acted reasonably based on the information they had at the time. Accordingly, there is a genuine dispute of fact as Plaintiffs' negligent investigation claim, and their motion for summary judgment is denied as to that claim.

(3) Immunity

***7** In their opposition brief, Defendants claim that they are entitled to immunity from negligent investigation claims under RCW 4.24.595(2). Neither party moved for summary judgment on the issue of immunity, but Defendants raised it as a defense. Dkt. 164 at 19-20. An immunity defense presents a "pure question of law" that must be decided prior to trial, and thus the Court will address it. *See Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945 (9th Cir. 2010) (noting that qualified immunity is a pure question of law and that Ninth Circuit may consider it *sua sponte*); *Desmet*, 200 Wn. 2d at 162 (finding that scope of RCW § 4.24.595 immunity appropriately decided at summary judgment stage).

As noted above, RCW § 4.24.595(2) grants the State and its agents limited immunity from harm caused by "acts performed to comply with ... court orders." In *Desmet*, the Washington Supreme Court emphasized that the scope of the immunity is narrow and that "[t]his court has established that the Department's investigative function is ... wholly separate from court orders and proceedings." *Id.* at 162-63. Defendants argue that the State's taking and maintaining custody of the children were "actions taken in compliance with the court ordered placement." Dkt. 164 at 19. Defendants claim that they simply "reported" Plaintiffs' violation of the No-Contact Order to the state court, that the court ordered a shelter-care placement,[5] and that all subsequent actions were taken in compliance with that order. *See id.*

As an initial matter, this is not an accurate description of the undisputed record regarding the placement order. DCYF did not merely report a violation of the No-Contact Order; its argument before the state court was also independently based on its agents' observations and reports from the children's school that evidenced "the mother's apparent parental deficits[ ] and inability to manage the children's behavior." Dkt. 165-10 at 2. This is plainly stated in the state court's order and further evidenced by the fact that the State maintained custody of the children for nearly nine months after the No-Contact Order was vacated. *Id.*; Dkt. 143-10.

More broadly, it is clear that Plaintiffs' allegations are centered on the State's investigative function, not its compliance with the state court's orders. Plaintiffs allege that Defendants conducted an inadequate and biased investigation —both with regard to the circumstances of the No-Contact Order and Plaintiffs' ability to parent their children—that presented a misleading picture to the state court. Plaintiffs essentially argue that, if Defendants had conducted a thorough and unbiased investigation, the state court would not have ordered that the children be removed from their parents.

Plaintiffs' allegations of an incomplete or biased investigation are colorable. The dependency court found that there was "overwhelming evidence" of Plaintiffs' parental fitness—including the testimony of several social workers and the results of DCYF's own investigations—yet the State chose to premise its case almost entirely on the testimony of a one "social service specialist." Moreover, Judge Amini

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specifically noted that she was "not convinced" that DCYF presented accurate information to a state court on at least one occasion. Dkt. 143-2 at 5 ¶ 26. It is also notable that, as described above, Defendants did not accurately describe the events surrounding their immunity defense to this Court.

***8** Therefore, the Court finds the state court's shelter-care placement and other related orders do not shield Defendants from Plaintiffs' colorable allegations that those orders were the result of Defendants' negligent investigation and presentation of facts. As the Washington Supreme Court phrased it in *Desmet*, "[s]hould the Department's negligence have caused an unnecessary and prolonged disruption of the family unit in this case, RCW 4.24.595(2) will not shield it from suit simply because the Department convinced the court to continue [a child's] shelter care placement." *Id.* at 163. This Court holds that RCW 4.24.595(2) does not grant Defendants immunity from Plaintiffs' claims.

2. Braam Substantive Due Process

(1) Legal Standard

In *Braam*, the Washington Supreme Court recognized that "foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety." *Braam v. State*, 150 Wn. 2d 689, 704 (2003) (en banc). Therefore, the State "must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." *Id.* Liability attaches "only when [the child's] care, treatment, and services 'substantially depart from accepted professional judgment, standards or practice.' " *Id.* The *Braam* court cautioned against a "mechanical application" of the standard, noting that whether the state's actions were reasonable "must be determined by balancing ... liberty interests against the relevant state interests." *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

(2) Analysis

To succeed on their substantive due process claim, Plaintiffs must prove, *inter alia*, that Defendants "substantially depart[ed] from accepted professional judgment, standards or practice" while they had custody of the children. There are genuine disputes as to several facts going directly to this claim. Defendants claim that, despite the State's best efforts, Plaintiffs actively encouraged their children to misbehave, which greatly hindered the State's ability to find stable placements for them. Plaintiffs deny this assertion and claim that the State gravely mishandled their custody of the children and bears sole responsibility for the harm they suffered. Each side has presented witness testimony supporting their position. There is a genuine dispute of fact appropriate for a jury to decide, and summary judgment is denied as to Plaintiffs' substantive due process claim.

3. Assault and Battery

(1) Legal Standard

Battery is the intentional infliction of harmful or offensive bodily contact that causes the plaintiff injury. *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408 (2000). Assault is intentionally causing someone to fear that harmful or offensive contact is imminent. *Brower v. Ackerley*, 88 Wn. App. 87, 92-93 (1997).

(2) Analysis

Plaintiffs attempt to support their assault and battery claims with statements made by Judge Amini during the dependency trial, such as her noting that "[one of the children] was assaulted by a security guard." Dkt. 140 at 24 (citing Dkt. 142-3 ¶¶ 33, 39, 48). As noted above, the dependency court's findings do not amount to undisputed facts in this case. Furthermore, Judge Amini did not truly make a finding that an assault had occurred, but rather remarked on what appeared to have been an assault based on the testimony of one witness. *See* Dkt. 164 at 25. Beyond Judge Amini's comments, Plaintiffs do not present any undisputed evidence going to the elements of assault or battery. As Defendants note, "Plaintiffs ... at a minimum have failed to establish that any of the alleged actors acted with intent to cause contact or apprehension." *Id.* at 26. Indeed, Plaintiffs' motion does not discuss intent at all, let alone establish that no genuine dispute of fact exists as to that necessary element of both claims. *See* Dkt. 140 at 23-24. Therefore, Plaintiffs' motion for summary judgment is denied as to their assault and battery claims.

***9** The Court notes that the parties' summary judgment briefs also refer to a dispute as to whether the State is liable for the acts of its third-party contractor Phoenix. *See* Dkt. 140 at 25. This dispute is also part of Plaintiffs' motion for partial

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summary judgment against Phoenix, filed separately from the instant motion against the State Defendants. The Court will decide this question in a separate order. Whether Phoenix or the State is liable for alleged assault and battery is not relevant to this order because there remains a dispute of fact exists as to whether an assault or battery actually occurred.

4. Failure to Report Abuse

RCW § 26.44.030 recognizes an implied right of action against a "mandatory reporter" who fails to report suspected child abuse. Plaintiffs claim Defendants violated this statute but their only evidence is Judge Amini's statement that Plaintiffs observed "numerous bruises" during their visitation, and that the children were hospitalized for mental health problems while in the State's custody. Dkt. 140 at 23. Defendants allege that there was no reason to believe the children had been abused while in their custody and claim that the bruises (and other injuries) were self-inflicted. Dkt. 164 at 24. This presents a genuine dispute of fact, and summary judgment is denied as to Plaintiff's claim under RCW § 26.44.030.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment against the State (Dkt. 140) is denied. Defendants' RCW 4.24.595(2) immunity defense is dismissed. The Court will resolve questions regarding Phoenix's agency relationship with the State in a separate order.

All Citations

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Footnotes

1 Plaintiffs also filed a motion for partial summary judgment against Phoenix (Dkt. 144), which the Court will address in a separate order.

2 Judge Amini explained that "Ms. Culp is a 'social service specialist' as opposed to a 'social worker' as she has yet to obtain a degree in social work and the Court denied the Department's request to certify her as an expert in social work." Dkt. 143-2 at 4 ¶ 21.

3 Some courts have applied a more "functional approach" to assessing ultimate facts, broadly considering whether the issue in question was central to the prior litigation (even if not logically necessary to the outcome) and "of unquestioned relevance and importance" in the present litigation. *E.g.*, *In re Westgate-California Corp.*, 642 F.2d 1174, 1177 (9th Cir. 1981).

4 Plaintiffs also make passing reference to the doctrine of res judicata. *See* Dkt. 140 at 11. Res judicata applies to claims or causes of action—not individual facts or issues—that have previously been litigated by the parties. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn. 2d 223, 225 (1978). The doctrine clearly does not apply here, as the previous action concerned a dependency petition, not tort claims.

5 This refers to the Washington Superior Court's order removing the children from Plaintiffs' custody entirely, not its earlier order allowing Ms. Medicraft to retain custody in a domestic violence shelter.

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