Supreme Court No. 93956-0
Court of Appeals No. 48098-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL NOEL,

Appellant,

v.

CITY OF LAKEWOOD,

Respondent.

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Michael Noel asks this Court to review the decision of the Court of Appeals referred in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of court of appeals decision in Michael Noel v. City of Lakewood, COA No. 48098-1-II, filed November 22, 2016, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

Is an issue of Substantial Public Interest presented by the Court Of Appeals when not providing clarity regarding the condition precedent of RCW 4.96 et seq., in conjunction of Civil Rule 41(a)?

D. STATEMENT OF THE CASE

On March 2, 2012, Sergeant Michael Noel was terminated from his position with the Lakewood Police Department (hereafter "LPD") after nearly eight years of faithful service to the department and the City of Lakewood. Sgt. Noel served the City of Lakewood under two separate administrations. He was hired from the Pierce County Sheriff's Department August 30, 2004, as a Sergeant and served in that capacity until his employment was terminated. Clerk's Papers 363-389.

When Sgt. Noel was hired from the Pierce County Sheriff's Department, the LPD was headed by Chief Larry Saunders. Clerk's

Papers 363-389. He retired from the department in 2008, at which time, after a selection process Asst. Id. Chief Brett Farrar ascended to the lead post of the Lakewood Police Department. Id. In June 2008, then probationary Sergeant Mike Zaro was promoted to Asst. Chief at the recommendation of Farrar. Clerk's Papers 390-499. Prior to his promotion to a sergeant, Zaro had been a detective with the LPD. He too was a lateral hire from the Pierce County Sheriff's Department where his last position was as a detective. Id.

During Noel's tenure at the LPD, his annual performance evaluations were generally satisfactory and superior. Clerk's Papers 363-389. He received many commendations from citizens and members of other police agencies. Id. Of significant note is the annual evaluation conducted by Lieutenant Jeff Alwine on September 12, 2010. Id. Lt. Alwine notes in the Supervisor's Additional Comments section, "[s]ince January, my dealings with Michael have been positive." Id. Additionally, Lt. Alwine stated, ". . . I know the day-to-day operations are, for the most part being handled in a manner consistent with what is expected." Id. Based upon Lt. Alwine's evaluation of Sgt. Noel's performance, Noel was rated at the superior level in most categories. Moreover, Lt. Alwine had no concerns that Sgt. Noel was a harm to himself or others. He had no concerns about his mental well-being. Clerk's Papers 390-499. Lt.

Alwine felt that Sgt. Noel and his squad were headed in the right direction following the murder of their comrades on November 29, 2009. Id.

Beginning on May 2009, Sgt. Noel was subjected to an internal affairs investigation for speaking with a boy who allegedly spoke expletives to Sgt. Noel's son while riding a school bus on the way home. Clerk's Papers 363-389. The matter was investigated and Sgt. Noel was given a reprimand for the incident. In accordance with the LPD's Manual of Operating Standards, the reprimand was to be removed from Sgt. Noel's employment file at this next annual employment review. Clerk's Papers 390-499. The reprimand from the bus incident was, in fact, used against Sgt. Noel in subsequent proceedings. Heidi Wachter's letter regarding use of the bus incident discipline violated the LPD's MOS. Clerk's Papers 77-229.

In 2010, Sgt. Noel was again investigated for an incident for which he had no involvement and no control. Sgt. Noel's wife, Diana Noel, was employed by a company that bought jewelry from patrons. Mrs. Noel approached Chief Farrar and spoke with him about the possibility of her company sponsoring a charity event to benefit Tina Griswold. The event was approved by Chief Farrar. During the planning of the event, Ms. Kris Nash, was called by Mrs. Noel who left a message on Ms. Nash's cellular phone. It was determined during the course of the investigation against

Sgt. Noel that Ms. Nash mentioned the call to Assistant Chief Zaro that Mrs. Noel had left a message on her cell phone. Mrs. Noel obtained Ms. Nash's telephone number from an LPD roster of contact information her husband maintained at their residence. Sgt. Noel was at the LPD at the time Mrs. Noel called Ms. Nash. Sgt. Noel was not disciplined for this incident. Clerk's Papers 363-389.

On February 14, 2011, Sgt. Noel, Off. Darrin Lattimer and Off. Matt Brown, were involved in a shooting resulting in the death of a suspect. Clerk's Papers 390-499. All 3 officers were immediately placed on administrative leave in accordance with standard policy. Id. Pending the outcome of the shooting investigation, the 3 officers involved in the Valentine's Day shooting were invited to attend a debriefing of the shooting. Sgt. Noel and Off. Lattimer did not attend the debriefing. At the time of the scheduling of the debriefing, the shooting had not yet been determined to be "justified". Id., Clerk's Papers 77-229.

On April 21, 2011, Sgt. Noel had been cleared of the shooting as it was determined to have been justified. Id. He was returned to work on March 9, 2011. Clerk's Papers 390-499. Upon his return, however, a notice of the initiation of an internal investigation was waiting for him in his departmental mailbox. Sgt. Noel and Off. Lattimer were being investigated for missing the debriefing. Shortly after receiving notice of

this investigation, Sgt. Noel received yet another notice that he was being investigated for participating in a gathering wherein the participants at the gathering held their own debriefing of the shooting. While being investigated for participating in the gathering, it was determined that Sgt. Noel only participated in the dinner. The dinner was not organized by him and no discussion of the February 14, 2011 shooting was ever engaged in by the officers. Id., Clerk's Papers 363-389.

On or about April 6, 2011, Sgt. Noel attended his Loudermill with Chief Farrar. Id. During the heated exchange, Sgt. Noel was denied the opportunity to present his side of the story as to the reasons he missed the debriefing. Sgt. Noel was permitted to disclose that upon the completion of the investigation of the missed debriefing, he contacted a Pierce County Sheriff's Deputy to verify his statement contained in the investigation package provided to Sgt. Noel. It was based upon this disclosure that Sgt. Noel was subjected to yet another internal affairs investigation and maintained on administrative leave. On April 8, 2011, Sgt. Noel was served with another notice regarding internal affairs investigation numbered 2011PSS-004. Id., Clerk's Papers 77-229.

During the month of April 2011, Detective Les Bunton was approached by Chief Farrar to specifically discuss Sgt. Noel. Clerk's Papers 390-499. Chief Farrar knew that Det. Bunton and Sgt. Noel were

good friends. Det. Bunton recalls that Chief Farrar approached him in an effort to convince Bunton to talk "some sense" into Noel to claim that Noel was suffering a disability. Id. The purpose of Noel making such a claim was so that Noel could maintain his job and exit the department under a disability claim. Id. Chief Farrar told Officer Wurts that Sgt. Noel was mentally unstable. Clerk's Papers 500-510.

On August 5, 2011, Appellant filed suit seeking injunctive relief and a temporary restraining order. Clerk's Papers 230-362, 38-69. Appellant sought to restrain the efforts of Respondents attempts to have him subjected to a second psychological examination despite having been cleared by the department's psychologist in February 2011. Id. The requested relief was denied and Appellant appeared for the examination as scheduled on August 8, 2011. That action was dismissed by the court for want of prosecution. Id.

Despite having followed through with all the requirements of the LPD administration, including yet another internal affairs investigation during the fall of 2011, Appellant's employment with Respondent was terminated in March 2012. Clerk's Papers 390-499.

Appellant filed a Standard Tort Claim with the Respondent on May 27, 2011. An amendment to the May 27, 2011 presentment was filed with

Respondent on April 4, 2014. The amendment included Appellant's claims under RCW 49.60. Id., Clerk's Papers 363-389.

Appellant filed suit on May 3, 2012. Clerk's Papers 230-362. That cause was removed by Respondents to Federal District Court. Id. After Appellants dismissed the possible federal claims, the Federal District Court lacked jurisdiction over the remaining claims and remanded the case to Pierce County Superior Court under the original cause 12-2-08690-2. Clerk's Papers 38-69.

On June 24, 2013, prior to any rulings by the Federal District Court, Appellant filed suit under Pierce County Cause number 13-2-11383-5 but dismissed as indicated by Respondents and based upon RCW 4.96. Id.

Respondents moved for summary judgment in Pierce County cause 12-2-08690-2 in material part claiming that Appellant had failed to present all tort claims as required under RCW 4.96. That action was dismissed by the Honorable Kathrine Stolz. Clerk's Papers 390-499, 363-389. Respondents recognized in their motion materials that Appellant was still well within the statute of limitations. Clerk's Papers 390-499.

Appellant filed the underlying cause in Pierce County Superior Court on June 5, 2014. Clerk's Papers 230-362.

C. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

I. An issue of Substantial Public Interest is presented by the Court Of Appeals not providing clarity regarding the condition precedent of RCW 4.96 et seq., in conjunction of Civil Rule 41(a)

On April 4, 2014, Plaintiff filed with the City of Lakewood a Standard Tort Claim Form amending the May 27, 2011 presentment. The April 4, 2014 form absolutely lists claims for violations of RCW 49.60, the Washington Law Against Discrimination. If the court deems that Plaintiff's claims under the WLAD were not explicitly listed, then those claims may be properly dismissed until the ripening of the April 4, 2014 presentment. The issue in this regard may be jurisdictional. Defendants argue that Plaintiff's WLAD claims "fail because it was not included on the tort claim form served on the City by Noel prior to initiating this lawsuit." Def. Motion Summary Judgment, pg. 17, lines 8-9. Clerk's Papers 38-69, 390-499.

RCW 4.96.010(1) states that a party must file a claim for damages with a local governmental entity before commencing a tort action against that entity. RCW 4.96.020 outlines the process a tort claimant must follow in filing a claim for damages. The claimant must (1) prepare a tort claim form containing certain minimum information outlined in RCW 4.96.020(3)(a); (2) have the claim form signed in one of the ways

specified in RCW 4.96.020(3)(b); (3) present the claim by delivering or mailing the claim form to the person the governmental entity designates to receive claims as provided in RCW 4.96.020(2); and (4) wait until 60 days have elapsed after the claim was presented before commencing an action against the governmental entity as provided in RCW 4.96.020(4).

The purpose of claim filing statutes is to "allow government entities time to investigate, evaluate, and settle claims." Medina v. Pub. Util. Dist. No. 1 of Benton Cnty, 147 Wn.2d 303, 310 (2002). Allowing time for investigation and evaluation also provides an opportunity for governmental entities to assess the potential costs and benefits of litigation. See Williams v. State, 76 Wn.App. 237, 248, 885 P.2d 845 (1994).

The Respondents have admitted that Plaintiff's failure to present separate and distinct claims under RCW 4.96 et seq., deprives the courts of subject matter jurisdiction. Id. As a condition precedent to suit Plaintiff must file tort claims for separate and distinct tort causes of action. Defendant requested dismissal of Plaintiff's WLAD claim on the basis that Noel failed to identify the claim on the tort claim served on the City on May 27, 2011. Clerk's Papers 390-499. Id. Defendants' have cited to no authority dispositive of the issue that all tort claims have to be listed at one time, especially tort claims that have not ripened or occurred. In the same

way that Defendants claim they should not be required to guess what the Plaintiff is claiming, Plaintiff should not be required to anticipate what wrongs a Defendant will accomplish against a Plaintiff. The law does not require any party to speculate on the actions of others prior to filing a tort claim against a government action.

Taken to its logical step, dismissal of a claim in which a trial court lacks jurisdiction should be dismissed if a condition precedent has not been accomplished prior to filing suit. This was the argument of Defendants on June 6, 2014 in Pierce County Cause Number 12-2-08690-2. Id. It was the basis upon which the Honorable Judge Katherine M. Stolz signed the June 6, 2014 Order Rendering Moot Defendants' Summary Judgment.

Respondents have cited to Jones v. University of Washington, 62 Wn. App. 653 (1991). Jones is an employment discrimination case involving wrongful termination based upon age and racial discrimination. Jones is distinguishable from the instant case in that Jones commenced suit and then 19 days into the suit he filed a tort claim with the State in violation of former RCW 4.92.110. Jones v. UW, 62 Wn. App. at 655. After the statute of limitations had run, the UW brought their motion for summary judgment, which was granted.

In Noel, however, there is no dispute that a claim for damages was presented prior to commencement of suit on May 27, 2011. That claim for damages was amended on April 4, 2014. The amendment ripened on or about June 4, 2014, 60 days after filing. The instant suit was then filed on June 5, 2014. Hence, the claims contained in the April 4, 2014 presentment were proper causes of action in the case before this court.

Jones is also distinguished from Noel's by virtue of the absence of CR 41(a)(4). In fact, Appellant has not found a case that involved the interplay of both the court rule and the presentment statute in the same case. Appellant argues that the presentment statute takes precedence over the civil rule. Requiring anything else would mandate a precise notice requirement in a statute which allows for substantial compliance. RCW 4.96.020(5).

II. Two dismissal rule is inapplicable.

In Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wash.2d 238, 103 P.3d 792 (2004), the Court was asked to determine the extent of the "two-dismissal" rule. In that case, Spokane County sued Specialty Auto for over billing. Because the county's governing board did not authorize the lawsuit, the county filed a second, authorized action. Specialty Auto moved to clarify the duplicate complaints. After discussions between the parties, Spokane County agreed to dismiss the

first complaint; however, the parties never entered a formal stipulation. The superior court entered Spokane County's order to dismiss the first action, pursuant to CR 41(a). Two months later Specialty Auto filed a tort claim against Spokane County. In order to coordinate the actions, but without discussing it with Specialty Auto, Spokane County voluntarily dismissed its second complaint and then filed its third complaint against Specialty Auto. Specialty Auto filed a motion to dismiss based on CR 41(a)(4), but the trial court denied the motion, finding that the rule did not apply. See id. at 242-43, 103 P.3d 792.

In construing the rule, the Court pointed out that it must interpret court rules in a manner " 'that advances the underlying purpose of the rules, which is to reach a just determination in every action.' " Id. at 245 103 P.3d 792 (quoting Burnett v. Spokane Ambulance, 131 Wash.2d 484, 498, 933 P.2d 1036 (1997)). The Court found it could fulfill the purpose of the rule while following its plain language by narrowly construing CR 41(a)(4) to apply only to dismissals that the plaintiff voluntarily and unilaterally obtained. See id. at 245, 103 P.3d 792. The Washington Supreme Court therefore "reject[ed] Spokane County's request that we ... attempt to determine the intent of the parties," id. at 247, 103 P.3d 792, and established a bright line rule that any unilateral dismissal by a plaintiff falls within the parameters of CR 41(a)(4). See id. at 246, 103 P.3d 792.

Conversely, where a defendant stipulated to the dismissal or the dismissal was by court order, then the dismissal was not unilateral and the rule did not apply. See id. at 248, 103 P.3d 792.

By virtue of the Order Rendering Moot Defendants' Summary Judgment Motion on June 6, 2014, the court entered an order based upon the agreement of the parties and the absence of full presentment of claims that were dismissed by the Honorable Judge Benjamin Settle in the removed Federal action. Plaintiff's claims, as presented in the tort claim filed with Defendants on April 4, 2014 had ripened on June 4, 2014. Thus, the current cause of action was filed on June 5, 2014. Moreover, a dismissal on the basis of RCW4.96 et seq., is in line with maintaining judicial economy as a cause of action that does not meet the condition precedent should be dismissed in order to comply with the prerequisites of the statutory scheme.

III. WLAD Discrimination.

To establish a prima facie case of disparate treatment based on disability, a plaintiff must show that she or he (1) has a disability or perceived to have a disability, (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated differently than someone not in the protected class. Kirby v. City of Tacoma, 124

Wn.App. 454, 468, 98 P.3d 827 (Div. II, 2004); accord: Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 152, 94 P.3d 930 (2004).

To establish the first prong of a claim for disparate treatment, a plaintiff must show that she or he was disabled in the meaning of the statute. For the second prong, a plaintiff must establish that she or he was subject to adverse employment action. An adverse employment action requires "an actual adverse employment action, such as a demotion or advance transfer, or a hostile work environment that amounts to an adverse employment action." Robel v. Roundup Corp., 148 Wn.2d 35, 74, n. 24, 59 P.3d 611 (2002). An adverse employment action, therefore, is more than an "'inconvenience or alteration of job responsibilities.'" Kirby, 124 Wn.App at 465 (quoting DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995).

The third prong may be shown, for example, that the employee consistently received positive evaluations during his employment. The fourth prong can be satisfied by showing that the employer treats able-bodied employees more favorably than it treats the disabled plaintiff.

An employer may be liable for employment decisions when the employer has knowledge of a disability. In addition, an employee's conduct resulting from a disability, not merely the disability per se, may be protected under the WLAD when the employer know or should have

known of a disability. Riehl, supra at 152; see also Gambini v. Total Renal Care, 486 F.3d 1087, 1093 (9th Cir. 2007). Discrimination is illegal if it is based upon the employer's perception that the employee is disabled, even if she or he is not, in fact, disabled. Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (Div. I, 1979). An undiagnosed condition can even be a disability under the WLAD if (1) it can be recognized or diagnosed; (2) it has a record or history, and (3) if it substantially limits the employee's ability to do his or her job. Callahan v. Walla Walla Housing Authority, 126 Wn.App. 812 (Div. III, 2005).

The case Barnes v. Washington Natural Gas is cited by both Plaintiff and Defendant. As the court stated "[t]he issue here is narrow: May a plaintiff claiming not to be handicapped sue under the Act on the grounds that he was discriminatorily discharged under the erroneous belief he suffered a handicap?" Barnes v. Washington Natural Gas, 22 Wn.App. at 577. The court resoundingly answered the question in the affirmative. Id. "Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent." Id. at 582. The law's application is not limited to Plaintiffs actually afflicted with handicaps, "excluding those

who are discriminated against in the same way because they are only thought to have handicaps." Id.

Plaintiff's claim of disability discrimination is based on timing. By the second week of April 2011, the administration had exhibited its intent to use an alleged mental instability claim to keep Michael Noel from returning to his job. Clerk's Papers 500-510. Chief Farrar had a discussion with Detective Les Bunton in April 2011. Initially, Det. Bunton believed this discussion, specifically concerning Noel, occurred in April 2010. Clerk's Papers 390-499. Det. Bunton confirmed that the conversation he had with Chief Farrar occurred after the February 14, 2011, shooting in which Sgt. Noel was involved. Id.

Chief Farrar confirmed that he had a conversation with Det. Bunton regarding Sgt. Noel making an L&I claim as an option. Id. It is, however, the conversations that Chief Farrar had with Officer Brian Wurts, Union President of the Lakewood Police Independent Guild (LPIG), that are the most revealing of Chief Farrar's discriminatory intent and defamation. Chief Farrar confirmed that he had no medical information regarding any medical or psychological conditions of Noel. Clerk's Papers 500-510. Moreover, Farrar could not provide a date or incident in which Noel was injured. Id. Instead, Farrar stated "Noel is mentally unstable and I won't have him back to work." Id. Chief Farrar's

statements and actions affirmatively show that he was not going to have Michael Noel returned back to work as of the late spring or early summer of 2011. The only reason for making a statement that Noel would not be returned to work was based upon the disability. Id.

This is the type of situation that the holding of Barnes v. Washington Natural Gas contemplates. Armed with no evidence of a disability, Chief Farrar took the affirmative step in April 2011 to keep Noel from returning to his position. In fact, Defendants admit that Plaintiff was psychologically cleared to return to his duties as a patrol sergeant for the City of Lakewood Police Department, "and did return to work on February 26, 2011". Clerk's Papers 390-499. The timing of the statements of Farrar and Zaro regarding taking action to prevent Noel from returning to the LPD is affirmatively shown by the delay and lack of any meaningful action on the part of the administration. There exists a dispute of material fact as to when Plaintiff was terminated from his position and what the true basis of that termination was. Additionally, there exists a dispute as to whether Farrar and Zaro used fraudulent means to terminate Noel's employment with the LPD.

Plaintiff can establish the elements of a discrimination claim. First, Chief Farrar states to third parties that Noel is "mentally unstable". He states this without any information regarding the truth or falsity of such

a statement. Second, adverse employment action comes finally culminates in Noel's termination. After Noel refuses to submit a claim of disability, the Chief and Asst. Chief retaliate against Noel by taking away his ability to perform law enforcement duties. Farrar goes so far as to state that in order for Noel to keep his job, Noel needs to file an L&I claim. Third, Noel is performing well as an officer for the LPD. Finally, according the Brian Wurts, during his tenure as the guild President, no other officer was treated in the same or similar manner as Noel. Sgt. Noel was finally terminated from his position with the Lakewood Police Department for following the order to submit to another fit for duty examination. All elements of a prima facie case have been met and established.

E. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court remand this matter to the trial court to allow Appellant to take his claims to trial against Respondents.

Dated this 12th day of January, 2017.

Respectfully submitted,

ALLIANCE LAW GROUP, PS

By: _____
Nelson C. Fraley, II, WSBA 26742
Attorney for Appellant

DECLARATION OF SERVICE

I certify under penalty of perjury that on the 12TH day of January 2017, I served a copy of this AMENDED PETITION FOR REVIEW to the individuals and via the method(s) designated below:

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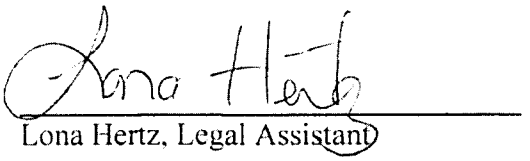

Lona Hertz, Legal Assistant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL NOEL, and DIANA NOEL, individually and as the marital community comprised thereof, Appellants, v. CITY OF LAKEWOOD, a municipal corporation; CITY OF LAKEWOOD POLICE DEPARTMENT, a political subdivision; BRET FARRAR, individually and as Chief of Police, Respondents.	No. 48098-1-II UNPUBLISHED OPINION

WORSWICK, P.J. — This is Michael Noel's third lawsuit arising from his termination from City of Lakewood Police Department in 2012. Noel voluntarily dismissed two prior lawsuits. Noel now appeals the superior court's summary judgment dismissal of all his claims against the City of Lakewood, City of Lakewood Police Department, and former police Chief Bret Farrar. Noel argues on appeal that CR 41(a)(4)'s two dismissal rule does not apply to his claims. Because Noel's lawsuit is procedurally barred, we affirm the superior court's order dismissing Noel's case.

FACTS

Noel was employed as a sergeant with the City of Lakewood Police Department until his termination on March 2, 2012. After his termination, Noel filed a lawsuit (2012 lawsuit) in Pierce County Superior Court against the City of Lakewood, City of Lakewood Police Department, Chief of Police Bret Farrar, and Assistant Chief of Police Mike Zaro (collectively

hereinafter, Lakewood), alleging a variety of state and federal claims stemming from his termination.[1] The case was removed to federal district court based on federal question jurisdiction. In response to Lakewood's motion for summary judgment in federal district court, Noel voluntarily dismissed several of his claims, including all federal claims. The federal court then remanded the case to Pierce County Superior Court for resolution of the remaining state claims.

While the 2012 lawsuit was pending in federal court, Noel filed a second, nearly identical lawsuit in Pierce County Superior Court on July 24, 2013 (2013 lawsuit).[2] When Lakewood notified Noel of its intent to seek dismissal of the duplicitous lawsuit, Noel voluntarily dismissed the 2013 lawsuit on October 3, 2013.

Lakewood then filed a motion for summary judgment dismissal of the 2012 lawsuit. On June 5, 2014, one day before the hearing on Lakewood's motion for summary judgment, Noel filed a third complaint (2014 lawsuit).[3] At the summary judgment hearing the next day, Noel told the superior court that he had filed the 2014 lawsuit in an attempt to fully comply with the tort claim form presentment requirements of RCW 4.96.020, and asked the superior court to

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[1] Noel's 2012 lawsuit listed the following causes of action: breach of contract, public records act, first amendment retaliation, due process, abuse of process, wrongful termination (ch. 49.60 RCW), disability discrimination (ch. 49.60 RCW), retaliation (ch. 49.60 RCW), defamation, fraud, misrepresentation, civil conspiracy, witness intimidation.

[2] Noel's 2013 lawsuit listed the following causes of action: wrongful termination (ch. 49.60 RCW); wrongful termination (public policy), disability discrimination (ch. 49.60 RCW), defamation, and violation of the public records act.

[3] Noel's 2014 lawsuit listed the following causes of action: wrongful termination (ch. 49.60 RCW), wrongful termination (public policy), disability discrimination (ch. 49.60 RCW), defamation, fraud, abuse of process, misrepresentation, and civil conspiracy.

dismiss the 2012 lawsuit. In response, Lakewood admitted it could not object to Noel taking a voluntary dismissal but noted that it was not waiving its right to seek dismissal of the claims. The superior court entered an order rendering Lakewood's motion for summary judgment moot and noting that each of Noel's claims was "voluntarily dismissed by plaintiffs." Clerk's Papers (CP) at 539.

Lakewood then filed a motion for summary judgment dismissal of the 2014 lawsuit, arguing that CR 41(a)(4)'s two dismissal rule bars all of Noel's claims. The superior court granted Lakewood's motion for summary judgment. Noel appeals.

ANALYSIS

I. NOEL CONCEDED MOST OF HIS CLAIMS

As an initial matter, at oral argument Noel conceded that all of his claims should be dismissed except disability discrimination and retaliation in violation of the "Washington Law Against Discrimination" (WLAD). Ch. 49.60 RCW. Thus, we address only his WLAD claim.

II. NOEL'S DISABILITY DISCRIMINATION AND RETALIATION CLAIM IS BARRED BY CR 41(a)(4)

Noel argues that CR 41(a)(4)'s two dismissal rule does not apply to this case, and therefore, the superior court erred by granting Lakewood's motion for summary judgment. We disagree.

CR 41(a) governs voluntary dismissals. In discussing the effect of a voluntary dismissal, CR 41(a)(4) states:

> Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, *except* that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(Emphasis added). This "two dismissal" rule operates as a nondiscretionary adjudication upon the merits when the dismissals at issue are unilaterally obtained by the plaintiff. *Spokane County v. Specialty Auto and Truck Painting, Inc.*, 153 Wn.2d 238, 246, 103 P.3d 792 (2004). Thus, the doctrine of res judicata prevents Noel from relitigating the same claim against the same party in a subsequent action. *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 224, 164 P.3d 500 (2007). The two dismissal rule's purpose is "to prevent the abuse and harassment of a defendant . . . and . . . the unfair use of dismissal." *Specialty Auto*, 153 Wn.2d at 245.

Noel offers two theories as to why the two dismissal rule does not apply to this case. First, he suggests that CR 41 should not apply because the second dismissal on June 6, 2014 was based on his anticipation that he had not yet complied with the presentment requirements of RCW 4.96.020.[4] Second, he contends that the June 6, 2014 dismissal was not a unilateral dismissal. Both of Noel's arguments fail.

A. *CR 41 Applies Regardless of the Reason Noel Sought Dismissal*

Noel argues that the two dismissal rule should not apply to his second dismissal because that dismissal was based on his alleged failure to comply with the tort claim form presentment requirements of RCW 4.96.020. However, Noel cannot avoid the application of the two dismissal rule by explaining *why* he sought the second dismissal.

[4] RCW 4.96.020 requires that all claims for damages based on the tortious conduct of local governmental entities and their agents be presented to the entity and/or agent on a standard tort claim form at least 60 days before commencing the action.

"The two dismissal rule of CR 41(a) applies automatically to unilateral dismissals by the plaintiff and 'does not provide for court discretion to look into the reasons for the dismissal.'" *Guillen v. Pierce County*, 127 Wn. App. 278, 285, 110 P.3d 1184 (2005); *see also Feature Realty, Inc.*, 161 Wn.2d at 223 ("We do not inquire into the plaintiff's intent in obtaining the dismissal.").

Furthermore, to the extent Noel argues that CR 41 does not apply because the superior court never had subject matter jurisdiction because he had not complied with RCW 4.96.020, his argument fails for two reasons. First, failure to comply with RCW 4.96.020 does not deprive a superior court of subject matter jurisdiction. *See Shoop v. Kittitas County*, 108 Wn. App. 388, 400, 30 P.3d 529 (2001). Second, Noel sought voluntary dismissal before the superior court ever ruled on the issue of compliance with RCW 4.96.020. Even assuming Noel's alleged failure to comply with RCW 4.96.020 would have rendered his prior lawsuit fatally flawed, such a defect does not preclude the application of CR 41(a)(4).

In *Specialty Auto*, our Supreme Court rejected a similar argument and held that an unauthorized lawsuit constitutes an action for purposes of CR 41(a)(4). 153 Wn.2d at 247. There, Spokane County argued that because its first lawsuit was not authorized as required by the Open Public Meetings Act of 1971, chapter 42.30 RCW, it did not constitute an "action" that implicated the two dismissal rule. 153 Wn.2d at 247 (citing RCW 42.30.060(1)). The court rejected Spokane County's argument, noting that "the filing of a complaint alone commences an action for purposes of the 'two dismissal rule,'" regardless of the "nullity" of the suit. 153 Wn.2d at 247. Similarly here, Noel commenced an action subject to the two dismissal rule when he filed his complaint, regardless of any potential procedural defect.

B. *Noel Voluntarily and Unilaterally Dismissed His Lawsuit for the Second Time on June 6, 2014*

Noel's argument that the parties agreed to the second dismissal on June 6, 2014, also fails. Lakewood never stipulated to the dismissal. Rather, the record shows that Noel unilaterally obtained the voluntary dismissal.

At the summary judgment hearing on June 6, 2014, Noel explained that he sought a dismissal of the lawsuit because he had recently filed a third complaint against Lakewood. Lakewood did not argue against the voluntary dismissal, explaining, "I can't think of any objection I have for [Noel's counsel] taking a voluntary dismissal." CP at 533. The superior court responded, "I wouldn't think you could think of any reason either. All right. What we'll do is: We'll take a voluntary nonsuit on this case. The [c]ourt will dismiss it without prejudice." CP at 533. Lakewood clarified that it was not stipulating to the dismissal, "I'm sorry. I believe this should go without saying, but just so I'm clear: By not objecting to this dismissal, we're not waiving the right to seek dismissal of these claims." Verbatim Report of Proceedings at 534. Lakewood did not stipulate to the dismissal.

Furthermore, the order entered by the superior court clearly lists each of Noel's claims as "voluntarily dismissed by plaintiffs." CP at 539. At no point did Noel object to the court's characterization of the dismissal as a "voluntary dismissal by plaintiffs." Nothing in the record suggests that the June 6, 2014, dismissal was anything other than a voluntary, unilateral dismissal by Noel.

Because the June 6, 2014 dismissal was Noel's second such dismissal of his claim, the dismissal operates as an adjudication on the merits. *See* CR 41(a)(4). Thus, the two dismissal

rule bars his present lawsuit. Consequently, we affirm the summary judgment dismissal of Noel's claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.