

66302-0

66302-0

NO. 66302-0-I

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

MATTHEW SILVA,

Appellant,

v.

DEBORAH HOLLY,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	ISSUE PRESENTED	1
II.	COUNTER STATEMENT OF THE FACTS	1
	A. Substantive Facts	1
	B. Procedural Facts.....	2
III.	STANDARD FOR REVIEW.....	4
IV.	ARGUMENT	5
	A. As Mr. Silva Previously Litigated The Issue Of The DOC Grievance Process, This Action Is Barred By Collateral Estoppel.....	6
	B. Even If This Court Finds That Dismissal Was Not Warranted Due To Collateral Estoppel, The Trial Court Order Must Be Affirmed As Mr. Silva Failed To State A Claim For Which Relief May Be Granted	20
	C. The Trial Court’s Order Must Affirm As Ms. Holly Is Entitled To Qualified Immunity.....	22
	D. This Court Should Affirm The Trial Court’s Dismissal Order As Mr. Silva’s Retaliation Claim Fails To State A Claim For Which Relief May Be Granted	25
V.	CONCLUSION	31

TABLE OF AUTHORITIES

Cases

<i>ACLU of Maryland v. Wicomico County</i> , 999 F.2d 780 (4th Cir. 1993)	24
<i>Act up!/Portland v. Bagley</i> , 988 F.2d 868 (9th Cir. 1993)	24
<i>Adams v. Rice</i> , 40 F.3d 72 (4th Cir. 1994)	26
<i>Allen v. Wood</i> , 970 F. Supp. 824 (E.D. Wash. 1997).....	20
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).....	27
<i>Barnett v. Centoni</i> , 31 F.3d 813 (9th Cir. 1994).....	28, 29
<i>Barnum v. State</i> , 72 Wn.2d 928, 435 P.2d 678 (1967).....	4
<i>Beagles v. Seattle-First Nat. Bank</i> , 25 Wn. App. 925, 610 P.2d 962 (1980)	15, 16
<i>Bernsen v. Big Bend Elec. Coop.</i> , 68 Wn. App. 427, 842 P.2d 1047 (1993)	12
<i>Bodeneck v. Carter's Motor Freight System, Inc.</i> , 198 Wash. 21, 86 P.2d 766 (1939)	16
<i>Booth v. Churner</i> , 532 U.S. 734, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)	17
<i>Brodheim v. Cry</i> , 584 F.3d 1262 (9th Cir. 2009)	25

<i>Brown v. Dodson</i> , 863 F. Supp. 284 (W.D. Va. 1994).....	20
<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	4
<i>Buckley v. Barlow</i> , 997 F.2d 494 (8th Cir. 1993)	21
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	4
<i>Canell v. Multnomah County</i> , 141 F. Supp. 2d 1046 (D. Or. 2001)	26
<i>Contreras v. Crown Zellerbach Corp.</i> , 88 Wn.2d 735, 565 P.2d 1173 (1977).....	4
<i>Davidson v. Cannon</i> , 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986)	6
<i>Davis v. Scherer</i> , 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984)	23
<i>Dunlap v. Wild</i> , 22 Wn. App. 583, 591 P.2d 834 (1979)	8
<i>Flick v. Alba</i> , 932 F.2d 728 (8th Cir. 1991)	21
<i>Flores v. Pierce</i> , 617 F.2d 1386 (9th Cir. 1980)	5
<i>Frazier v. Dubois</i> , 922 F.2d 560 (10th Cir. 1990).....	26
<i>Gibson v. United States</i> , 781 F.2d 1334 (9th Cir. 1986)	5
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 744 P.2d 1032 (1987).....	4

<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)	23
<i>Henderson v. Bardahl Int'l Corp.</i> , 72 Wn.2d 109, 431 P.2d 961 (1967).....	8
<i>Henderson v. Tyrrell</i> , 80 Wn. App. 592, 910 P.2d 522 (1996)	11, 12
<i>Hines v. Gomez</i> , 108 F.3d 265 (9th Cir. 1997).....	29, 30
<i>Hogan v. Sacred Heart Medical Center</i> , 101 Wn. App. 43, 2 P.3d 968 (2000).....	12
<i>Hoover v. Watson</i> , 886 F. Supp. 410 (D. Del. 1995).....	20
<i>Hunter v. Bryant</i> , 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991)	23
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	8
<i>In re Parmelee</i> , 115 Wn. App. 273, 63 P.3d 800 (2003)	18
<i>Jones v. Community Redevelopment Agency</i> , 733 F.2d 646 (9th Cir. 1984)	6
<i>Joyce v. L.P. Steuart, Inc.</i> , 227 F.2d 407 (D.C. Cir. 1955).....	12
<i>Kinney v. Cook</i> , 150 Wn. App. 187, 208 P.3d 1 (2009).....	4
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	5, 25
<i>Mahoney v. Tingley</i> , 85 Wn.2d 95, 529 P.2d 1068 (1975).....	12

<i>Mann v. Adams</i> , 855 F.2d 639 (9th Cir. 1998)	20
<i>Marella v. Terhune</i> , 568 F.3d 1024 (9th Cir. 2009)	17, 21
<i>McCabe v. Arave</i> , 827 F.2d 634 (9th Cir. 1987)	18
<i>Merrick v. Sutterlin</i> , 93 Wn.2d 411 (1980).....	4
<i>Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle</i> , 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)	5, 25
<i>Nielson by and Through Nielson v. Spanaway General Medical Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	10
<i>Pearson v. Callahan</i> , 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)	23
<i>Pozo v. McCaughtry</i> , 286 F.3d 1022 (7th Cir. 2002)	17, 21
<i>Pratt v. Rowland</i> , 65 F.3d 802 (9th Cir. 1995)	26, 27, 28
<i>Procunier v. Martinez</i> , 416 U.S. 396, 94 S. Ct. 1800 (1974)	27
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	6, 9, 10
<i>Ramirez v. Galaza</i> , 334 F.3d 850 (9th Cir. 2003)	20
<i>Rhodes v. Robinson</i> , 408 F.3d 559 (9th Cir. 2005)	25, 26, 30, 31
<i>Rizzo v. Dawson</i> , 778 F.2d 527 (9th Cir. 1985).....	26, 27

<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).....	26, 28
<i>Seattle First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978).....	6
<i>Silva v. Gregoire</i> , No. C05-5731RJB, 2007 WL 1724957, *1 (W.D. Wash.), <i>aff'd</i> , 2007 WL 2034359 (W.D. Wash.).....	7, 20
<i>Somers v. Thurman</i> , 109 F.3d 614 (9th Cir. 1997)	24
<i>State v. Bryant</i> , 97 Wn. App. 479, 983 P.2d 1181 (1999).....	5
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	11
<i>State v. Padilla</i> , 69 Wn. App. 295, 846 P.2d 564 (1993)	11
<i>State v. Seek</i> , 109 Wn. App. 876, 37 P.3d 339 (2002)	14, 15
<i>Stevens v. Murphy</i> , 69 Wn.2d 939, 421 P.2d 668 (1966).....	4
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940)	9
<i>Turner v. Safely</i> , 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)	18, 27
<i>Voters Educ. Comm. v. Public Disclosure Comm'n.</i> , 161 Wn.2d 470, 166 P.3d 1174 (2007)	18
<i>Ward v. Torjussen</i> , 52 Wn. App. 280, 758 P.2d 1012 (1988)	9

<i>Wendle v. Farrow</i> , 102 Wn.2d 380, 686 P.2d 480 (1984).....	5
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Statutes

42 U.S.C. § 1983.....	passim
42 U.S.C. § 1997e(a) (2000).....	17
Revised Code of Washington.....	1, 17

Rules

Civil Rule 12(b).....	4, 11
Civil Rule 12(c).....	4
ER 201.....	16
ER 201(b).....	13
RAP 2.5(a).....	10

I. ISSUE PRESENTED

1. Whether Mr. Silva's claims regarding failure to process his prison grievances are barred by collateral estoppels?
2. Whether there exists other grounds to confirm the trial court's ruling based on Mr. Silva's failure to state a claim and Ms. Holly's entitlement to qualified immunity?
3. Whether there are other grounds to confirm the dismissal of Mr. Silva's retaliation claim as his claim is based on a truthful infraction?

II. COUNTER STATEMENT OF THE FACTS

A. Substantive Facts¹

Mr. Silva alleges that while incarcerated at the Monroe Correctional Complex, Deborah Holly, a grievance coordinator, failed to process three of his grievances. CP 65-69. In regards to the first grievance, Mr. Silva alleged his grievance complaining of a "campaign of retaliation" was not processed because Ms. Holly determined it contained "multiple unrelated issues."² CP 66.

In a second grievance, Mr. Silva then alleged that there was a conspiracy "spearheaded" by the law librarian. CP 66-67. Mr. Silva was told that his grievance could not be processed because it contained hearsay and cited to the Revised Code of Washington. CP 67. Mr. Silva conceded that Ms. Holly informed him that he could resubmit the

¹ The facts are adopted from the complaint as to the extent required under CR 12(b)(6).

² In his complaint, Mr. Silva seems to admit that he did in fact raise several issues in his grievance. CP 66.

claim if it was “changed” to fit within the guidelines for submitting a grievance. CP 67.

On the same day that he filed his second grievance, Mr. Silva filed a third grievance alleging that an infraction report had been falsified against him. CP 67. He claims that Ms. Holly would not process it and told him that he could only raise “one issue per complaint.” CP 67.

Mr. Silva did not resubmit any of his grievances despite being informed of the issues with grievances and how he needed to resolve them. Instead, he filed the underlying matter. Mr. Silva alleges that he used another offender to serve Ms. Holly with the complaint. Mr. Silva concedes that such action was against Department of Corrections Policy, however, argues that notice prohibiting such behavior was not posted. CP 44-45. Mr. Silva alleges that while Ms. Holly knew that there was no notice posted, she chose to infract him. Mr. Silva’s infraction was dismissed for lack of notice.

B. Procedural Facts

On July 20, 2009, Mr. Silva served Ms. Holly with his initial civil rights complaint. On or about August 14, 2009, Mr. Silva filed the complaint in Snohomish County Superior Court alleging that his three grievances were not processed. On or about August 19, 2009, Ms. Holly

filed an Answer. In her Answer, Ms. Holly admitted that Mr. Silva was told he needed to re-write his grievances as they did not meet various procedural requirements. CP 59-60.

On July 14, 2010, Ms. Holly submitted a motion for judgment on the pleadings arguing that Mr. Silva's action was barred by collateral estoppel, Mr. Silva failed to state a claim for which relief may be granted, and that she was entitled to qualified immunity. CP 47-57.

On August 26, 2010, Mr. Silva filed a response to the motion, as well as a motion to amend his complaint, and a proposed amended complaint. CP 33-39. Mr. Silva's amended complaint was essentially similar to his first complaint but Mr. Silva added an allegation of retaliation. Ms. Holly filed a reply on August 27, 2010.

On August 30, 2010, the Court held a hearing on the pending motions. At the conclusion of the case, the Court granted Mr. Silva's motion to amend his complaint, as well as granting Ms. Holly's motion to dismiss based on collateral estoppel.

Mr. Silva filed a Motion for Reconsideration on September 13, 2010. Ms. Holly filed a motion in opposition to the motion for reconsideration. On October 19, 2010, the trial court entered an order denying Mr. Silva's Motion for Reconsideration. Mr. Silva now appeals the trial court's dismissal of his action.

III. STANDARD FOR REVIEW

A motion to dismiss under Civil Rule 12(c) is akin to a motion to dismiss under CR 12(b) with the benefit of Defendant's answer. *Stevens v. Murphy*, 69 Wn.2d 939, 941, 421 P.2d 668 (1966) (*overruled on other grounds by Merrick v. Sutterlin*, 93 Wn.2d 411 (1980)). Appellate review of a trial court ruling under CR 12(c) is *de novo*.³ *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). A dismissal under CR 12(c) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). A motion to dismiss questions only the legal sufficiency of the allegations in a pleading. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975). "The only issue before the trial judge is whether it can be said there is no state of facts which plaintiff could have proven entitling him to relief under his claim." *Contreras*, 88 Wn.2d at 742; *Barnum v. State*, 72 Wn.2d 928, 929, 435 P.2d 678 (1967). Additionally, an

³ Mr. Silva incorrectly alleges that even though this Court will be conducting a *de novo* review of the record, the sole issue in front of this Court is the trial court's dismissal based on *collateral estoppel*. Mr. Silva fails to provide any case law to support this assertion. In fact, when an appellate court conducts a *de novo* review it conducts the same inquiry as the trial court. *Kinney v. Cook*, 150 Wn. App. 187, 190, 208 P.3d 1 (2009).

appellate court may affirm a trial court's decision on any grounds supported by the record. "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)); *State v. Bryant*, 97 Wn. App. 479, 490-491, 983 P.2d 1181 (1999).

IV. ARGUMENT

To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the defendant must be a person acting under color of state law, and (2) his conduct must have deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of the United States. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). Implicit in the second element is a third element of causation. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286-87, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980). When a plaintiff fails to allege or establish one of the three elements, his complaint must be dismissed. That plaintiff may have suffered harm, even if due to another's negligent conduct, does not in itself, necessarily demonstrate an abridgment of constitutional protections. *Davidson v. Cannon*, 474

U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986); *see also Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations unsupported by facts are insufficient to state a claim under 42 U.S.C. § 1983).

A. As Mr. Silva Previously Litigated The Issue Of The DOC Grievance Process, This Action Is Barred By Collateral Estoppel

As Mr. Silva previously litigated the issue of his grievances not being processed, his matter was properly dismissed as being barred by collateral estoppel. Collateral estoppel “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) *citing Seattle First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978). A party is collaterally estopped from litigating issues a second time if the following factors are met:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains, 100 Wn.2d at 665 (citations omitted.)

Mr. Silva’s claim meets all four of the factors of collateral estoppel. With regard to the first factor, the issues in both actions are the

same. In this action, Mr. Silva is challenging, under the First Amendment, that his grievances were not processed because they did not meet the certain procedural requirements. CP 66-68. In *Silva v. Gregoire*, No. C05-5731 RJB/KLS, 2007 WL 1814073, at *5 (W.D. Wash.), Silva alleged First Amendment violations regarding a grievance coordinator who “did not process his grievances.” *Id.* Mr. Silva also brought this claim under the First Amendment. *Id.* at 6. The magistrate judge recommended granting summary judgment for the defendants on the plaintiff’s 42 U.S.C. § 1983 action because his claim “fail[ed] as a matter of law as Plaintiff ha[d] no constitutional right to a prison grievance system.” *Id.* This recommendation was adopted by the district court and summary judgment was granted. *Silva v. Gregoire*, No. C05-5731RJB, 2007 WL 1724957, *2 (W.D. Wash.), *aff’d*, 2007 WL 2034359 (W.D. Wash.). In order to prevail in the current suit, Mr. Silva would have to show that his constitutional right to a prison grievance system was violated. To show that his rights were violated, he would have to prove that he had a constitutional right to a prison grievance system. Therefore, the same issue must be presented to the court.

As required by the second factor, there was a final judgment on the merits in Mr. Silva’s previous case. By adopting the

recommendation, the district court gave preclusive effect to the ruling. Summary judgment constitutes a final judgment on the merits for the purposes of collateral estoppel. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). Mr. Silva had a full and fair opportunity to litigate this issue in his first case. Even if he chose not to do so, a party's failure to oppose a motion is "considered by the Court as an admission that the motion has merit." *Silva*, 2007 WL 1814073 at *1 (citing CR 7(b)(2)). Further, he appealed that decision and his appeal was dismissed with prejudice. *Silva*, 2007 WL 1724957 at *2.

Third, the party against whom collateral estoppel is asserted was a party in the first action. Mr. Silva was the plaintiff in the prior proceeding, and Ms. Holly seeks to use that judgment to invoke collateral estoppel in the current proceeding. The rule specifies that only the party against whom collateral estoppel is asserted must have been a party in the original action. Therefore, it is unnecessary that Ms. Holly have been a party or in privity to the previous suit.

While traditionally some courts held that mutuality of parties was needed in this context, Washington no longer has this requirement. *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 116, 431 P.2d 961 (1967); *Dunlap v. Wild*, 22 Wn. App. 583, 588-89, 591 P.2d 834 (1979) ("one principle is clear: a nonparty to prior adjudication may invoke

collateral estoppel defensively against a party to the earlier action”). Therefore, as Mr. Silva was a party to the first suit and is the party against whom collateral estoppel is sought, this element is met.

However, if the court is not persuaded by the clear precedent indicating that mutuality is not required, the defendants in both cases are in privity. In the prior case, Mr. Silva named the governor along with several other officials inside of the prison. *Silva*, 2007 WL 1814073 at *7. Ms. Holly works for the same organization and this creates the requisite privity in this situation. The court in *Ward v. Torjussen*, 52 Wn. App. 280, 283, 758 P.2d 1012 (1988), held that an agency theory could be used “when the principal or agent is attempting to benefit from collateral estoppel.” *See also Rains*, 100 Wn.2d at 666-67 (“substitution of parties who are qualitatively the same does not lessen the equivalency of the issues”). Further, the “[i]dentity of parties is not a matter of form, but of substance [and] parties nominally different may be, in legal effect, the same.” *Id.* (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 1263 (1940)). Mr. Silva already litigated this issue against the prisons and substituting a different grievance officer does not change the resolution. As such, privity exists between the named defendants in the prior action and Ms. Holly in the current one.

Finally, applying collateral estoppel in the instant situation will not cause injustice to Plaintiff. Collateral estoppel does not work an injustice if the parties “were afforded a full and fair opportunity to litigate their claim in a neutral forum.” *Nielson by and Through Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998) *citing Rains*, 100 Wn.2d 666. Mr. Silva litigated the prior matter in federal court. He initiated the action and the ruling terminated his cause of action. He now wastes this Court’s time, as well as the trial court’s, by litigating the identical issue that he has already fully litigated. Because Mr. Silva is barred from re-litigating the fact that he does not have a constitutionally protected right to a prison grievance process, he is unable to prove a § 1983 claim. Therefore, this matter should be dismissed.

In his appeal, Mr. Silva raises various arguments against the trial court’s dismissal of his action based on collateral estoppel, none of which are persuasive. Mr. Silva argues that since collateral estoppel was not pled as an affirmative defense in the Answer, Ms. Holly failed to meet the necessary burden. *See Appellant’s Opening Brief*, p. 9. First, Mr. Silva did not properly preserve this issue as he had failed to raise this issue in the lower court. *See RAP 2.5(a)*. To preserve an issue for review, “an objection must be sufficiently specific to inform

the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error.” *State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). A party may only raise this issue for the first time on appeal if he demonstrates that it is a manifest constitutional error. *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). To so do, he must identify a constitutional error and show how the alleged error actually affected his rights at trial. “It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Kirkman*, 159 Wn.2d at 926-27.

Although Mr. Silva had multiple opportunities to argue this at the trial court he failed to do so. Mr. Silva did not object to the collateral estoppel argument in his response to the Motion to Dismiss or in his Motion for Reconsideration. Had he objected, it would have given the opportunity, if the trial court deemed it necessary, to correct the issue by filing an amended answer.

However, even if this issue was properly before this Court for review, Mr. Silva’s argument still fails, as the collateral estoppel defense was not waived. “Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 623, 910 P.2d 522 (1996)

(quoting *Bernsen v. Big Bend Elec. Coop.*, 68 Wn. App. 427, 433-34, 842 P.2d 1047 (1993)). However, an affirmative pleading is not always required. *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 54, 2 P.3d 968 (2000). Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless. *Id.* at 54-55 (citing *Henderson*, 80 Wn. App. at 6240; *see also Mahoney v. Tingley*, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975). Also, “objection to a failure to comply with the rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense.” *Mahoney*, 85 Wn.2d at 100-01 (citing *Joyce v. L.P. Stewart, Inc.*, 227 F.2d 407 (D.C. Cir. 1955) (party cannot claim that they were prejudiced by surprise when defense was introduced without objection, and its legal effects were argued to the court by both parties orally and in written briefs)).

Mr. Silva never objected to the defense of collateral estoppel due to it not being pled in the Answer. *See* CP 33-39. Therefore, Mr. Silva consented, be it expressly or implied, to the defense being asserted. Additionally, as collateral estoppel was argued to the court both orally and in written briefs, Mr. Silva cannot claim that he was prejudiced. Finally, beyond self serving conclusory statements, Mr.

Silva has failed to show the failure to plead a defense affirmatively affected his substantial rights, and therefore the failure to plead the affirmative defense was harmless. Therefore, the issue that Mr. Silva's claims were barred by collateral estoppel was properly in front of the trial court.

As Mr. Silva's previous case, which was cited to establish collateral estoppel, was properly taken judicial notice of by the trial court, the motion to dismiss was in front of the court, and was not a summary judgment motion. Mr. Silva incorrectly argues that the order to be dismissed should be reversed as the trial court considered matters outside the pleading without treating the motion to dismiss as a summary judgment motion. Although in his relevant argument section Mr. Silva does not state the basis of this argument, one would guess that he is referring to the citations to case law that were submitted to the trial court. *See* Opening Brief, p. 5-6. However, a court may take judicial notice of facts that are not reasonable to dispute in that that it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). The citations to case law in a publically available database meet the criteria of ER 201(b). The cases are such that their accuracies can be

easily determined and cannot be reasonably questioned. Additionally, unpublished opinions “can also be cited to establish facts in a different case that are relevant to the current case”). *State v. Seek*, 109 Wn. App. 876, 878 n. 1, 37 P.3d 339 (2002). Therefore, the trial court could establish the facts from Mr. Silva’s previous case in which he had previously attempted to litigate his grievances not being processed which it was held to fail to state a claim for which relief could be granted. Additionally, the only prejudice Mr. Silva cites in having the motion not being treated as a summary judgment motion was that he would have extra time to present “extra-recorded” evidence. *See* Appellant’s Amended Opening Brief, p. 6. However, that argument is not persuasive as Mr. Silva never requested a continuance to file his response or to argue he needed additional time. As the trial court properly treated Ms. Holly’s motion as a motion to dismiss, Mr. Silva would not have been entitled to additional time. The Court properly construed Ms. Holly’s pleading as a motion to dismiss

Mr. Silva alleges because certified copies of the complaint, answer and final judgment from the “alleged prior federal action” were offered, there was no evidence before the court. Appellant’s Amended Opening Brief, p. 9. However, as a court had the information necessary to form the facts in Mr. Silva’s prior matter, Ms. Holly met the burden

of pleading and proving collateral estoppel. Unpublished opinions can be cited to establish facts in a different case that are relevant to the current case. *Seek*, 109 Wn. App. at 878 n. 1. In this matter, the trial court, as well as this court can establish the facts of what occurred in Mr. Silva's previous case through the unpublished cases. Mr. Silva's whole argument fails as evidence was introduced for the court to consider. Additionally, the cases Mr. Silva relies on are distinguishable from the matter at hand. For example, in *Beagles v. Seattle-First Nat. Bank*, 25 Wn. App. 925, 610 P.2d 962 (1980), the issue involved the complicated issue of "whether the proper method of accounting for purposes of valuation of plaintiff's stock was determined in the federal securities action so as to preclude a second action to enforce the reorganization agreement's arbitration clause to settle the dispute on the method of accounting." *Beagles*, 25 Wn. App. at 929. The issue that the court could not determine was whether "the federal action in fact turned on a resolution of the accounting question, or whether the accounting question was only a collateral issue used to prove or disprove the fraudulent scheme to obtain the stock of Computech without payment asserted by plaintiff." *Id.* at 931. The only evidence presented was excerpts from the pleadings and findings in the affidavit of the defendant's attorney. *Id.* at 932. Contrary to Mr. Silva's

assertion, *Beagles* does not stand for the proposition that certified copies of the necessary documents must be before the trial court in every matter. *See* Appellant's Amended Opening Brief, p. 9. Rather, that is what the court wanted in that particular case. It should also be noted that *Beagles* and the other case Mr. Silva relies on, *Bodeneck v. Carter's Motor Freight System⁴, Inc.*, 198 Wash. 21, 86 P.2d 766 (1939), are from 1980 and 1939, before the availability of publically accessible databases containing case law and other pleadings. Therefore, the proper evidence was before the trial court in order for the court to properly hold that Mr. Silva's action was barred by collateral estoppel.

Mr. Silva's argument that Ms. Holly failed to prove identity of the issues is also unpersuasive and myopic in nature. Mr. Silva asserts that the claims in his case regard content censorship of his grievances. *See* Amended Opening Brief, p. 10-11. Although Mr. Silva attempts to take a very narrow view of his argument in this matter, both cases ultimately deal with his claim that his grievances were not processed.

⁴ *Bodeneck* is also not persuasive as to Mr. Silva's argument. In that matter, the issue was that the trial court took notice of the memorandum opinion which was filed by a previous trial judge but not introduced by the parties. *Bodeneck*, 198 Wash. at 29. In this matter, however, the prior ruling that the trial court used to determine collateral estoppel were provided by Ms. Holly and were properly in front of the court. Additionally, *Bodeneck* was decided prior to the adoption of the Washington State Rules of Evidence, which does allow the court to take judicial notice. *See* ER 201.

Although Mr. Silva attempts to argue that the issue in the underlying matter involves content-based censorship and prior restraint of speech, this is a mischaracterization of the issues. The Prison Litigation Reform Act (“PLRA”) requires inmates to exhaust available administrative remedies prior to their filing suit in federal court under 42 U.S.C. § 1983. *See* 42 U.S.C. § 1997e(a) (2000); *Booth v. Churner*, 532 U.S. 734, 735, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). This means that a prisoner must file any grievances, complaints, and appeals he has concerning his prison conditions in the time, place, and manner required by the prison’s administrative rules. *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2009) (A prisoner must comply with a prison’s procedural requirements). Mr. Silva was told to resubmit the three grievances because the grievances he submitted did not follow the requirements as they included multiple, unrelated issues, and a citation to the Revised Code of Washington. *See* Amended Opening Brief, p. 2. Although Mr. Silva may object to or disagree with the basis for his grievances being rejected, his grievances violated the procedure. Mr. Silva was well aware his remedy would be to resubmit his grievances.

The cases that Mr. Silva relies on in this matter are not persuasive to his argument that there is no identity of issues. In *In re*

Parmelee, 115 Wn. App. 273, 63 P.3d 800 (2003), the offender received an infraction and lost good conduct time, after being infraacted for making threats and disparaging comments in his grievance. Mr. Silva was never punished for the writing of his grievances or told that he could not submit them. However, he was told that he would have to meet the procedural requirements. In *McCabe v. Arave*, 827 F.2d 634 (9th Cir. 1987), the issue was that certain materials were not allowed to be kept in the prison chapel due to their content. *McCabe v. Arave*, 827 F.2d at 638. Mr. Silva, however, did not have content based restrictions, but rather would not follow procedural requirements to file his grievance. Finally, *Voters Educ. Comm. v. Public Disclosure Comm'n.*, 161 Wn.2d 470, 166 P.3d 1174 (2007) does not apply as there is no issue regarding prior restraint. 'Prior restraint' is an administrative or judicial order forbidding communications prior to their occurrence. *Voters Educ. Comm.*, 161 Wn.2d at 494. Prior restraint, therefore, prohibits future speech, as opposed to punishing past speech. *Id.* (internal citations omitted). Simply, Mr. Silva presents no argument or case law to assert that a prison requirement as to the time, place, and manner for a grievance to be filed elevates any correction to a constitutional content-based censorship issue requiring a *Turner v. Safely*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)

analysis. Therefore, the issue that was in front of the court in this underlying matter was regarding the processing of Mr. Silva's grievances. This was the same issue that the federal district court ruled on in Mr. Silva's previous case. Therefore, there was an identity of issues in both matters, and Mr. Silva's matter was properly dismissed.

As Mr. Silva had an opportunity to fully and fairly litigate his previous claim in a neutral forum, it would not work an injustice to apply collateral estoppel in this matter. Mr. Silva asserts that: no proof was offered that application of collateral estoppel would not work an injustice, no evidence was presented that the federal appeal was decided on the merits, and that the federal court erroneously decided the previous matter. Despite Mr. Silva's assertion, it is clear Ms. Holly addressed the issue that applying collateral estoppel would not cause an injustice as Mr. Silva had a chance to litigate the matter. CP 52. The fact that Mr. Silva disagrees with the outcome of the decision does not raise an issue of injustice. Otherwise, anyone who simply provided conclusory self serving statements that they disagreed with a court decision would nullify the application of collateral estoppels. Finally, Mr. Silva provides no explanation or case law to establish why the resolution of any appeal, as to his previous matter, is relevant to any determination regarding collateral estoppel. In his previous matter, the federal district court ruled on the merits when it ruled

that Mr. Silva's grievances being proceeded did not raise a constitutional issue. *See Silva v. Gregoire*, No. C05-5731RJB, 2007 WL 1724957, *1 (W.D. Wash.), *aff'd*, 2007 WL 2034359 (W.D. Wash.). Whether Mr. Silva's appeal was dismissed on the merits or on procedural grounds does not change that there was a final order on the merits. No injustice can be argued by Mr. Silva. Therefore, the trial court's decision should be upheld.

B. Even If This Court Finds That Dismissal Was Not Warranted Due To Collateral Estoppel, The Trial Court Order Must Be Affirmed As Mr. Silva Failed To State A Claim For Which Relief May Be Granted

In order to prevail on a § 1983 claim, Mr. Silva has the burden to prove that he actually has a constitutional right that could be violated. It is well-established that "inmates lack a separate constitutional entitlement to a specific prison grievance procedure." *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1998)). Moreover, if the state elects to provide a grievance mechanism, violations of its procedures do not give rise to § 1983 claims. *Hoover v. Watson*, 886 F. Supp. 410 (D. Del. 1995); *Brown v. Dodson*, 863 F. Supp. 284, 285 (W.D. Va. 1994); *Allen v. Wood*, 970 F. Supp. 824, 832 (E.D. Wash. 1997). In fact, even when a prison official denies, screens-out, or ignores an inmate's grievance, the

prison official does not deprive the inmate of any constitutional right. *See Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993) (prison official's failure to process inmate grievance fails to state a constitutional claim). Prison officials are also allowed to set procedures which regulate the time, place, and manner in which a grievance is to be handled. *See Pozo*, 286 F.3d at 1025. Offenders are required to follow those procedures. *Marella*, 568 F.3d at 1028 ("The absence of a proper administrative process for a prisoner to appeal from an initial rejection of an appeal does not abrogate the requirement that he comply with a prison's procedural requirements.") A refusal to process an offender or failure to see that grievance are properly processed does not create a constitutional claim as the offender has a right to directly petition the government for redress of that claim. *Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991).

Declining to process Mr. Silva's grievances was not based on the substantive content of his grievances, nor was Mr. Silva denied the right or ability to seek redress for meritorious grievances. Mr. Silva admits that for each grievance he has brought forward in his action, Ms. Holly instructed him that his grievance did not meet the established guidelines, as they were written, and that he could resubmit them if he complied with the established guidelines. Submitting a grievance in an

improper format and refusing to follow procedural steps could hardly be classified as a Constitutional violation. Mr. Silva's argument that Ms. Holly's rejection to process his grievances was content-based censorship is inherently wrong. To adopt Mr. Silva's argument in his response would require adopting that the Department of Corrections is not allowed to set any sort of criteria or parameters in processing grievances. Mr. Silva would have the Court believe that any time a grievance was rejected for not being done following procedures triggered a content based analysis. However, in this case, Mr. Silva was simply told that he would have to conform to the parameters and regulations set forth in the grievance process. Mr. Silva was neither told that he could not file a grievance, nor was his grievance denied because the state disapproved what he said. *See* CP 36. Mr. Silva had the option of re-writing his grievances. It was Mr. Silva who controlled whether his grievances would be processed. He chose not to.

C. The Trial Court's Order Must Affirm As Ms. Holly Is Entitled To Qualified Immunity

In the event that this Court determines that Mr. Silva stated a valid constitutional claim, which is not barred by collateral estoppel, the trial court's decision must be affirmed as Ms. Holly is entitled to qualified immunity from damages. Under the doctrine of qualified

immunity, officials are “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The qualified immunity doctrine “gives ample room for mistaken judgments” by protecting “all but the plainly incompetent or those who knowingly violate the law.” *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (citation omitted). “This accommodation . . . exists because ‘officials should not err always on the side of caution’ because they fear being sued.” *Id.* at 537 (citation omitted).

A trial court confronted with an assertion of qualified immunity should determine whether the plaintiff has properly asserted a constitutional violation and whether the law governing the official’s conduct was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818-19, 172 L. Ed. 2d 565 (2009). It is the plaintiff who bears the burden of proving that the specific right claimed was clearly established at the time of the alleged misconduct. *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). Until this burden is met, the defendants are presumed to be immune from suit

and the suit should be dismissed. *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993).

If a violation could be established, the court must also address whether the law governing the official's conduct was clearly established. If the relevant law was not clearly established, the official is entitled to immunity from suit. *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997). Further, the test for qualified immunity is an objective test based on whether a reasonable official would have believed his actions were constitutional. *See Act up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).

As discussed above, Mr. Silva has failed to demonstrate a constitutional violation and is barred by collateral estoppel from asserting otherwise. Ms. Holly was reasonable to believe requiring Mr. Silva, and all other offenders⁵, to abide by the standards set forth in the grievance procedure. Ms. Holly would be reasonable to believe that such requirements, which had to do with time, place and manner of how a grievance was filed, were lawful. Therefore, any such mistake would be a reasonable one and Ms. Holly would be entitled to qualified immunity. Mr. Silva has the burden of showing that the law was not

⁵ In his complaint, Mr. Silva does not allege that he was treated differently than any other offender or that the procedural requirements were forced only upon him.

clearly established and has failed to do so. Therefore, Ms. Holly is entitled to qualified immunity.

D. This Court Should Affirm The Trial Court's Dismissal Order As Mr. Silva's Retaliation Claim Fails To State A Claim For Which Relief May Be Granted

As Mr. Silva filed his amended complaint after Ms. Holly's motion to dismiss and just days before the hearing, the retaliation claim was obviously not covered by the collateral estoppel argument. However, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon*, 112 Wn.2d at 200-01. In this case, Mr. Silva's retaliation claim must be dismissed.

In order to state a claim of retaliation, a prisoner must allege that (1) that he was subjected to adverse action; (2) the adverse action was imposed because of certain conduct; (3) the conduct that gave rise to the adverse action is legally protected; (4) the adverse action chilled the prisoner's speech; and (5) the adverse action did not advance a legitimate penological goal. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). In addition, Mr. Silva must show that the retaliation was the substantial or motivating factor behind the conduct of the prison official. *Mt. Health City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1976); *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009).

Mr. Silva must also show his First Amendment rights were actually chilled by the retaliatory action. *Rhodes*, 408 F.3d 568. With respect to the second element, the Ninth Circuit standard requires a prisoner to allege that the prison authorities' retaliatory action did not reasonably advance legitimate goals of the correctional institution. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); *Frazier v. Dubois*, 922 F.2d 560 (10th Cir. 1990).

Because claims of retaliation are easy for inmates to allege, courts examine such claims with skepticism to avoid interfering too much with prison operations. *See Canell v. Multnomah County*, 141 F. Supp. 2d 1046, 1059 (D. Or. 2001) (quoting *Adams v. Rice*, 40 F.3d 72, 74 [4th Cir. 1994]). Further, courts should review prisoner retaliation claims in light of the United States Supreme Court's "disapproval of excessive judicial involvement in day-to-day prison management." *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995) (citing *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 132 L. Ed. 2d 418 [1995]). To survive a motion to dismiss, Mr. Silva must plead enough facts to plausibly establish Ms. Holly's retaliatory motive. Timing alone cannot support a claim for retaliation unless the complaint contains other factual material to support the inference of retaliatory motive because an inmate that has filed a grievance is still subject to standard prison practices after the filing of a grievance. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.

Ed. 2d 868 (2009); *Pratt*, 65 F. 3d at 808. Further, a retaliation claim is not plausible if there are “more likely explanations” for the action. *See Iqbal*, 129 S. Ct. at 1951; *Pratt*, 65 F. 3d at 808.

With *Turner v. Safley*, the Supreme Court modified the second element of the retaliation standard announced in *Rizzo*. *See Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, the Court formulated a new standard of review for prisoner’s constitutional claims, discarding the high scrutiny of the “narrowly tailored” review that had been discussed in *Rizzo*. The new “reasonableness” standard is responsive both to the policy of judicial restraint regarding prison operations and the need to protect constitutional rights. *Turner*, at 85 (citing *Procunier v. Martinez*, 416 U.S. 396, 406, 94 S. Ct. 1800, 1808 (1974)). The Court specifically noted:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.

Id., at 89.

The *Turner* standard recognizes that forcing officials to prove that their actions were narrowly tailored to correctional purposes would lead to an unwarranted amount of judicial intervention into sensitive prison

operations. The deferential reasonableness standard avoids this intrusion while sufficiently protecting prisoners from arbitrary interference with their constitutional rights.

The Ninth Circuit reviewed inmate retaliation claims in *Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995) and revisited the Ninth Circuit's standard for retaliation claims in light of *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995). *Sandin* involved determinations of the liberty interests of prisoners and the high standard of deference due decisions by prison officials. The court in *Pratt v. Rowland* adopted the deferential standard for retaliation claims asserted by Defendants and stated:

While we affirm the *Rizzo* line of cases, therefore, we also conclude at the same time that we should evaluate retaliation claims in light of these general concerns expressed in *Sandin*. In particular, we should “afford appropriate deference and flexibility” to prison officials in evaluation of proffered legitimate penological concerns for conduct alleged to be retaliatory.

Pratt v. Rowland, 65 F.3d at 807.

In *Barnett v. Centoni*, 31 F.3d 813 (9th Cir. 1994), the Ninth Circuit used this heightened standard to affirm the dismissal by summary judgment of an inmate's retaliation claim. In his civil rights claim, Barnett alleged that prison officials had retaliated against him for engaging in litigation and that he was denied his right of due process when he was reclassified and transferred to a higher level of custody. *Barnett v. Centoni*, 31 F.3d at 814.

The court affirmed the dismissal by the district court with the following reasoning:

Because there was “some evidence” to support Barnett’s reclassification, *see Superintendent v. Hill*, 472 U.S. 445, 455-56 (1985), and because Barnett’s reclassification served the legitimate penological purpose of maintaining prison discipline, *see Rizzo*, 778 F.2d at 532, the district court properly granted summary judgment on Barnett’s retaliation claim.

Barnett, 31 F.3d at 816.

In *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997), the Ninth Circuit held that the issuance of an infraction to an inmate in retaliation for the inmate’s exercise of constitutional rights violates those rights and is actionable under 42 U.S.C. § 1983. However, *Hines* also indicated that the infraction charge must be false:

Hines brought this action under § 1983 alleging that Pearson’s charge was false and in retaliation for his use of the grievance system.

Id., at 267.

Pearson does not contest the jury’s determination that he falsely accused Hines of attempting to receive an object from another inmate.

Id., at 268.

We hold that where a prisoner alleges a correctional officer has falsely accused him of violating a prison rule in retaliation for the prisoner’s exercise of his constitutional rights, the correctional officer’s accusation is not entitled to

the “some evidence” standard of review that we afford disciplinary administrative decisions.

Id., at 269.

Mr. Silva’s retaliation claim fails on the pleading alone. Mr. Silva does not allege that Ms. Holly’s basis for the infraction was false as he concedes using another offender to serve her with a lawsuit was against Department policy. CP 44-45. Mr. Silva further concedes that although there was adequate basis for the infraction, his infraction was dismissed because there was no notice posted prohibiting such conduct. It is clear the more likely explanation for Ms. Holly issuing the infraction against Mr. Silva is due to the fact that the service of the lawsuit against her by using another offender was against Department policy not because she was retaliating against him. The issuance of an infraction that is truthful and accurate advances prison security and order, even if the offender is subsequently found not guilty of the infraction. *Hines, supra*. Additionally, as Mr. Silva’s amended complaint alleges the infraction was dismissed; therefore, Mr. Silva did not suffer any “adverse actions.” CP 44-45; *Rhodes*, 408 F.3d at 567. The fact that the offender was found not guilty of the infraction is not evidence of retaliatory motive by the infracting officer and is evidence only that the prison’s disciplinary system functions fairly and properly. Furthermore, Mr. Silva’s extensive filings in this matter and

continued litigation establish that his First Amendment rights were not actually chilled by the alleged conduct. *See Rhodes*, 408 F.3d at 568. As Mr. Silva failed to allege a proper retaliation claim, this Court can sustain the trial court judgment, and affirm the dismissal order.

V. CONCLUSION

For all of the foregoing reasons, Ms. Holly respectfully requests that this Court affirm the superior court's dismissal of Mr. Silva's Complaint.

RESPECTFULLY SUBMITTED this 4 day of November, 2011.

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CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the BRIEF OF RESPONDENT on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:

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EXECUTED this 4th day of November, 2011, at Olympia,
Washington.


KAREN THOMPSON
Legal Assistant