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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
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NO. 37757-8

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

STEPHANIE CHAU,

Petitioner,

v.

ATTORNEY GENERAL STATE OF WASHINGTON,

Respondent.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER-STATEMENT OF ISSUES	2
III.	COUNTER-STATEMENT OF THE CASE.....	2
IV.	STANDARD OF REVIEW.....	4
V.	ARGUMENT	4
	A. This Court Should Affirm The Dismissal Of Ms. Chau’s Lawsuit Because Res Judicata Bars Re-litigation Of Her Claims	4
VI.	CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Chau v. State of Washington Employment Security Dep't</i> , 133 Wn. App. 1044 (2006)	5
<i>In re Marriage of Dicus</i> , 110 Wn. App. 347, 40 P.3d 1185 (2002).....	7
<i>Kibler v. Maryland Cas. Co.</i> , 74 Wash. 159, 132 P. 878 (1913)	9
<i>Kuhlman v. Thomas</i> , 78 Wn. App 115, 897 P.2d 365 (1995).....	4
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995).....	6
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983)	6, 8
<i>Staats v. Brown</i> , 139 Wn.2d 757, 991 P.2d 615 (2000).....	5
<i>Syrovoy v. Alpine Resources, Inc.</i> , 122 Wn.2d 544, 859 P.2d 51 (1993).....	4
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	4

Statutes

42 U.S.C. § 1983.....	8
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Other Authorities

Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805 (1985).....	6
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Rules

RAP 10.3(6)..... 5

I. INTRODUCTION

This case arises out of Appellant Steffanie Chau's termination of employment with her former employer, Respondent Washington State Employment Security Department (ESD).¹ In April 2005, Ms. Chau filed a wrongful termination lawsuit in Thurston County Superior Court against ESD. In that lawsuit, Ms. Chau made allegations and claims for fraud, harassment, retaliation, conspiracy, discrimination and breach of agreement. In August 2005, the trial court granted defendant's motion for summary judgment dismissing her lawsuit. Ms. Chau appealed that ruling. In July 2006, this Court, in Cause No. 33830-1-II, affirmed the trial court's ruling dismissing her lawsuit on the basis that she was collaterally estopped from re-litigating issues related to her termination of employment. Ms. Chau petitioned for review of the unpublished Court of Appeals' decision. In June 2007, the Supreme Court denied Ms. Chau's petition for review.

Ms. Chau filed another lawsuit in Thurston County Superior Court in December 2007. Her complaint named the Respondents State of Washington Attorney General, the Department of Employment Security and the Personnel Appeals Board, as the defendants. Like her 2005

¹ The named defendants listed in paragraph 1.2 of Ms. Chau's complaint include the State of Washington Attorney General, Department of Employment Security and Personnel Appeals Board. CP at 98.

lawsuit, Ms. Chau's 2007 lawsuit arose out of what she believes was the wrongful termination of her employment with ESD. Her 2007 lawsuit again includes claims for conspiracy, fraud, and retaliation. In addition, Ms. Chau added claims for perjury and negligent infliction of emotional distress. In April 2008, the trial court granted defendants' motion for summary judgment on the basis of res judicata. Ms. Chau now appeals that ruling. This Court should affirm the trial court's summary judgment dismissal of Ms. Chau's lawsuit.

II. COUNTER-STATEMENT OF ISSUES

Does the doctrine of res judicata bar Ms. Chau from re-litigating the claims and issues surrounding the termination of her employment when the undisputed evidence establishes that she has already litigated those matters in a prior action?

III. COUNTER-STATEMENT OF THE CASE

Ms. Chau is a former employee of ESD. CP at 49. In April 2002, ESD terminated Ms. Chau after determining that she had neglected her duty, was incompetent, insubordinate, and had engaged in gross misconduct. CP at 56. Ms. Chau appealed her dismissal to the Personnel Appeals Board (PAB) which upheld Ms. Chau's termination. CP at 60. Ms. Chau appealed the PAB's decision to the Thurston County Superior

Court. In April 2004, the Thurston County Superior Court affirmed the PAB's decision. CP at 63.

In April 2005, Ms. Chau filed a lawsuit in Thurston County Superior Court alleging retaliation, discrimination, fraud and breach of contract against ESD. CP at 70-75. In August 2005, the trial court granted ESD's motion for summary judgment and dismissed Ms. Chau's lawsuit. CP at 77-78. Ms. Chau appealed the dismissal of her lawsuit. CP at 81-86. In July 2006, this Court affirmed the trial court order granting ESD's motion for summary judgment finding that Ms. Chau was collaterally estopped from re-litigating the PAB's decision upholding the termination of her employment. CP at 88-96. Ms. Chau sought discretionary review of that decision and, in June 2007, the Supreme Court denied her petition for review.

In December 2007, Ms. Chau filed a second lawsuit in Thurston County Superior Court. CP at 98-106. Ms. Chau's complaint named the State of Washington, Attorney General, Department of Employment Security and the Personnel Appeals Board, as the defendants. *Id.* Like her 2005 lawsuit, Ms. Chau's second lawsuit included claims for conspiracy, fraud, and retaliation. *Id.* In addition, Ms. Chau added a claim for perjury arising out of the 2003 PAB hearings and a claim for negligent infliction of emotional distress. *Id.*

In April 2008, the trial court granted defendants' motion for summary judgment on the basis of res judicata. CP at 29, 264. Ms. Chau now appeals the trial court's dismissal of her second lawsuit.

IV. STANDARD OF REVIEW

When reviewing an order on summary judgment, the appellate court engages in the same inquiry as the trial court. *Syrovoy v. Alpine Resources, Inc.*, 122 Wn.2d 544, 548-49, 859 P.2d 51 (1993). The court should affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the non-moving party, *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992), and all questions of law are reviewed de novo, *Syrovoy*, 122 Wn.2d at 548-49. Whether res judicata applies to a set of facts is a matter of law, which is reviewed de novo. *Kuhlman v. Thomas*, 78 Wn. App 115, 120, 897 P.2d 365 (1995).

V. ARGUMENT

A. This Court Should Affirm The Dismissal Of Ms. Chau's Lawsuit Because Res Judicata Bars Re-litigation Of Her Claims

Ms. Chau's brief on appeal claims that ESD used fraudulent documents to support the termination of her employment and claims that this issue has not been examined in any prior litigation involving her

termination of employment. Br. of Appellant at 6, 18. This is not a new allegation. In her 2006 appeal, Cause No. 33830-1-II, Ms. Chau argued that ESD “created a new document (misrepresented/Altered the document) . . . to cover-up . . . to aid as a convenient smoke screen to protect management”.²

Likewise, Ms. Chau claims that her claims for conspiracy, based on fraud, have not been previously claimed or litigated. Br. of Appellant at 9. However, in its 2006 unpublished opinion, this Court noted:

The same identity of issues analysis applies to the remainder of her arguments, which mainly comprise claims that ESD engaged in fraud and perjury in wrongfully discharging her.³

Also like her 2006 appeal, Ms. Chau devotes considerable attention in her brief to attacking the decision of the ESD to terminate her employment and the decision of the PAB in upholding her termination. Br. of Appellant at 9, 10, 12-19. What Ms. Chau fails to address in her brief are the reasons she believes res judicata does not apply to bar re-litigation of her claims.⁴

² See page 4 of Ms. Chau’s Reply Brief filed in Cause No. 33830-1-II.

³ *Chau v. State of Washington Employment Security Dep’t*, 133 Wn. App. 1044 (2006).

⁴ Ms. Chau’s failure to address the legal issue upon which her appeal is based should preclude further review. *Staats v. Brown*, 139 Wn.2d 757, 784-85, 991 P.2d 615 (2000). RAP 10.3(6).

The purpose of res judicata is to “prevent re-litigation of already determined causes and curtail multiplicity of actions and harassment in the courts.” *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata bars re-litigation and prevents re-casting allegations under a different legal theory and suing again. Moreover, res judicata not only bars re-litigation of the claims and issues that were actually litigated, but also bars re-litigation of all matters that *might have been litigated* in a prior action. *Id.* (emphasis added) (citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985)).

Res judicata requires a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against who the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). In determining the identity of causes of action, the following criteria apply:

[W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 663-64.

Here, Ms. Chau's claims for conspiracy, fraud, and retaliation were properly dismissed by the 2007 trial court because the 2005 trial court had granted summary judgment dismissal of those claims with prejudice. Ms. Chau cannot re-submit those claims in a second lawsuit as those matters were determined previously in her 2005 lawsuit. Likewise, Ms. Chau cannot bring new claims for perjury and negligent infliction of emotional distress based on the same transactional nucleus of facts that comprised her 2005 lawsuit. To do so would ignore the purposes of res judicata to ensure finality and to conserve judicial resources by preventing parties from litigating over and over. The fact that Ms. Chau alleged new claims in her 2007 lawsuit does not preclude re-litigation because she could have raised those claims in her first complaint.

[R]es judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, *exercising reasonable diligence*, might have brought forward at that time.

In re Marriage of Dicus, 110 Wn. App. 347, 356, 40 P.3d 1185 (2002) (quoting *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997)).

Ms. Chau could have brought her claims for perjury and negligent infliction of emotional distress at the same time as her claims for wrongful

termination, conspiracy, fraud, and retaliation. Therefore, there is concurrence of identity of causes of action between Ms. Chau's first and second actions, and her new claims are precluded from re-litigation every bit as much as her old claims.

Moreover, the fact that Ms. Chau has named new parties in her 2007 lawsuit, State of Washington, Attorney General, and the Personnel Appeals Board, in addition to the named party in her 2005 lawsuit, ESD, does not prevent application of res judicata to preclude her re-litigating her claims. A similar situation arose in *Rains*, in which the plaintiff first filed an action against members of the Washington State Public Disclosure Commission (PDC) for violation of rights under 42 U.S.C. § 1983. *Rains*, 100 Wn.2d at 662. The plaintiff subsequently filed an action in state court against the State of Washington and the PDC for the same violation. *Id.* The Washington State Supreme Court held that, for purposes of res judicata, the parties "were 'qualitatively' the same" because "A suit against members of the PDC is in effect a suit against the State." *Id.* at 664. Like the defendants in *Rains*, the defendants in this case are qualitatively the same. Moreover, parties who actually controlled or conducted the earlier litigation are in privity with parties named in the earlier action. "It matters not that respondents were not mentioned as defendants in the second amended complaint upon which the . . . judgment

was based. . . . Respondents, although not parties to that action, were directly interested in the result of that litigation and actively defended that case. They were, in substance, parties to it and bound by it.” *Kibler v. Maryland Cas. Co.*, 74 Wash. 159, 163, 132 P. 878 (1913).

In this case, the State of Washington, Attorney General, and the Personnel Appeals Board were not defendants in Ms. Chau’s earlier action, but they were directly interested in the result of the litigation and actively defended the case, as required by state law. As a result, res judicata bars Ms. Chau from naming new parties and re-litigating claims which were already determined by the trial court in her earlier lawsuit.

VI. CONCLUSION

The Respondents, State of Washington, Attorney General, Department of Employment Security and the Personnel Appeals Board, respectfully request this Court affirm the trial court’s order granting the summary judgment of dismissal.

RESPECTFULLY SUBMITTED this 23rd day of October, 2008.

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STATE OF WASHINGTON

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the Respondent's Reply Brief was filed by legal messenger in Division II of the Court of Appeals at the following address:

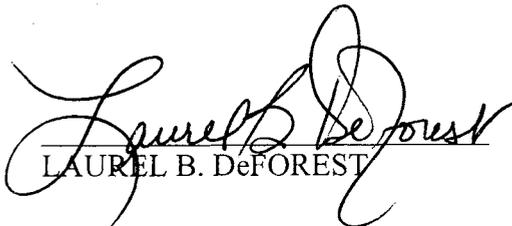
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And that one copy was sent US Mail via Consolidated Services on

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DATED this 23rd day of October, 2008 at Tumwater, Washington.


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