

No. 41570-4-II

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

DAVID PATRICK WHITE,

Appellant,

Vs.

LARRY PLETCHER and DIANE PLETCHER,

husband and wife and their marital community composed thereof,

and FIFE RV & AUTO CENTER, INC.,

BRIEF OF APPELLANT WHITE

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I. ASSIGNMENTS OF ERROR

1. The Court found that the Doctrine of Collateral Estoppel applied in this case and ordered a dismissal on that basis.
2. The Court may have Granted Summary Judgment, finding Washington's Felony Tort Statute, RCW 4.24.420 applied, as a matter of law, to preclude Mr. White's claims.

II. APPELLANT'S STATEMENT OF THE ISSUES

1. Whether the Trial Court erred, as a matter of law, in finding that the Doctrine of Collateral Estoppel applied to preclude Mr. White's civil claims for damages when there was no similarity of issues or parties, no final judgment on the merits as to the issues raised in the instant case, and no opportunity for Mr. White (Appellant) to have proceeded with his civil claims in the previous criminal proceeding.
2. Whether the Trial Court Judge intended to grant summary judgment solely on the application of the doctrine of collateral estoppel.
3. If the Trial Court Judge did intend to apply Washington's Tort Felony Statute, whether the Trial Court erred, as a matter of law, in determining that Washington's Felony Tort Statute, RCW 4.24.420 precluded Mr. White's (Appellant's) claims against Mr. Pletcher and Fife RV (Respondents) where there was a genuine issue of material fact as to whether some of White's injuries were proximately caused by the felony.

III. APPELLANT'S STATEMENT OF THE CASE

A. General facts of the case

On July 7, 2008, Mr. White (the Appellant) came to Fife RV (Respondent) to look into purchasing a "fifth Wheel" and engaged in discussions with Mr. Pletcher (Respondent), who was a salesman at Fife RV (CP 30, 31) Mr. Pletcher and Mr. White were seated inside of the

“Fifth Wheel,” after what both men described as a cordial conversation, when Mr. Pletcher rose and began to lead Mr. White out of the vehicle towards the sales office to complete the sales paperwork. (CP 32, 56) At this point, each man claims to have been struck by a tire iron wielded by the other. Interestingly, neither man claims to have seen the other inflict the initial head wound, but each claims that he was suddenly, and unforeseeably hit on the head, with the next memory being that of the other man holding a tire iron.

Mr. White’s Testimony:

Q. You testified the next thing you knew is you had been hit, correct?

A. Correct. Okay. Correct.

Q. You didn’t see anyone hit you?

A. Correct.

Q. The only two people that were there were you and Mr. Pletcher?

A. Correct.

(CP 55)

...

Q. How many people were present?

A. Him and I. I did not see him strike me.

Q. Okay. But can you use deductive reasoning, logic?

A. Do you want – I would love to, but I haven’t been able to thus far. I would assume, yes, that he hit me.

(CP 56)

...

Q. Well, you weren't totally aware of what was going on.

A. Correct.

Q. You and Mr. Pletcher, basically, your testimony is the same. Mr. Pletcher got up and walked

toward the stairway. Would you agree with that?

A. Yes.

Q. and that something occurred in the area which is marked on this map "1," "2," "3"?

A. Correct.

Q. That's where you indicate you were when you were struck?

A. Yes.

(CP 56)

Mr. Pletcher's testimony

Q. When you got to the point where the "x" was, what happened?

A. I felt three strikes to the back of my head right here.

(CP 32)

...

Q. At that point did you realize what was going on?

A. No, I did not...

(CP 39)

...

Q. When you looked up and saw the defendant holding something in his hand, did you recognize what he was holding?

A. Yes I did.

(CP 34)

...

A. To me it was a lug nut or a tire iron.

(CP 34)

...

Q. Did you realize that you had been hit with the tire iron?

A. That's what I figured at that point.

Q. You didn't know, though?

A. No.

Q. You didn't see the blows?

A. No. They were behind me.

(CP 35)

A fight then ensued, as Mr. Pletcher kicked Mr. White in the groin, knocking him to the ground. Mr. Pletcher then leapt at Mr. White, grasping him around the waist as Mr. White tried to "wiggle towards the door" holding him while Pletcher punched and twisted Mr. White's testicles. (CP 37) The fight only got more violent thereafter. For the purposes of the appeal issues regarding the Trial Court's granting of the Defendants'

motions for summary judgment, the initial blow, which foreseeably led to the fight, is the important and relevant factor.

C. Facts relevant to the issue of collateral estoppel

After the physical altercation between Mr. White and Mr. Pletcher, Mr. White escaped from Pletcher and Fife RV in his car. Pletcher and the other employees of Fife RV reported to the authorities that White was the aggressor in the altercation. White was later arrested and charged with assault. White demanded a jury trial, which resulted in a verdict of “guilty” on the assault charge. The criminal case was captioned: “State of Washington v. David Patrick White.” The verdict in the criminal case was rendered on October 1, 2009. (CP 63)

Larry Pletcher filed a civil suit against David White on November 10, 2008. The caption was “LARRY PLETCHER and DIANE PLETCHER, Husband and wife, and their marital community composed thereof vs. DAVID PATRICK WHITE” (CP 84) Pletcher alleged assault, battery, and negligent and intentional infliction of emotional distress against White.

On December 9, 2008, Mr. White filed “DEFENDANT’S ANSWER TO COMPLAINT AND COUNTERCLAIM AGAINST PLAINTIFF, COMPLAINT AGAINST THIRD PARTY DEFENDANT.” (CP 91) White counterclaimed against Pletcher and brought a third party action against Fife RV, alleging that it was responsible for Pletcher’s actions by respondeat superior and for negligent supervision.

The Superior Court in Pierce County granted the Defendants' motions for Summary Judgment on November 12, 2010, finding that Collateral estoppel precluded Mr. White's claims. (RP 25; CP 134) On December 13, 2010, on the day of trial, Mr. Pletcher voluntarily dismissed his claims against Mr. White.

IV. STANDARD OF REVIEW

In this appeal, the Appellant is asking the Court to review an Order granting Summary judgment on Mr. White's claims against Mr. Pletcher and Fife Rv. The Appellate Court reviews summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). An order granting summary judgment will be affirmed only if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552. The burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A fact is "material" when the outcome of the litigation depends on it. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

V. ARGUMENT FOR REVERSAL

- (1) The claims against Fife RV are not precluded by collateral estoppel because the parties are not identical, no judgment was rendered as to Fife RV's liability, and to apply collateral estoppel would work an injustice against Mr. White.

Collateral estoppel precludes relitigation of the same issue in a subsequent action **between the same parties**. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 306, 96 P.3d 957 (2004). (emphasis added) In order to prevail on a claim of collateral estoppel, the party seeking application of the doctrine bears the burden of showing (1) identical issues, (2) a final judgment on the merits, (3) identity of the parties, and (4) that application of collateral estoppel will not work an injustice against the estopped party. *Id.* at 307, 96 P.3d 957. The Court should note that, in order for Collateral estoppel to apply, all three elements must be present.

The Trial Court found that the criminal case against White involved the same issue as White's civil case against Pletcher. It does not. The Court, in granting Summary Judgment against Mr. White, compared the criminal case, *State v. White*, to the civil case, *Pletcher v. White v. Fife RV*. In the criminal case, the jury had found Mr. White guilty of assaulting Mr. Pletcher. The issues in the two cases are different in that David White's conduct was on trial during his criminal case. Pletcher's

actions, negligent and otherwise, were not. Therefore the first element of collateral estoppel, “identical issues” is not satisfied.

The record does not support a finding that the second element of collateral estoppel, “a final judgment on the merits” was satisfied.

Although there was a decision on the merits of *State of Washington v. White*, there was no decision on the merits of Mr. White’s claims against Fife RV or Mr. Pletcher. The issues raised in Mr. White’s claims relate to whether Pletcher and his employer are liable for injuries suffered by White at Pletcher’s hands. In the criminal case, *State of Washington v. White*, the State prosecuted White for an assault against Pletcher. However, no verdict or decision was ever rendered as to Pletcher’s actions or Fife RV’s responsibility therefore. It seems apparent that, although there was a judgment in the criminal case, there was no judgment on the merits related to the claims in this case. The Court erred in finding that this element of collateral estoppel was satisfied.

The third element required to support an application of collateral estoppel is “identity of parties.” Fife RV was not a party to the criminal case. Neither was Pletcher. The only parties to *State of Washington vs. White* were the State of Washington and David P. White. The third element is therefore most obviously lacking.

The final element to collateral estoppels requires the Court to determine that the application of collateral estoppel will not work an

injustice against the estopped party. In this case it most certainly has. In a criminal case, the accused Defendant has no opportunity or ability to pursue a civil claim for damages against a third party. The thought of a criminal defendant making some motion to implead a third party as a civil defendant in his own criminal case is laughable. The rules simply don't allow it. Precluding Mr. White from seeking compensation for an injury caused by Pletcher and, vicariously, by Fife RV in civil court based on collateral estoppel, when White had no opportunity to bring such a claim in the prior criminal case would (and has) certainly work an injustice against Mr. White. The Trial Court should not have applied the doctrine of Collateral estoppel to dismiss Mr. White's claims against Fife RV and Pletcher.

(2) The Court appears to have granted Summary Judgment solely on the application of the doctrine of Collateral Estoppel, making arguments concerning the Washington Felony Tort Statute moot.

The Trial Court granted summary judgment against Mr. White's claims against Pletcher and Fife RV based, on collateral estoppels. It is unclear, from the transcript, whether the Judge intended to apply the Washington Felony Tort Statute. At this point, the Appellant, of course, would take the position that the Court did not apply the Felony Tort Statute. The Order appealed in this case, which grants summary judgment, does not state on what grounds Summary judgment was being granted.

(CP 134) Defendant had presented two, the doctrine of collateral estoppels, and the Washington Felony Tort Statute. It seems clear, from

the Judge's statements, that she is simply reciting the ideal that one should not benefit from a felony, but that collateral estoppels is the actual basis for granting Summary Judgment:

THE COURT: Okay. I had read through all of the materials that I had prior to today. I do believe that collateral estoppel applies. I believe it applies as a matter of law. The felony tort statute also precludes a criminal defendant from benefitting from his criminal activity, but more importantly, the issue of self-defense was raised in the criminal trial. It was adjudicated by a jury on the merits when they found him guilty because the elements of the crime of second Degree Assault had not been met; therefore, I'm granting summary judgment as to both Third-Party Defendant, Fife RV; and the Plaintiff, the counterclaim against the Plaintiff is dismissed, as are all claims against Fife RV. (RP 25)

If the Appellate Court finds that the Judge did base the Summary Judgment order solely on the application of the doctrine of Collateral Estoppel, the Appellant would urge the Court to find the remainder of the argument in this brief to be moot, as it all applies to issues dealing solely with the application of the Washington Tory Felony Statute. In an abundance of caution, in case the Appellate Court finds that the Trial Judge did intend to apply the Washington Tort Felony Statute as well as collateral estoppel, the Appellant is presenting the following arguments applicable to the Washington Tort Felony Statute.

- (3) In the application of the Washington's Felony Tort Statute, RCW 4.24.420 to preclude a civil claim for damages, the issue of proximate cause is a question of fact which should have been presented to the jury in this case.

For RCW 4.24.420 to be a complete bar to a claim for personal injury, two elements must be met. First, the injured party (Mr. White)

must have been engaged in a felony at the time of the injury. Second, the injury must have been *proximately caused by the felony itself*.

**§ 4.24.420. Action by person committing a felony -
Defense – Actions under 42 U.S.C. Sec. 1983**

It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

The Court in *Dickinson v. City of Kent*, 2007 U.S. Dist. LEXIS 95195, *8 (W.D. Wash. Dec. 10, 2007) notes “We have consistently held that ‘the question of proximate cause is for the jury, and it is only when the facts are undisputed and there inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the Court.’” The *Dickinson* case involves the application of the Washington Tort Felony Statute. In the *Dickinson* case, the Plaintiff was injured when the police sent a dog, Jedi, in to a stolen pickup truck to retrieve the Plaintiff, who had either stolen it or at least admitted to knowing it was stolen (possessing the stolen truck was a felony). While one could certainly argue that having a police dog attack you while refusing to obey an officer’s orders and sitting in a stolen truck is foreseeable, the Court found that it was a jury issue as to whether the felony of sitting in a stolen truck proximately caused the Plaintiff’s injuries.

In this case, there is a genuine issue of material fact as to whether Mr. White's injuries (at least some of them) were caused by Pletcher before White ever engaged in the violent altercation. As the review of a motion for summary judgment requires the Court to view the evidence in a light most favorable to the non-moving party, the Trial Court should have accepted Mr. White's testimony as true. This is particularly important as it relates to the application of the Washington Tort Felony Statute. Mr. White clearly testifies that he was hit by Pletcher initially, with a tire iron, before the men became locked in combat. At least part of the injury to Mr. White, therefore, was inflicted **before** the fracas began, and most importantly, **before** Mr. White ever struck a blow. As a result, the issue of whether some of Mr. White's injuries (the severe blow to his head with a tire iron) were proximately caused by the felony (of assault) itself appears to be destined to be a jury issue, and raises a genuine issue of material fact. Because there is a genuine issue of material fact as to whether and how many of white's injuries were proximately caused by the felony itself, the Washington Tort Felony Statute should not have applied to bar White's action as a matter of law.

VI. CONCLUSION

The Trial Court, in this case, erred in applying the doctrine of collateral estoppel to grant the Defendants' motion for summary judgment. None of the essential elements of collateral estoppel are met. The Appellate Court should find that issues concerning the Washington Tort Felony Statute, at this level, are moot, as it appears the Trial Judge intended to grant summary judgment solely upon the application of the doctrine of collateral estoppel. If the Court finds, however, that the Trial Judge clearly intended to grant summary judgment upon a finding that the statute precluded White's claims as a matter of law, this decision should be reversed because there is a genuine issue of material fact as to whether some of White's injuries occurred before his engagement in the fight with Pletcher. The Appellant respectfully requests that the Appellate Court issue an Order reversing the Trial Court's Order granting Summary Judgment to Pletcher and Fife RV and allow this case to remand to the Superior court for a jury trial.



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CERTIFICATE OF MAILING

SIGNED at Silverdale, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 24nd day of June, 2011, the document to which this certificate is attached, Brief of Appellant White, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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