No. 48346-7

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LAWRENCE PAUL SHANDOLA,

Appellant,

vs.

Paula Henry, et al.

Respondents.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
HONORABLE GAROLD E. JOHNSON
Pierce County Superior Court Cause No. 13-2-06153-3

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. ISSUES FOR REVIEW 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

A. Davis v. Cox Cannot Be Applied Retroactively 5

1. Res Judicata Bars Re-Litigating Prior Dismissal 6

2. The Davis Decision Does Not Apply to Prior Dismissal 8

B. There Was No Basis for Vacation Under CR 60(b)(11) 14

C. Montgomery v. Louisiana Does Not Control 15

D. Request for an Award of Attorneys' Fees on Appeal 20

V. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Davis v. Cox, 183 Wn.2d 269, 351 P.3d 862 (2015) ..... passim

Davis v. Nielson, 9 Wn. App. 864, 515 P.2d 995 (1973) 7

Dragonslayer, Inc. v. Wa. State Gambling Com'n, 139 Wn. App. 433, 161 P.2d 428 (2007) 10, 11, 13

Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 93 P.3d 108 (2004) 7

In re Carson, 84 Wn.2d 969, 530 P.2d 331 (1975) 11, 12

In re Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014) 16

In Re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992) 11, 13

In re Marriage of Flannagan, 42 Wn. App. 214, 709 P.2d 1247 (1985) 14, 15

In re Marriage of Yearout, 41 Wn. App. 897, 707 P.2d 1367 (1985) 14

In re Pers. Restraint of Markel, 154 Wn.2d 262, 111 P.3d 249 (2005) 10

In re Pers. Restraint of Sauve, 103 Wn.2d 322, 692 P.2d 818 (1985) 10

In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992) 10

Jackson v. Burton, 2016 WL 4269478 (2016) 19

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991) 9, 13

Johnson v. Morris, 87 Wn.2d 922, 557 P.2d 1299 (1976) 11, 12, 14

Matter of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992) 8

Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599, 2016 WL 280758 (2016) ..... passim

Nguyen v. State, 878 N.W.2d 744 (2016) 18

Raglin v. Mitchell, 2016 WL 4035185 (2016) 18, 19

Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1983) 7

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995) 9, 10

Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009) 8
Schoeman v. N.Y. Life Ins. Co., 106 Wn.2d 855, 726 P.2d 1 (1986) 7
Shandola v. Henry, 44764-9, Div. II 2
Sound Built Homes, Inc. v. Windermere Real Estate South, Inc., 118 Wn. App. 617, 72 P.3d 788 (2003) 6
Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005) 7
State v. Evans, 154 Wn. 2d 438, 114 P.3d 627 (2005) 9
State v. Hanson, 151 Wn.2d 783, 91 P.3d 888 (2004) 10
State v. Terrell, 2016 WL 3442917 (2016) 19
Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334 (1989) 17, 19
United States v. Estate of Donnelly, 397 U.S. 986 (1970) 9

Statutes

RCW 4.24.510, *et seq.* 1, 2, 4
RCW 4.24.525 1
WAC 137-67-020, *et seq.* 3

Rules

CR 12(b)(6) 3
CR 60(b)(11) 2, 14, 15
RAP 18.1(a) 2, 20, 21

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns whether the Washington State Supreme Court's ruling in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015) invalidating RCW 4.24.525 can be applied retroactively to an order dismissing appellant's case against respondents. Such retroactive application of new law is precluded because appellant's case against respondents was adjudicated to final determination and cannot now be disturbed by a subsequent change in law. The issue before the Superior Court in appellant's underlying lawsuit involved the application of Washington's Anti-SLAPP statute, RCW 4.24.510 *et seq.*, to communications between respondents and the Washington State Department of Corrections ("DOC"). After learning of respondents' communications to the DOC, appellant sued respondents in tort. Under the provisions of the law as it was constituted at the time, appellant's lawsuit was absolutely barred by the Anti-SLAPP statute. Prior to the *Davis* decision, the Anti-SLAPP statute granted unqualified immunity from civil liability to persons who communicated with governmental agencies about issues reasonably of concern to such agencies.

The Superior Court correctly found that each defendant, including respondent Lew Cox, was immune from all causes of action brought by plaintiff pursuant to the anti-SLAPP statute, RCW 4.24.510, *et seq.*

After his case was dismissed by the Superior Court, appellant sought review from this Court (*see, Shandola v. Henry*, 44764-9, Div. II). This Court denied appellant's first appeal after hearing *sua sponte* a motion on the merits. Appellant did not seek review of that denial.

In the time since appellant's first appeal was denied by this Court, the Anti-SLAPP statute has been ruled unconstitutional. Upon learning of the *Davis* decision, appellant moved the Superior Court for an order vacating the dismissal of his case. The sole basis for appellant's motion to vacate was CR 60(b)(11). After hearing arguments, the Superior Court denied appellant's motion to vacate on November 6, 2015.

II. ISSUES FOR REVIEW

A. Whether the trial court erred when it denied appellant's motion to vacate an order of dismissal under CR 60(b)(11).

B. Whether this Court should award respondents their reasonable attorneys' fees and costs incurred in defending this appeal, pursuant to RCW 4.24.510 and RAP 18.1(a).

III. STATEMENT OF THE CASE

This is a case arising from letters written by respondents Paula Henry, Anna Nelson, Laureen Nicolay, and Lew Cox to the Washington State Department of Corrections. In those letters, respondents separately

provided information of interest to the DOC in connection with appellant Lawrence Shandola. [Defendant Cox's Opposition to Motion to Vacate, CP 51.]

Appellant was convicted of murdering Robert Henry, the husband of respondent Paula Henry. After his conviction, appellant was sentenced to more than 30 years in prison for Henry's murder. [*Id.*] Appellant, who is a Canadian national, applied for a transfer to Canada under the International Prisoner Transfer Program to serve his remaining sentence. [*Id.*] Appellant's application for transfer was handled by the DOC pursuant to WAC 137-67-020, *et seq.* [*Id.*] During the time the DOC was reviewing appellant's application for transfer, respondents Henry, Cox, Nelson, and Nicolay each individually wrote to the DOC to convey information regarding appellant for the DOC's consideration. [*Id.*] After his request for transfer was denied, appellant brought this suit alleging respondents' communications to the DOC constituted false light invasion of privacy and intentional infliction of emotional distress. [*Id.*, CP 51-52.]

Pursuant to CR 12(b)(6), respondents brought a motion to dismiss all of appellant's claims and causes of action against them. [*Id.*, CP 52.] Respondents also sought an award against appellant for their expenses and reasonable attorneys' fees incurred in defending against appellant's suit and an award for statutory damages. [*Id.*] The basis of respondents'

motion to dismiss was that they were immune to all civil liability for their communications with the DOC pursuant to Washington's Anti-SLAPP statute, RCW 4.24.510. [*Id.*]

After hearing oral arguments on respondents' motion on April 12, 2013, the Superior Court granted respondents' motion and dismissed appellant's lawsuit. [*Id.*] The Honorable Judge Johnson also awarded respondents their expenses, reasonable attorneys' fees, and statutory damages of $10,000 each. [*Id.*]

Following dismissal of his complaint, appellant filed a Notice of Appeal in this Court on April 23, 2013. [*Id.*, CP 52.] After receiving briefing from the parties, appellant's appeal was dismissed by this Court *sua sponte* on a motion on the merits. [*Id.*] This Court's ruling on the motion on the merits was issued March 20, 2014. [*Id.*] Following other motions heard by this Court, the order affirming dismissal became the final order terminating review on June 24, 2014. [*Id.*] Appellant did not seek discretionary review of that final order. [*Id.*]

More than a year later, on May 28, 2015, the Washington State Supreme Court decided *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015). [CP 25-39.] The holding of that decision is that the Anti-SLAPP statute was unconstitutional. [*Id.*] The court's opinion did not contain any

reference to whether the decision was to be applied prospectively or retroactively. [*Id.*]

After the *Davis* decision was announced, appellant filed a motion to vacate the Superior Court's order dismissing the underlying lawsuit. [CP 1-5.] The basis of appellant's motion was that *Davis* should be applied retroactively to the Superior Court's order of dismissal even though that order had become final after appellant's first appeal. [*Id.*] After hearing oral argument, the Superior Court denied the motion to vacate on November 6, 2015. [CP 78-80.] This appeal, appellant's second attempt to overturn a final order terminating review, followed.

IV. ARGUMENT

A. *Davis v. Cox* Cannot Be Applied Retroactively

The Superior Court's order denying vacation of its dismissal of appellant's underlying lawsuit should be affirmed because the recent holding in *Davis*, *supra*, cannot be applied retroactively to that dismissal. Appellant characterizes the Superior Court's refusal to vacate the order of dismissal as either manifestly unreasonable or based on untenable grounds. As set forth in appellant's opening brief, however, his sole contention is that *Davis* should be applied retroactively. No other allegation of error is made with respect to the proceedings before the

Superior Court. Controlling authority from the Supreme Court of the State of Washington and from the United States Supreme Court precludes retroactive application of the change in law wrought by the *Davis* decision.

Appellant does not contend that there was any error or irregularity in the manner in which the Superior Court interpreted and applied the statute when it dismissed appellant's case. Nor does he dispute the fact that when the final order terminating review in the underlying lawsuit was entered, the Anti-SLAPP statute was valid and controlling. Because the statute was validly enforced by the Superior Court when it dismissed appellant's complaint and was still in force when the final order terminating review was entered, the doctrine of *res judicata* bars appellant from re-litigating these issues. Additionally, well-established principles governing retroactive application of statutory changes support affirmation of the Superior Court's ruling on appellant's motion to vacate dismissal.

1. *Res Judicata* Bars Re-Litigating Prior Dismissal

The doctrine of *res judicata* prevents a second judicial proceeding involving claims that were considered, or could have been considered, in a prior proceeding. *Sound Built Homes, Inc. v. Windermere Real Estate South, Inc.*, 118 Wn. App. 617, 72 P.3d 788 (2003). It is a rule intended to prevent piecemeal litigation and to ensure the finality of judgments.

Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). The doctrine of *res judicata* operates as a bar to an entire cause of action. *Davis v. Nielson*, 9 Wn. App. 864, 872, 515 P.2d 995 (1973). *Res judicata* effects flow from a final judgment if the first and second proceedings are identical in four respects: (1) subject matter; (2) claim or cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

Res judicata "is the rule, not the exception" in almost all cases. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108, 114 (2004). *Res judicata* applies to all parts of a litigated case, including not only those issues actually adjudicated, but also any claims that a party could have brought with the exercise of reasonable diligence. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986). The threshold requirement necessary to bar subsequent litigation is a "final judgment on the merits" in the previous litigation. *Hisle*, at 865. Once this threshold is met, *res judicata* bars subsequent litigation when there is identity of subject matter, cause of action, persons and parties, and the quality of persons against whom the claim is being made. There is such identity in this matter.

The relief sought by appellant from this Court is precisely what is barred by *res judicata*, namely re-litigation of a cause of action that has already been the subject of a final judgment. All four elements required for the application of *res judicata* are satisfied in the instant case, and the Superior Court's order should be affirmed.

2. The *Davis* Decision Does Not Apply to Prior Dismissal

Well-established principles governing the retroactive application of statutory changes require that the Superior Court's order be affirmed. Appellant does not cite any authority for the contention that the holding of *Davis v. Cox*, should be applied retroactively. It should not.

It is well settled that substantive statutory changes are not applied retroactively. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009). In that case, Division I of this Court referenced the well-known rule "that we do not apply statutes retroactively unless they are merely procedural or remedial." *Id.*, at 45. Similarly, in *Matter of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992), the Washington State Supreme Court held, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases...pending on direct review or not yet final." *Id.*, at 326. In other words, retroactive application is not allowed in cases that are final or not pending on direct (not collateral) review.

Similarly, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), the United States Supreme Court discussed the principles of retroactivity at length:

> Of course, retroactivity in civil cases must be limited by the need for finality, once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas; why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring?...Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.

Id., at 541-542 (emphasis added, internal citations omitted).

Another decision by the United States Supreme Court resulted in a similar holding:

> New legal principles, even when applied retroactively, do not apply to cases already closed. *Cf. United States v. Estate of Donnelly,* 397 U.S., at 296, 90 S.Ct., at 1039 (Harlan, J., concurring) (at some point, "the rights of the parties should be considered frozen" and a "conviction ... final").

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758, 115 S. Ct. 1745, 1751, 131 L. Ed. 2d 820 (1995).

Washington state courts follow the same rule. Discussing the concept of retroactivity, the court in *State v. Evans*, 154 Wn. 2d 438, 443-44, 114 P.3d 627, 630-31 (2005), held:

> The law favors finality of judgments, and courts will not routinely apply "new" decisions of law to cases that are already final. *In re Pers. Restraint of St. Pierre,* 118 Wash.2d 321, 329, 823 P.2d 492 (1992); *cf. State v. Hanson,* 151 Wash.2d 783, 790, 91 P.3d 888 (2004). Generally, we have followed the lead of the United States Supreme Court when deciding whether to give retroactive application to newly articulated principles of law. *See In re Pers. Restraint of Markel,* 154 Wash.2d 262, 268, 111 P.3d 249 (2005) (citing *In re Pers. Restraint of Sauve,* 103 Wash.2d 322, 328, 692 P.2d 818 (1985)).

The rule of both the United States Supreme Court and the Washington State Supreme Court regarding retroactivity in cases such as this is clear: "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co.*, 514 U.S. at 758.

A similar analysis was followed in *Dragonslayer, Inc. v. Wa. State Gambling Com'n*, 139 Wn. App. 433, 448-449, 161 P.2d 428 (2007). In that case, this Court held, "Generally, statutes are presumed to apply prospectively ... however, the presumption ... is reversed to favor retroactive application if the amendment is remedial and concerns procedure or forms of remedies.... A statute is remedial when it relates to practice, procedure, or remedies and <u>does not affect a substantive or vested right</u>. A vested right [is] .... a legal exemption from a demand by another." *Id.* (underlining added, internal citations omitted). The Superior Court's order dismissing appellant's lawsuit constitutes a "legal exemption

from a demand". Therefore, respondents had a vested right once the lawsuit was dismissed. The *Davis* decision cannot be applied retroactively because it would affect a vested right in contravention of the holding of *Dragonslayer*.

The Washington State Supreme Court put it even more plainly in *In Re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992), "a remedial statute cannot be retroactively applied if it affects a vested right." Applying the reasoning and analysis of these cases to the facts at issue here, it is clear that the holding of *Davis* cannot be applied retroactively to vacate the Superior Court's order of dismissal. There is a presumption that changes in statutory provisions apply only prospectively to cases filed or decided after a change in law. Thus, the presumption is that the holding of *Davis* applies prospectively only. Nothing in that decision offers a basis to support a contrary conclusion. Appellant's brief does not contain any authority or argument that overcomes this presumption.

The case primarily relied on by appellant, *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976), does not change the result. In that case, after the defendant's conviction, the Washington State Supreme Court held that the age of majority that terminated the jurisdiction of the Juvenile Court was 18. *In re Carson*, 84 Wn.2d 969, 530 P.2d 331 (1975).

Later, and just before the appellant's 18th birthday, the legislature extended the age of jurisdiction to 21. Johnson argued that because the Supreme Court had already construed the statute at issue in *Carson*, that construction should control. The *Johnson* court agreed, and found that the laws in effect when appellant was sentenced controlled that sentencing, notwithstanding subsequent changes in the law. *Johnson*, 87 Wn.2d at 928.

Appellant attempts to turn the holding in *Johnson* on its ear by claiming it stands for the proposition that retroactivity analysis has been banished from Washington jurisprudence since 1976. It does not. *Johnson* is a case about the rules of statutory construction, not retroactivity. A clear reading of the language relied on by appellant here is that the *Johnson* court did not see the need to engage in a retroactivity analysis because it was considering the construction of a statute. This does not mean that the ordinary rules governing retroactivity were abolished, and they were not.

Moreover, the holding of *Johnson* supports affirmation of the Superior Court's dismissal of appellant's case. As cited by appellant to this Court, the *Johnson* court held, "the law at the time respondent committed his criminal acts" was the law that controlled his sentencing, even though a later legislative change would have compelled a different

result. Such a result here would mean that the law in effect at the time appellant's case was dismissed by the Superior Court (immunity under the Anti-SLAPP statute) should control regardless of a subsequent change in the law (*Davis v. Cox* decision).

Appellant's complaint was dismissed and that dismissal became final before the change in law brought about by the *Davis* decision. The holdings of *Dragonslayer* and *In re F.D. Processing*, *supra*, mandate that retroactive application of a statutory change cannot occur if such application would affect a vested right. Respondents have vested rights in this Superior Court's dismissal of appellant's complaint. That dismissal was "a legal exemption from a demand by another," the exact definition of a vested right set forth in *Dragonslayer*, *supra*. Because an application of the holding in *Davis* as sought by appellant would affect respondents' vested rights it is precluded. *In Re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303(1992) ("a remedial statute cannot be retroactively applied if it affects a vested right").

Additionally, retroactive application can only occur in cases pending on direct, not collateral, review or not otherwise final. When, as here, a final order terminating review has been entered, the case is closed. "Matters once tried shall be considered forever settled." *James B. Beam Distilling,* 501 U.S. 529, 541. Appellant's claims were tried, dismissed by

the Superior Court, and this Court has issued a final order terminating review. Thus, the dismissal "shall be considered forever settled" and the statutory change announced in *Davis* cannot be applied retroactively to vacate the Superior Court's order of dismissal.

Appellant's reliance on *Johnson v. Morris*, 87 Wn.2d 922 (1976) is inapposite and does not change the result. *Johnson* is a statutory construction case that can be distinguished on its facts. Its holding is the opposite of what appellant seeks through this appeal. Even if applicable, *Johnson* contradicts appellant's position rather than supporting it.

B. <u>There Was No Basis for Vacation Under CR 60(b)(11)</u>

Appellant's motion to vacate was based solely upon CR 60(b)(11), which requires the existence of extraordinary circumstances to justify vacation of a trial court's order. The Superior Court correctly found there was no basis for vacation under this rule. CR 60(b)(11) is a "catchall" provision confined to situations involving extraordinary circumstances not covered by other sections of CR 60(b). *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). The claimed extraordinary circumstances must relate to irregularities that are extraneous to the trial court's action or go to the question of the regularity of its proceedings. *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985).

Vacation of dismissal under CR 60(b)(11) "'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule ....'" *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985). However, no such extraordinary circumstances are present in this case. Appellant has not set forth any facts to suggest that an extraneous event or some other irregularity occurred during the pendency of the underlying lawsuit, and they did not. Appellant's appeal does not suggest the existence of any irregularities in the proceedings before the Superior Court, and there were none. In the absence of any evidence in the record of such events, there is no basis for appellant's claim of extraordinary circumstances justifying vacation. Because there were no extraordinary circumstances involved in the Superior Court proceedings, there was never any basis for a CR 60(b)(11) motion and the Superior Court ruled correctly when it denied the motion to vacate.

C. *Montgomery v. Louisiana* Does Not Control

The United States Supreme Court recently announced its decision in *Montgomery v. Louisiana*, 136 S. Ct. 718, 193 L. Ed. 2d 599, 2016 WL 280758 (2016). *Montgomery* is a criminal habeas corpus case involving a state court's collateral review of sentencing requirements for juvenile offenders. It has no application to the facts of this case and does not compel the relief sought by appellant.

The *Montgomery* decision is narrow and its effect is limited to its holding, "If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires'. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.*, at 731-732 (underlining added).

Decisions involving collateral appeals, such as the *Montgomery* case relied on by appellant, are generally not considered controlling authority in actions on direct appeal. *In re Coggin*, 182 Wn.2d 115, 121-122, 340 P.3d 810 (2014). As explained in that case:

> Collateral review is fundamentally different from a direct appeal, and different rules apply on direct review as compared to collateral review. Primarily, the appellate process exists to remedy trial errors even when constitutionally based. ... The appellate process also exists to develop the body of law governing all cases; collateral review focuses on the facts of the individual defendant, and its purpose is to correct the most egregious errors that cause actual harm. The principles of finality outweigh any public trial rights when the petitioner raises the public trial right issue for the first time on collateral review.

In re Coggin, 182 Wn.2d 115, 122 (2014).

The issues before this Court are on direct appeal, are not a collateral review of a state's criminal proceeding, and do not implicate any claims controlled by substantive or procedural federal criminal law.

Collateral review is "fundamentally different" from direct review. Different rules apply to the consideration of matters on direct review as opposed to collateral review. Additionally, this is not a proceeding involving a claim controlled by federal law, unlike the situation before the *Montgomery* court.

Moreover, a clear reading of *Montgomery* makes it plain that it's limited holding applies to a single exception to the general rule for retroactivity in cases on federal collateral review first articulated in *Teague v. Lane,* 489 U.S. 288, 103 L. Ed. 2d 334 (1989). Under *Teague*, new constitutional rules do not apply, as a general matter, to convictions that were final when the new rule was announced. The *Montgomery* decision addresses one of two limited exceptions to the *Teague* general retroactivity bar. That exception concerns new rules of constitutional law, "'forbidding criminal punishments of certain primary conduct', as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Id.*, at 728. These principles are not implicated here as this is a civil tort matter, not a collateral review of a criminal conviction nor an application of a *Teague* exception to sentencing requirements.

Respondent is not aware of any Washington or 9th Circuit decision applying the holding of *Montgomery* to a civil case. Courts in other

jurisdictions have rejected appellant's contention that *Montgomery* affects retroactive application of changed laws outside of its narrow holding. In *Nguyen v. State*, 878 N.W.2d 744, (2016), the Iowa Supreme Court refused to retroactively apply its overruling of a long line of cases that would have invalidated Nguyen's criminal conviction. The Iowa Supreme Court found that when a state court overrules prior authoritative precedent on a substantive issue there is no requirement for retroactive application of that change. *Id.* During the pendency of the appeal in *Nguyen*, the U.S. Supreme Court announced its decision in *Montgomery*. Nguyen argued the holding of *Montgomery* applied to his appeal and required retroactive application of the changed law. The Iowa Supreme Court disagreed, finding that the changes in Iowa's laws did not create "a new substantive rule of constitutional dimension." *Id.*, fn. 4.

Raglin v. Mitchell, 2016 WL 4035185 (2016) is a case from the U.S.D.C., S.D. Ohio where a convicted murderer had already unsuccessfully appealed his death sentence. His conviction became final when the United States Supreme Court denied certiorari. Raglin sought to have a subsequent decision applied retroactively to his sentencing, relying in part on the holding of *Montgomery*. *Id.* at *3. The court rejected this argument, holding:

> Petitioner reads *Montgomery* to hold that the retroactivity framework set out in *Teague v. Lane*, 839 U.S. 288 (1988), represents a constitutional requirement that the state courts are obliged to apply in their own collateral proceedings." That is not an accurate reading of the case. *Montgomery* requires state courts to apply new substantive constitutional rights when they are exercising collateral review jurisdiction. Justice Kennedy expressly disclaimed any decision regarding procedural rights: "This holding is limited to Teague's first exception for substantive rules; the constitutional status of Teague's exception for watershed rules of procedure need not be addressed here."

Id. (underlining added) (citing *Montgomery*, 136 S.Ct. at 729).

The *Raglin* court correctly held that *Montgomery* is limited to the application of new substantive constitutional rights pursuant to *Teague v. Lane* when state courts exercise collateral jurisdiction. This is not the situation here. The holding in *Montgomery* is limited to sentencing issues for minors subject to collateral review and goes no further. *Id.* (See also, *State v. Terrell*, 2016 WL 3442917 (2016) ("The [Montgomery] decision had nothing to do with mandatory indefinite life sentences… *Montgomery* clarified the court's holding in *Miller*"); *Jackson v. Burton*, 2016 WL 4269478 (2016) ("*Montgomery v. Louisiana* … held that *Miller* is retroactive on collateral review. Petitioner was not sentenced to mandatory life imprisonment without any possibility of parole…. Therefore *Miller* is not applicable" [and *Montgomery* didn't require different result])).

Thus, even in cases involving criminal convictions courts have limited the application of *Montgomery* to its narrowly stated holding: the appropriateness of mandatory life sentencing without parole on minors being addressed on collateral review. This is not the situation before this Court.

For any and all of these reasons, therefore, the holding of *Montgomery* has no effect on the determination of this appeal.

D. Request for an Award of Attorneys' Fees on Appeal

This Court should award respondent his reasonable attorneys' fees and costs incurred in defending this appeal pursuant to RAP 18.1(a).

V. CONCLUSION

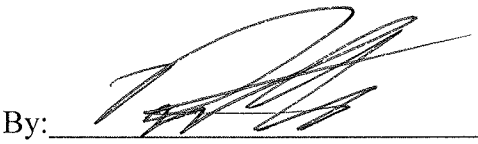
This Court should affirm the Superior Court's denial of appellant's motion to vacate. Although appellant seeks to characterize his appeal as a constitutional issue, it is not. Rather, it involves straightforward application of well-established principles of *res judicata* and finality. Retroactive application of a change in law is precluded when, as here, an appellant's case was adjudicated to final determination prior to the change in law. The Superior Court did not err when it denied appellant's motion for vacation because any change wrought by the holding of *Davis. v. Cox*

did not apply retroactively to the original dismissal of appellant's action against respondent.

For the reasons stated above, this Court should affirm the trial court's order (a) granting respondents' motion to dismiss all of appellant's claims with prejudice and (b) awarding respondents' expenses, reasonable attorneys' fees and statutory damages. This Court should also award respondents their reasonable attorneys' fees and costs incurred in defending this appeal pursuant to RAP 18.1(a).

Respectfully submitted this 19th day of August, 2016.

FORSBERG & UMLAUF, P.S.



By:_____
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DECLARATION OF SERVICE

I, Shannon Walker, declare under penalty of perjury that I am over the age of 18 and competent to testify as to service in this matter.

On the date given below, I caused a copy of Respondents' Brief to be delivered to the following by the manner indicated:

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Court of Appeals Division II
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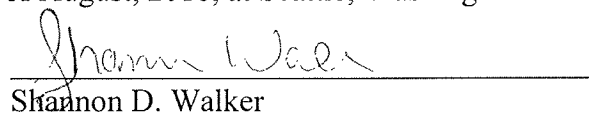
I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of August, 2016, at Seattle, Washington.



Shannon D. Walker

1651738 / 458.0366

FORSBERG AND UMLAUF PS

August 19, 2016 - 3:03 PM

Transmittal Letter

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Case Name: Lawrence Paul Shandola v. Paula Henry, et al.
Court of Appeals Case Number: 48346-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondents'__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Sherelyn L Anderson - Email: swalker@foum.law

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