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DIVISION II

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No. 48668-7-II
(Pierce County Superior Court No. 15-2-09573-6)

STATE OF WASHINGTON
BY  _____
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

PAUL WILKINSON,

Plaintiff-Petitioner,

v.

TRACY RADCLIFF AND MELISSA POLANSKY,

Defendants-Respondents.

**BRIEF OF DEFENDANTS-RESPONDENTS
TRACY RADCLIFF AND MELISSA POLANSKY**

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I. INTRODUCTION

The Pierce County Superior committed no error. It properly dismissed Mr. Wilkinson's sole claim under the Washington Law Against Discrimination ("WLAD") applying *res judicata* and collateral estoppel.

Mr. Wilkinson's multiple lawsuits against Respondents Tracy Radcliff and Melissa Polansky began in 2012 when he sued them, along with Auburn Regional Medical Center ("ARMC"), his former employer, in King County Superior Court alleging discrimination, harassment, and retaliation claims related to his employment and termination from ARMC. That case, which was consolidated with yet another lawsuit about Mr. Wilkinson's alleged wrongful termination from ARMC, was dismissed on a motion to dismiss or, in the alternative, for summary judgment. Mr. Wilkinson appealed that dismissal to the Washington Court of Appeals, Division One. Division One affirmed the King County Superior Court's decision.

Still unsatisfied, in 2015, Mr. Wilkinson filed a nearly identical lawsuit against Ms. Radcliff and Ms. Polansky in Pierce County Superior Court. Mr. Wilkinson again claimed they had discriminated, harassed, and retaliated against him in his employment and his termination from ARMC. After complete briefing and arguments regarding the application of *res judicata* and collateral estoppel to Mr. Wilkinson's claims, Pierce County Superior Court Judge Jack Nevin dismissed them.

The lower court did not err in dismissing Mr. Wilkinson's most recent lawsuit against Ms. Radcliff and Ms. Polansky, which was based on

the same facts, law, and claims that were previously the basis for claims that were dismissed by the King County Superior Court. The lower court's judgment dismissing Mr. Wilkinson's lawsuit should be affirmed because *res judicata* and collateral estoppel bar it.

II. ISSUE PRESENTED

Whether the Pierce County Superior Court properly dismissed Mr. Wilkinson's lawsuit.

III. STATEMENT OF THE CASE

A. Mr. Wilkinson's First Lawsuit Against Ms. Radcliff and Ms. Polansky ("Wilkinson I").

On or about September 4, 2012, Mr. Wilkinson filed a lawsuit in the King County Superior Court against ARMC, Universal Health Services ("UHS"), Dr. Daniel Clerc, Tracy Radcliff, and Melissa Polansky for "discrimination, harassment, and retaliation" related to his employment with and termination from ARMC.¹

On or about September 26, 2012, Mr. Wilkinson filed a second, nearly-identical lawsuit against ARMC and UHS for discrimination, harassment, and retaliation" related to his termination from ARMC.² Specifically, Mr. Wilkinson alleged, "Beginning in April of 2009, [ARMC], [UHS], Melissa Polanski, Tracy Radcliff, and Jerry Hudson, did engage in discrimination, harassment, and retaliation against

¹ CP 138 and 142-146 (Bryan O'Connor Dec.), at Exh. A (Initial Pleading in *Wilkinson v. Auburn Regional Medical Center, et al.*, King County Superior Court Case No. 12-2-29262-1 KNT).

² CP 138, 147-152, at Exh. B (Initial Pleading in *Wilkinson v. Auburn Regional Medical Center, et al.*, King County Superior Court Case No. 12-2-31215-01 KNT).

[Mr. Wilkinson] during his employment with ARMC and [UHS], which resulted in his wrongful termination from ARMC on June 25, 2012.”³ His causes of action were based on the WLAD and other anti-discrimination / anti-retaliation laws.

The two King County lawsuits were later consolidated due to the privity of the parties and similarity of the claims.⁴ These matters are referred to throughout this brief as “Wilkinson I.”

On May 15, 2013, the Defendants in the King County action (including Ms. Radcliff and Ms. Polansky) moved the Court for an order dismissing all of Mr. Wilkinson’s claims with prejudice or, in the alternative, granting them summary judgment. The parties fully briefed the issues.⁵

On July 12, 2013, the Honorable Judge Carol Schapira dismissed the majority of Mr. Wilkinson’s claims in Wilkinson I. Judge Schapira dismissed certain claims related to the collective bargaining agreement covering Mr. Wilkinson’s position without prejudice because he had failed to exhaust contractual remedies.⁶ However, she found he could otherwise challenge his 2012 termination at that time, but “only to the extent that he can causally link th[e] [termination] decision to claims for gender

³ CP 151, at Exh. B, at 4:13-16.

⁴ CP 139, 153-156, at Exh. C (Order Granting Defendant’s Motion to Consolidate King County Superior Court Case Nos. 12-2-31215-01 KNT & 12-2-31215-01 KNT).

⁵ CP 139, 157-939, at Exh. D (Complete Briefing on Summary Judgment in the matter of *Wilkinson v. Auburn Regional Medical Center, et al.*, King County Superior Court Case Nos. 12-2-31215-01 KNT & 12-2-31215-01 KNT) (emphasis added).

⁶ CP 139, 940-945, at Exh. E (Order Granting Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment In Part, King County Superior Court Case Nos. 12-2-31215-01 KNT & 12-2-31215-01 KNT).

discrimination, harassment or retaliation under the Washington Law Against Discrimination and Title VII.”⁷ The court reserved its ruling on Mr. Wilkinson’s remaining claims for gender discrimination, harassment or retaliation under the WLAD and Title VII pending additional briefing and argument.⁸

On August 9, 2013, after additional briefing and argument, Judge Schapira dismissed all of Mr. Wilkinson’s remaining claims in Wilkinson I *with prejudice*, including his “Title VII, Washington Law Against Discrimination gender *and retaliation claims* and his NLRA⁹ claim(s).”¹⁰

Mr. Wilkinson appealed the dismissal to the Washington Court of Appeals, Division One. On September 15, 2014, Division One affirmed the trial court’s dismissal of Mr. Wilkinson’s claims with prejudice.¹¹

B. Mr. Wilkinson’s Second Lawsuit Against Ms. Radcliff and Ms. Polansky (“Wilkinson II”).

On June 22, 2015, Mr. Wilkinson filed the lawsuit giving rise to this appeal in the Pierce County Superior Court.¹² Mr. Wilkinson re-alleged that Ms. Radcliff and Ms. Polansky wrongfully terminated him

⁷ CP 943, at Exh. E, at 3:10-17 (paragraph 6).

⁸ CP 943-944, at Exh. E, at 3:18-4:10 (paragraphs 7 and 8).

⁹ One of Mr. Wilkinson’s original claims was filed under the National Labor Relations Act (“NLRA”).

¹⁰ CP 139, 946-947, at Exh. F (emphasis supplied) (Order Dismissing the matter of *Wilkinson v. Auburn Regional Medical Center, et al.*, King County Superior Court Case Nos. 12-2-31215-01 KNT & 12-2-31215-01 KNT, with prejudice).

¹¹ CP 139, 948-961, at Exh. G (Washington Court of Appeals, Division One, Case No. 70819-8-1, Decision affirming the decision of the King County Superior Court in Case Nos. 12-2-31215-01 KNT & 12-2-31215-01 KNT).

¹² CP 5-7 (Complaint in Wilkinson II).

on June 25, 2012, by retaliating against him in violation of the WLAD: “On June 25, 2012, [UHS], Melissa Polansky and Tracy Radcliff did wrongfully terminate the plaintiff from ARMC in retaliation for the complaints he filed with the NLRB, HRC, and EEOC.”¹³ This statement was very similar to the one in Mr. Wilkinson’s second Complaint in Wilkinson I.¹⁴ The 2015 lawsuit is referred to as “Wilkinson II” throughout this brief.

While Ms. Radcliff and Ms. Polansky initially removed Wilkinson II to federal court due to the existence of two claims raising federal questions, Mr. Wilkinson amended his complaint in an effort to drop his federal claims in order to remand Wilkinson II back to state court.¹⁵ Ultimately, Mr. Wilkinson agreed to dismiss his two federal claims with prejudice and the parties stipulated to the remand of Wilkinson II on his sole remaining WLAD retaliation claim related to his June 2012 termination.¹⁶

On December 3, 2015, Ms. Radcliff and Ms. Polansky filed a Motion to Dismiss Or, In the Alternative, for Summary Judgment, asking

¹³ CP 5-7, 139, at Exh. H, at 2:20-22.

¹⁴ Compare CP 6, 139, at Exh. H, at 2:20-22 (“On June 25, 2012, [UHS], Melissa Polansky and Tracy Radcliff did wrongfully terminate the plaintiff from ARMC in retaliation for the complaints he filed with the NLRB, HRC, and EEOC.”), with CP 151, at Exh. B, at 4:13-16 (“Beginning in April of 2009, [ARMC], [UHS], Melissa Polanski, Tracy Radcliff, and Jerry Hudson, did engage in discrimination, harassment, and retaliation against [Mr. Wilkinson] during his employment with ARMC and [UHS], which resulted in his wrongful termination from ARMC on June 25, 2012.”).

¹⁵ CP 139, 966-970, at Exh. I (Wilkinson Amended Complaint, Case No. 3:15-cv-05487) (alleging two federal claims under Title and the NLRA).

¹⁶ CP 139, 971-974, at Exh. J (Stipulated Joint Motion for Partial Dismissal With Prejudice and Remand of Plaintiff’s Remaining State Law Claim to Pierce County Superior Court, Case No. 3:15-cv-05487).

the lower court to dismiss Wilkinson II on *res judicata* and collateral estoppel grounds.¹⁷ Mr. Wilkinson filed his Response Brief on January 19, 2016.¹⁸ On January 20, 2016, Ms. Radcliff and Ms. Polansky filed a Reply Brief in support of their motion.¹⁹

On January 29, 2016, Judge Jack Nevin held oral argument on the dispositive motion.²⁰ After considering all of the briefing and the parties' arguments, Judge Nevin dismissed Wilkinson II with prejudice.²¹

Mr. Wilkinson filed a Motion for Reconsideration on February 5, 2016.²² Judge Nevin denied the motion and found no error in the court's understanding or application of state law.²³

On February 26, 2016, Mr. Wilkinson filed his notice of appeal.²⁴

IV. ARGUMENT

A. Summary of Argument.

The lower court properly dismissed Wilkinson II because Mr. Wilkinson's lawsuit against Ms. Radcliff and Ms. Polansky is barred by *res judicata* and collateral estoppel. Mr. Wilkinson is not allowed to file a lawsuit against parties based on particular facts and claims, lose that lawsuit, and subsequently file a nearly identical lawsuit against the same parties arising out of the same facts and alleging the same claims. That is

¹⁷ CP 42-52 (Defendants' Motion to Dismiss).

¹⁸ CP 68-98 (Plaintiff's Response Brief).

¹⁹ CP 99-105 (Defendants' Reply Brief).

²⁰ CP 114-115 (Minutes of January 29, 2016 Court Proceedings.).

²¹ CP 111-113 (Order of Dismissal with Prejudice).

²² CP 116-121 (Plaintiff's Motion for Reconsideration).

²³ CP 123-125 (Order Denying Motion for Reconsideration).

²⁴ CP 126-129 (Notice of Appeal).

precisely why the lower court dismissed the lawsuit filed in Wilkinson II. That is also why this Court should affirm that dismissal.

B. Standard of Review – *De Novo*.

A trial court’s decision to dismiss a party’s complaint is reviewed *de novo* by the appellate courts. *See Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004) (applying *de novo* review standard to analysis of trial court’s dismissal of a lawsuit involving *res judicata* and collateral estoppel). Additionally, while Mr. Wilkinson claims he should be entitled to some level of leeway regarding his understanding or attempted application of the law, it is settled law that “*pro se* litigants are bound by the same rules of procedure and substantive law as attorneys.” *Westberg v. All-Purpose Structures*, 86 Wn. App. 405, 411, 936 P.2d 1175 (Wash. Ct. App. 1997).

C. The Lower Court Was Correct in Finding that *Res Judicata* Bars Mr. Wilkinson’s Only Claim in this Lawsuit.

I. A basic res judicata analysis leads to the conclusion that Mr. Wilkinson’s remaining WLAD claim is barred.

Once a final judgment in an action is entered against a plaintiff, *res judicata* bars the plaintiff from bringing a second lawsuit concerning the same subject matter and the same causes of action against the same defendants. *Hisle*, 151 Wn.2d at 855-66. “*Res judicata* applies . . . 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 litigation, and which the parties, exercising reasonable diligence, might have brought forward at that**

time.”” *Id.* (quoting *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986)) (emphasis supplied); *see also*, *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (Wash. Ct. App. 1995) (“Under the doctrine of *res judicata*, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action.”).

This matter fits squarely within this well-established doctrine as (1) Mr. Wilkinson filed Wilkinson I pursuant to the WLAD, alleging discrimination, harassment, and retaliation related to his employment with and termination from ARMC on June 25, 2012;²⁵ (2) Mr. Wilkinson filed Wilkinson I against Respondents Tracy Radcliff and Melissa Polansky, among others in privity;²⁶ (3) the King County Superior Court issued a decision and order on the merits, dismissing Wilkinson I against Ms. Radcliff and Ms. Polansky, among others in privity, with prejudice;²⁷ (4) the Court of Appeals for Division One affirmed this decision;²⁸ and (5) Mr. Wilkinson filed the present lawsuit alleging retaliation under the WLAD against Ms. Radcliff and Ms. Polansky for his June 25, 2012 termination from ARMC.²⁹ As such, Mr. Wilkinson’s Complaint in the present matter is barred by the doctrine of *res judicata*—he has brought the same cause of action (WLAD retaliation) against the same defendants for a second time after his prior case was dismissed with prejudice and a final order on the merits was entered.

²⁵ CP 138-139, 142-947 (O’Connor Dec.), at Exhs. A-F.

²⁶ *Id.*

²⁷ *Id.*, at Exhs. E & F.

²⁸ *Id.*, at Exh. G.

²⁹ *Id.*, at Exhs. H & I.

2. ***The res judicata analysis in Kuhlman v. Thomas directly forecloses any possible argument Mr. Wilkinson has that res judicata does not apply.***

While not totally clear, it appears Mr. Wilkinson might claim he should be permitted to sue Ms. Radcliff and Ms. Polansky in Wilkinson II because his first Complaint³⁰ against Ms. Radcliff and Ms. Polansky in Wilkinson I did not seek redress for his June 25, 2012 termination from ARMC. This, however, completely ignores Mr. Wilkinson's second Complaint in Wilkinson I, which was ultimately consolidated with the first Complaint, and which expressly sought redress for his June 25, 2012, termination: "Beginning in April of 2009, [ARMC], [UHS], Melissa Polanski, Tracy Radcliff, and Jerry Hudson, did engage in discrimination, harassment, and retaliation against [Mr. Wilkinson] during his employment with ARMC and [UHS], which resulted in his wrongful termination from ARMC on June 25, 2012."³¹ Furthermore, it ignores the fact that the King County Superior Court in Wilkinson I allowed Mr. Wilkinson to proceed with his discrimination, harassment and retaliation claims under the WLAD against all defendants related to his June 2012 termination.

In Wilkinson II, Mr. Wilkinson alleged the following, which all but mirrors the language noted above from Wilkinson I: "On June 25, 2012, [UHS], Melissa Polansky and Tracy Radcliff did

³⁰ CP 142-146, at Ex A (Initial Pleading in *Wilkinson v. Auburn Regional Medical Center, et al.*, King County Superior Court Case No. 12-2-29262-1 KNT).

³¹ CP 151, at Ex B, at 4:13-16.

wrongfully terminate the plaintiff from ARMC in retaliation for the complaints he filed with the NLRB, HRC, and EEOC.”³²

While Mr. Wilkinson vaguely suggests he filed different claims in Wilkinson I and II, such argument—even if true—does not alter the lower court’s decision in this matter. In *Kuhlman*, the plaintiff, a former employee of the Seattle Housing Authority (“SHA”), filed a lawsuit against SHA alleging due process, breach of an employment contract, and deprivation of wages. *Id.* at 117-18. He later filed a due process claim against his former supervisors at SHA. *Id.* at 118-19. After judgment was issued in favor of SHA in its dispute with the plaintiff, the former supervisors filed a motion for summary judgment in their case on *res judicata* grounds. *Id.* at 119. The lower court granted the motion. *Id.* The plaintiff appealed the decision and contended his supervisors were different parties than SHA, thus *res judicata* should not apply. *Id.* Division One held that the privity between SHA and its supervisors established that they were the same parties when analyzing the case under *res judicata*:

[W]hether SHA violated Kuhlman’s rights turned on the propriety of its employees’ conduct. Having defended that suit, SHA essentially acted as their representative, protecting their interests in the first suit. Under these circumstances, the parties must therefore be viewed as sufficiently the same, if not identical.

³² CP 6 at 2:20-22.

Id. at 122. Division One affirmed the dismissal of the plaintiff’s attempted identical litigation against his former supervisors under the doctrine of *res judicata*. *Id.* at 124-25.

In the case at bar, there can be no dispute that Mr. Wilkinson brought the same cause of action against Ms. Radcliff and Ms. Polansky in Wilkinson I that he did in Wilkinson II. Ms. Radcliff and Ms. Polansky were defendants in the consolidated case of Wilkinson I, which included Mr. Wilkinson’s WLAD retaliation claim related to his June 25, 2012, termination—the only claim at issue in this case.³³

To the extent the Court finds Mr. Wilkinson did not expressly bring his WLAD retaliation claim related to his June 25, 2012, termination against Ms. Radcliff and Ms. Polansky in Wilkinson I, there can be no dispute that Mr. Wilkinson brought that very cause of action against ARMC, their former employer, in Wilkinson I.³⁴ There can also be no dispute that Mr. Wilkinson’s second Complaint in Wilkinson I was based on Ms. Radcliff and Ms. Polansky’s alleged discriminatory, harassing, and retaliatory conduct, which allegedly resulted in Mr. Wilkinson’s termination on June 25, 2012.³⁵ That case was dismissed with prejudice in Wilkinson I and later affirmed by Division One. *Res judicata* applies here just as it applied in *Kuhlman*.

³³ CP 142-961, at Exhs. A-G.

³⁴ CP 147-152, at Exh. B.

³⁵ CP 151, at Ex B, at 4:13-16 (“Beginning in April of 2009, [ARMC], [UHS], Melissa Polanski, Tracy Radcliff, and Jerry Hudson, did engage in discrimination, harassment, and retaliation against [Mr. Wilkinson] during his employment with ARMC and [UHS], which resulted in his wrongful termination from ARMC on June 25, 2012.”).

For these reasons, the lowr court properly dismissed Mr. Wilkinson's Complaint with prejudice and this Court should affirm that decision.

D. The Lower Court Was Also Correct in Finding that Collateral Estoppel Bars Mr. Wilkinson's Only Claim in this Lawsuit.

To the extent the Court finds Mr. Wilkinson has brought different causes of action in this lawsuit as compared to his first lawsuit, Mr. Wilkinson's claims are still barred by the doctrine of collateral estoppel.

"The doctrine of collateral estoppel . . . prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted" in the second lawsuit. *Hisle*, 151 Wn.2d at 855. Collateral estoppel has four elements: (1) the issue decided in the first adjudication is identical to that presented in the second; (2) the first adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party to (or in privity with the party to) the first adjudication; and (4) application of the doctrine will not work an injustice. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-62, 852 P.2d 295 (1993).

In Mr. Wilkinson's case, each of these elements is met, foreclosing his lawsuit against Ms. Radcliff and Ms. Polansky:

(1) In *Wilkinson I*, Mr. Wilkinson claimed Ms. Radcliff and Ms. Polansky discriminated, harassed, and retaliated against him in

violation of the WLAD when they played some role in his termination from ARMC. All of the facts in Wilkinson I related to his employment with and separation from ARMC.³⁶

(2) Wilkinson I ended in a dismissal with prejudice on summary judgment, which was then affirmed by Division One.³⁷

(3) Mr. Wilkinson was the plaintiff in Wilkinson I against Ms. Radcliff and Ms. Polansky, who were two of the defendants.³⁸ They are again adverse parties in this action.³⁹

(4) Application of collateral estoppel against Mr. Wilkinson will not work an injustice against him. Again, to the extent the Court finds Wilkinson II is somehow different from Wilkinson I, both of which were filed against Ms. Radcliff and Ms. Polansky, Mr. Wilkinson had the opportunity to bring his present claims in Wilkinson I, but did not.

Collateral estoppel and judicial economy dictate that Mr. Wilkinson not be permitted to continue pursuing this lawsuit against Ms. Radcliff and Ms. Polansky after his prior lawsuit against them, a lawsuit adjudicating the same issues, was dismissed with prejudice. For these alternative reasons, the lower court's decision should be affirmed.

³⁶ CP 142-961 (O'Connor Dec.), at Exhs. A-G.

³⁷ CP 940-961, (O'Connor Dec.) at Exhs. E-G.

³⁸ CP 142-961 (O'Connor Dec.), at Exs A-G.

³⁹ *Id.* at Exs H & I.

E. Mr. Wilson Cannot Challenge the Decision of the Lower Court in Wilkinson I.

In addition to all of the above reasons the Pierce County Superior Court's decision should be affirmed by this Court, to the extent Mr. Wilkinson now challenges the King County Superior Court's decision(s) in Wilkinson I, his arguments should be rejected as that court's decision was already affirmed by Division One, the appellate court responsible for reviewing such decisions. If he had other arguments that he chose not to raise on appeal to Division One, Mr. Wilkinson waived those arguments long ago.

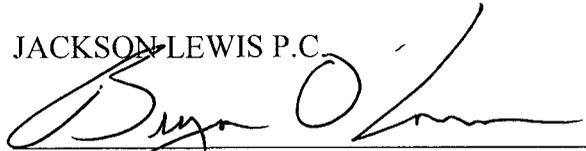
V. CONCLUSION

Mr. Wilkinson's claims and allegations in this lawsuit were previously addressed and dismissed with prejudice when he first brought them in prior litigation against Ms. Radcliff, Ms. Polansky, and their other co-defendants in Wilkinson I. Accordingly, the lower court in this case properly dismissed Mr. Wilkinson's claims against Ms. Radcliff and Ms. Polansky because the claims are barred by *res judicata* and collateral estoppel. The lower court did not substitute its own opinion or judgment for the law. To the contrary, the lower court appropriately applied the binding, well-established precedent to the undisputed facts of this case. For these reasons, this Court should affirm the lower court's dismissal of Mr. Wilkinson's claims.

Dated this 27th day of June, 2016.

Respectfully submitted,

JACKSONLEWIS P.C.

A handwritten signature in black ink, appearing to read "Bryan O'Connor", written over a horizontal line.

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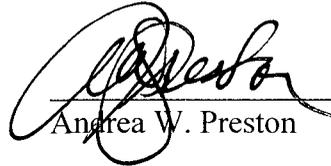
STATE OF WASHINGTON

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws BY DEPUTY
of the State of Washington that a true and accurate copy of the document
to which this declaration is affixed was sent via regular mail, postage
pre-paid, on this day, to:

Paul Wilkinson
8136 Mullen Road S.E.
Olympia, WA 98503

Dated this 27th day of June, 2016, at Seattle, Washington.



Andrea W. Preston