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COURT OF APPEALS  
DIVISION II

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Case No. 49669-1-II  
STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

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ROBERT E. TUTTLE, JR.,

*Appellant,*

v.

ESTATE OF ANITA D. TUTTLE, Patricia Hicklin, Personal  
Representative; TUTTLE FAMILY LIMITED PARTNERSHIP, Eric  
Anderson, General Partner; PATRICIA HICKLIN and SYDNEY  
HICKLIN, SR., husband and wife; ROBERT E. TUTTLE SR.  
TESTAMENTARY TRUST u/w/d/ 11/17/1993, Patricia Hicklin,  
Co-Trustee,

*Respondents,*

and

ROBERT E. TUTTLE SR. TESTAMENTARY TRUST u/w/d/ 11/17/1993,  
Doreen Hunt, Co-Trustee,

*Defendant.*

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**APPELLANT'S OPENING BRIEF**

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January 30, 2017

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### **Introduction**

Plaintiff Robert E. Tuttle, Jr. (hereinafter “Robert”) appeals the trial court’s application of the doctrine of res judicata to bar his claim of title which relates to property on which he and his family have lived for over 30 years. Robert also appeals the dismissal of his claims against the Hicklins for trespass and wrongful logging of his property. The application of res judicata was based on a subsequently filed lawsuit in which Robert was not a party. Robert appeals the trial court’s award of attorneys fees to the defendants for claims that are the subject of this appeal and requests an award of attorney’s fees in his favor, on appeal, with respect to the matters addressed herein.

### **Assignments of Error**

1. The trial court erred in granting the Estate, the Trust, and the Hicklins standing to contest Robert’s title claims.
2. The trial court erred by granting Defendants’ Motions for Summary Judgment based on claim preclusion.
3. The trial court erred in Conclusion of Law 5 stating Robert’s title claim to the subject property was “either directly litigated by the FLP’s [Family Limited Partnership's] lawsuit against the Defendants,” or was “so related to the subject matter that it should have been raised in the other suit.”

4. The trial court erred in Conclusion of Law 6 stating Robert “was in direct privity of interest” with the FLP with respect to the title issues by being a limited partner in the FLP.
5. The trial court erred in Conclusion of Law 7 stating all of the Robert’s claims were barred by “res judicata.”
6. The trial court erred in denying Robert’s motions for reconsideration.
7. The trial court erred in granting the Hicklins, personally, and Patricia Hicklin, as trustee, summary judgment dismissing all of Robert’s claims against them, which included a claim for trespass and wrongful logging of Robert’s property. The trial court also erred in awarding them attorney’s fees and costs in the sum of \$17,185.00.
8. The trial court erred in granting the Estate summary judgment dismissing Robert’s claims and awarding it attorney’s fee and costs in the sum of \$14,977.07.

**Issues Pertaining to Assignments of Error**

- A. Assignment Nos. 1, 7, 8: Did the Tuttle Estate, the Robert Tuttle Sr. Testamentary Trust, or the Hicklins have standing to contest Robert's Quiet Title action against the Tuttle Family Limited Partnership (“FLP”), in which he claimed title to real property he

and his family had lived on for over 30 years; where title was in the name of the FLP and none of these other parties had an interest in the property at issue? If there was no standing, was it error to award the Defendants attorney's fees for time spent on this issue?

- B. Assignment Nos. 2, 3, 6, 7, 8: Was Robert required to intervene in the subsequently filed 2014 lawsuit (Cause no.14-2-00463-2) brought by the Family Limited Partnership against the Estate and others, which involved accounting, mismanagement and fiduciary claims, in order to preserve his right to pursue his previously filed title claim?
- C. Assignment Nos. 2, 4, 5, 6, 7: Was there sufficient identity of persons or parties between Robert, in his title claims against the FLP, and the FLP, in its conversion and mismanagement claims against the Estate and the Hicklins, so that the dismissal of the FLP's 2014 case for failure to timely file a creditor's claim precluded Robert's pursuit of his previously filed title claim against the FLP?
- D. Assignment Nos. 4, 5, 6, 7, 8: Did Robert's ownership of a 0.001 limited partner interest in the Family Limited Partnership create sufficient "privity" between Robert and the FLP, as plaintiffs, with regard to Robert's title claim so that the failure of the FLP to bring

Robert's title claim in cause 14-2-00463 prevented Robert's pursuit of this claim in his previously filed action? Is this affected by the fact that Robert's title claim was against the FLP or that Robert was not a party to the second action?

- E. Assignment Nos. 2, 5, 6, 7: Was there sufficient "sameness of subject matter" or "causes of action" between Robert's title claims in his 2013 lawsuit and the claims for for mismanagement of the FLP, brought by the successor General Partner in the 2014 lawsuit, in order for claim preclusion to apply?
- F. Assignment Nos. 2, 5, 7: Did the trial court err in dismissing Robert's claims against the Hicklins for trespass and wrongful logging of his property in 2011 where the evidence showed the Hicklins ordered the logging under the purported authority of a power of attorney granted by Anita Tuttle but title to the property that was logged was not held by Anita Tuttle? It was held by the Tuttle Family Limited Partnership and Robert and his family had occupied the property for 30 years.
- G. Assignment Nos. 7, 8: Was it error for the trial court to award attorney's fees to the Estate, the Hicklins and the Trust based upon an erroneous ruling? Is Robert entitled to an award of attorney's fees on appeal?

## Statement of the Case

### I. Procedural Background

This lawsuit was brought by Robert E. Tuttle, Jr. under Clallam County Superior Court cause no.13-2-01120-7. *See* Complaint (CP 296). The primary focus of Robert's lawsuit was Robert's claim of title to a 22.5 acre parcel of real property that Robert and his family had lived on for over 30 years. Complaint (CP 298, 302-303, 301-304); Declaration of Robert E. Tuttle, Jr (CP 185-238); Robert's Summary Judgment Briefs (CP 239-249; CP 172-177). Title to the property claimed by Robert was held in the name of the Tuttle Family Limited Partnership. (CP 298, ¶ 2.1). The complaint sought judgment quieting title in Robert to this 22.5 acre parcel. (CP 298, ¶ 2.1; CP 299, ¶ 1; CP 303-304).

The lawsuit also involved claims against Robert's sister, Patricia Hicklin, and her husband, acting individually or under purported authority from her mother, Anita Tuttle. It also requested an accounting and potential declaratory relief and/or damages with respect to the management and operation of the Tuttle Family Limited Partnership and the Robert Tuttle, Sr. Testamentary Trust.

### II. Issues/Claims That Are Not the Subject of This Appeal.

The primary subject of this appeal is the trial court's determination that Robert's title claim is barred by the doctrine of res

judicata (claim preclusion). Robert also seeks to preserve his claim against Patricia and Sydney Hickin, and the entities they represented, for trespass and wrongful logging of his property in 2011. Robert has elected not to appeal the trial court's dismissal of claims related to the actions of Anita Tuttle, as General Partner of the Tuttle Family Limited Partnership, but does appeal the trial court's dismissal of claims in relation to the trust to the extent that trial court dismissed these claims on the basis of res judicata, and appeals the award of attorney fees to the trust.

### **III. Factual Background.**

In 1974, as a single man, Robert purchased 40 acres of timberland adjacent to an approximately 300 acre timber "farm" that his parents owned in the "West End" of rural Clallam County. In 1980, he cleared a five-plus acre area on the property to be used as a future home site. He then constructed a "stick built" shop type building to live in. In 1983, now a married man, he bought a mobile home and moved it onto the property. He made improvements including water, septic, electrical, phone and cable. In August, 1983, he and his wife moved into the mobile home on the property. In February, 1990, they built a new home on the property. They have lived there and raised a family of three daughters ever since.

In 1986, Robert encountered financial problems and the property, which secured a line of credit for his business, was subject to foreclosure.

(CP 187-88). Robert made an agreement with his parents to help buy the property for him at the foreclosure sale. Robert put up more than half the purchase price (\$28,000 out of \$54,155<sup>1</sup>) and had an agreement with his parents to work the land and his parents' adjacent land to pay off the remaining amount. (CP 187-88). Following the sale, title was in the name of his parents. Robert and his family continued to use, improve, log, pay real property taxes, and live on the property following the trustees sale, and do so to this day. For over 30 years they have used and occupied this property as their own. Additional facts regarding the historical use of the property are set forth in Robert's Declaration at CP 185-190.

Because Robert's parents owned over 300 acres of forest land, they created a complex estate plan to attempt to avoid estate taxes. Their plan involved a testamentary trust for Robert Tuttle, Sr., and a family limited partnership. Following the death of Robert's father in 1999, the property was made part of a large lot subdivision created by Robert's mother as part of her estate plan. (CP 190). There continued to be no interference with Robert's exclusive use of this property until 2010 when Robert's sister, Patricia Hicklin, began taking over management of their mother's affairs. *Id.* At that time, Robert noticed timber cutters on a portion of the property. He confronted them and they left. (CP 190). A year

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<sup>1</sup> The trial court erred in stating that purchase price at the trustee's sale was \$65,000. (CP 132). It was \$54,155. (CP 188).

later a different logger returned and logged a portion of the property. Discovery has shown that this logging was authorized under a DNR permit obtained by Patricia Hicklin, acting under the purported authority of a power of attorney for her mother. (CP 190). The logging was managed by her husband, Sydney Hicklin. (CP 190-191, 214-226 (Exhibits D-F)). The 2011 logging was the first and only time there was ever any interruption or infringement on Robert's exclusive use of the property to which he claims title.

Robert and his siblings realized they needed to clarify ownership of the property. Robert brought this action to quiet title in his land and home. (CP 296). Robert also named as defendants the multiple entities and trusts created by his parents' lawyers and also the individuals who had been managing - or possibly mismanaging - those entities and trusts. Robert considered all of these parties to be necessary parties due to the complexity of his parents' estate plan and the danger of leaving out a liable party.

#### **IV. Trial Court Proceedings in this Cause and the Partnership's 2014 case.**

In 2013, Robert's mother, Anita Tuttle died, and Robert filed a timely creditor's claim against her estate, which included a claim of title to the real property he and his family lived on, title to which was now held in the name of the Tuttle Family Limited Partnership. (CP 301).

Subsequent to Robert's complaint, his nephew, Eric Anderson, learned that he had been identified as the successor general partner of the Tuttle Family Limited Partnership, one of his parents' estate planning entities. As general partner, Eric filed a different lawsuit (Clallam County Superior Court cause 14-2-00463-2) naming all of the other defendants that Robert had named in Robert's lawsuit. However, Robert was not named a party to this subsequent lawsuit (hereinafter "2014 case") or provided a copy of the lawsuit papers. Because Robert's primary interest concerned ownership of his land and home, which was already the subject of his existing lawsuit, Robert did not seek to intervene in that lawsuit.

In the Family Limited Partnership's 2014 case, it is said that the trial court ruled that the Partnership had failed to timely file a creditor's claim and dismissed the lawsuit as untimely. (CP 310, 313). Thus the 2014 case never reached the merits of the underlying claims in that action. Robert's title claims were never part of that action.

After the judgment in the 2014 case, some Defendants – the Estate of Anita Tuttle (acting through its attorney, Patrick Irwin) and Patricia Hicklin, individually, and as co-trustee of the Robert Sr. Testamentary trust (represented by attorney, Shane Seaman) – brought motions for summary judgment dismissal of Robert's claims, including his title claim. (CP 250, CP 263). The motions were based, in part, on a claim

of res judicata as a result of a decision reached in the 2014 case. In its argument in support of summary judgment, the Estate asked the Court to take judicial notice of documents in the file in the 2014 case. (CP 267). Despite demand by Robert's attorney that these documents be identified and made a part of the record in the instant case (CP 177), they were not made a part of the record and copies were never provided to Robert's attorney.<sup>2</sup>

In its motion for summary judgment, the Estate made brief mention of res judicata as a potential bar to Robert's claims based on the dismissal of the FLP's action in the 2014 case. (CP 268-69). However, the Estate only made this argument in relation to the dismissal in the 2014 case of the FLP's claims for an accounting and breach of fiduciary duties. See Estate's Motion for Summary Judgment (CP 263 at 268). Significantly, in this case the Estate made no claim of res judicata, based upon the 2014 case, in relation to Robert's title claim. (CP 268-269). Nevertheless, the trial court concluded that res judicata, based on the 2014 case dismissal, should be applied not only to claims that were dismissed in

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<sup>2</sup> The trial court later noted that it had only reviewed three documents from the 2014 case in reaching his decision, the Complaint and the two Orders granting summary judgment (CP 79). Although these documents were never filed as part of the record in this case or copies provided to Robert's attorney, they have now been designated by Robert, at Appellant, and submitted as part of the Clerk's Papers for this appeal. (See CP 310, 313 and 325).

the 2014 case but also to Robert's title claim. He concluded that "[a]ll of Plaintiff's claims, including his claim to the subject property, were either directly litigated by the FLP's suit against the Defendants, under *Tuttle Family Limited Partnership v. Estate of Anita D. Tuttle, et al.*, Clallam County Superior Court Cause No. 14-2-00463-2, or was so related to the subject matter that it should have been raised in the other suit.

Memorandum Opinion (CP 132, 143-144); Conclusion of Law 5, (CP 100).

The Defendants then asked for an attorney fee award, which the trial judge granted, in part.

Robert appeals these decisions.

### **Argument**

#### **I. The Estate and the Hicklins did not have Standing to contest Robert's Title Claim Against the FLP.**

Roberts Tuttle, Jr's claim to quiet title to the real property that he had lived on since 1981 was not a claim against the Estate. Nor was it a claim against Patricia Hicklin, in any capacity.

At the top of page 5 of the Estate's Answer to the Plaintiff's Complaint, the Estate agreed that title to the disputed property was held in the name of the Tuttle Family Limited Partnership. (CP 286). The same admission was made in the last sentence of paragraph 2.1 of the Answer of Defendant Hicklin. (CP 293). While the historical basis for Robert's title

claim rests, in part, in actions that were taken and agreements that were made while his parents were living, the Estate conceded that “title to this property was not included in the Estate of Anita Tuttle.” Estate’s Motion for Summary Judgment (CP 263 at 277). Accordingly, neither the Estate nor Hicklin had standing to contest Robert’s position on this issue.

As the undisputed holder of recorded title to the property claimed by Robert, it was the Tuttle Family Limited Partnership that was the real party in interest with respect to this claim. It was up to the FLP to contest Robert’s title claim, should it chose to do so. Eric Anderson, the grandson of Robert Sr. and Anita Tuttle, and now the General Partner of the FLP, has not joined in the position of the Estate or the Hicklins on this issue.

A claim made in a quiet title action must rest on the strength of the claimant’s own title. *Bavand v. OneWest Bank*, 176 Wn. App. 475, 502, 309 P.3d 649 (2013). Here, neither the Estate nor Patricia Hicklin, personally, have any claim of title to the real property at issue. The doctrine of standing prohibits a party from asserting another person’s legal right. *Haberman v. WPPSS*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *appeal dismissed*, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988); *Miller v. U.S. Bank*, 72 Wn. App. 416, 424, 865 P.2d 536 (1994). Not being able to defend this claim on the strength of its own title, the Estate as well as Hicklin – in any of her capacity’s – were both without standing

to bring a summary judgment motion on the question of Robert's claim of title to a portion of the land held by the FLP. *See Timberlane Homeowner's Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995) (holding homeowner's association lacked standing to bring action to enforce its members easement rights to a common area since it was not the owner of those easement rights).

In the end, it appears that the Estate has agreed with this position. As stated in the final paragraph of its Rebuttal Brief in the trial court: "the Estate of Anita D. Tuttle incorporates by reference all arguments made in its Motion for Summary Judgment *with the admission that the Estate has no standing regarding any claims between Robert, Jr. and the Tuttle FLP.*" (CP 183 (emphasis added)). The significance of this admission on appeal relates to the trial court's award of attorney's fees to the Estate as well as the Estate's right to contest Robert's claim of title at all on appeal. *See also* CP 172-73.

**II. None of the elements required for res judicata are present in the instant case.**

The principles underlying the application of the doctrine of res judicata are stated in *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 680, 319 P.3d 868 (2014):

Whether res judicata bars an action is a question of law we review de novo. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005). Res judicata is a doctrine

of claim preclusion. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). It bars the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). The person asserting the defense of res judicata bears the burden of proof. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). “The threshold requirement of res judicata is a final judgment on the merits in the prior suit.” *Hisle*, 151 Wn.2d at 865. “Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and ‘the quality of the persons for or against whom the claim is made.’” *Hisle*, 151 Wn.2d at 865-66 (quoting *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

179 Wn. App. at 680; *see also* 14A Teglund, Washington Practice, §§ 35:20 *et seq.* (2009) (hereafter “Teglund”). In order for claim preclusion to exist there must first be a “final judgment on the merits.” *Pederson v. Potter*, 103 Wn. App. 62, 70, 11 P.3d 833 (2000). The analysis of whether there has been a final judgment on the merits is made on a case by case basis and determined by whether the status of the action was such that the parties might have had their suit finally disposed of, if properly presented and managed. *Id.*

- A. Res Judicata based upon the Court’s dismissal of the FLP’s claims in the 2014 case, is not applicable to Robert’s title claims in this lawsuit, because the 2014 case did not include a final judgment on the merits, let alone any final judgment with respect to Robert’s title claims.**

Res judicata precludes parties from re-litigating claims resolved by the court in a previous case. Teglund, *supra* § 35.20 at 508. The

doctrine is designed to prevent repetitive litigation of the same matters between the same parties. *Id.*, § 35.21 at 510. The doctrine preserves the integrity of the legal system; provides finality with regard to the subject of the litigation, and allow persons to carry on with their affairs in reliance of a final decision properly entered. *Id.* In order for a judgment to be “on the merits” and thereby have potential preclusive effect, the first and second proceedings must be 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. *Id.*, § 35.24 at 521. It is only after all four of these requirements are satisfied, that the doctrine provides that “all matters that were considered or could have been considered in the prior action, as part of the same claim or cause of action, merge with the judgment and cannot be the basis for a later action.” *Id.*, § 35.24 at 522.

The dismissal of the 2014 case for failure to file a timely creditor’s claims, in a lawsuit which did not involve Robert’s title claims, was not a dismissal “on the merits” with respect to that claim.

**B. The subject matter of the 2014 case, which was based upon claims for mismanagement of the FLP, does not provide a basis for applying res judicata to preclude Robert’s title claims in this case.**

In its decision, the trial court disclosed for the first time that it

considered only three documents from the 2014 case (although copies were never provided): the complaint and the two orders granting summary judgment. (CP 79; complaint at CP 315-320; dismissal orders at CP 310, 313). The first dismissal order related only to claims against the Estate and Patricia Hicklin, as personal representative (CP 310). The second order simply stated that the motion of the defendants, the Trust and the Hicklins, for “summary dismissal of Plaintiff’ claims” was granted and the claims were dismissed with prejudice. CP 314. In order to determine the claims that were dismissed, however, it is necessary to refer to the complaint. Despite the fact that the caption named the Trust and the Estate, as well as the FLP, as defendants, a reading of the complaint shows that there was no claim made against the trust or with respect to activities involving the trust. (CP 315). Rather, the subject of the lawsuit related only to the management of the FLP. (CP 317-320). The relief sought was an accounting of the activities of the defendants in relation to the FLP, and potential damages for mismanagement of the FLP. (CP 320). This made sense since the plaintiff was the successor general partner of the FLP . The only claim against the Hicklins was in relation to Patricia’s alleged management of the FLP, but not otherwise. The prayer for relief did not involve the trust or the Hicklins except for their potential involvement with the FLP. There were no claims made with regard to Robert’s title.

The trial court erroneously dismissed Robert's claims against the Hicklins and the Testamentary Trust on the basis of issue preclusion flowing from the dismissal of the complaint in the 2014 case. The trial court erred because the complaint reveals that the claims in that case related only to management of the FLP. The trial court's decision applying res judicata to Robert's claims against the trust and his judgment awarding attorney's fees in favor of the trust (CP 76-77) must be set aside. The claims dismissed in the 2014 case did not involve the trust.

**C. The claims made in the 2014 lawsuit had no relationship to Robert's title claim.**

The claims in the 2014 lawsuit were strictly between the FLP and the Tuttle Estate and the Hicklins. (CP 315). The causes of action included claims for conversion, breach of fiduciary duties and an accounting. (CP 320). Robert's title claims or the facts relevant thereto – already the subject of a previously file lawsuit – were not included in the 2014 lawsuit in any fashion.

**D. Robert was not a party to the 2014 lawsuit and his title interests were not represented in that action.**

“Identity of parties” in both cases is a prerequisite for application of res judicata. *Thompson v. King Cnty.*, 163 Wn. App. 184, 192, 259 P.3d 1138 (2011) (citation omitted); *see also Cook v. Brateng*, 180 Wn. App. 368, 373, 321 P.3d 1255 (2014) (“Res judicata, or claim preclusion,

prohibits the same parties from litigating a second lawsuit on the same claim or any other claim that could have been, but was not, raised in the first suit.” (citing *Roberson v. Perez*, 156 Wn.2d 33, 41 n. 7, 123 P.3d 844 (2005))).

Robert was neither named nor subsequently added as a party to the 2014 case. (CP 124). Neither he nor his attorney were ever served with copies of any of the documents filed in that case. *Id.* There was never any indication that the subject matter of the 2014 case involved or was intended to involve Robert’s title claims. *Id.*

**E. There was insufficient “identity of persons” and “quality of parties” between Robert (in his title claims against the FLP) and the FLP (in its claims against the Estate and other defendants) in order for res judicata to preclude Robert’s pursuit of his lawsuit.**

A key element in considering the application of claim preclusion is whether there is an identity of parties in both lawsuits. Traditionally, it has been said that claim preclusion prohibits the same parties from litigating a second lawsuit on the same claim. *See Cook v. Brateng*, 180 Wn. App. 368, 373, 321 P.3d 1255 (2014) (“Res judicata, or claim preclusion, *prohibits the same parties* from litigating a second lawsuit on the same claim or any other claim that could have been but was not raised in the first suit.” (emphasis added)).

A similar requirement for the applicability of res judicata is that

there be the same “quality of persons for or against whom a claim is made” in order for the second to be bound by a decision involving the first. *See Tegland, supra*, § 35.26 at 553-34.

Here, the trial court found that Robert was bound by the dismissal of the FLP’s claims against the Estate in the 2014 case, a lawsuit in which he was not a party, and that he was therefore precluded from pursuing his title claims in his previously filed action. (CP 315). But there is a significant difference between Robert being bound by the dismissal of the FLP’s claims made on behalf of itself and its limited partners (claims related to mismanagement and breach of fiduciary duty), and Robert’s title claims against the FLP.

Res judicata is intended to prevent the same party from taking a “second bite out of the apple” against the same defendant on the same claim or a claim that could have been raised but was not. As to his title claims, Robert and the FLP were not the “same party” and the FLP certainly did not or could not represent Robert’s title interests against itself. Indeed, with respect to Robert’s title claims, Robert and the FLP are opposing parties. It is the FLP that holds title to the property that Robert claims is his. (CP 298, para 2.1).

**F. Robert was not “in privity” with the FLP for the purpose of his title claim because his title claim was against it. There was no “identity of parties” between the FLP and Robert on this issue.**

The “quality of persons” element of res judicata addresses the issue of who is bound by the first judgment. Tegland, *supra*, § 35.27 at 534. In order to be bound, the party must generally be “in privity” with the first party, meaning the second party is a successor to the same rights that the first party had. *Id.* Here, the trial court erroneously concluded that there was “privity” or the same “quality of persons” between Robert and the FLP solely on the basis that Robert held a fractional limited partnership interest. (CP 144). That limited partnership interest did not create a “privity” between Robert and the FLP when it came to his title claim. The interests of Robert and the FLP clearly diverged on the issue of Robert’s title. In its initial Memorandum Opinion, the trial court concluded that Robert was a party to the FLP’s 2014 lawsuit because he was a limited partner. (CP 140-141). The trial court concluded that Robert and the FLP were therefore “in privity” for the purpose of applying res judicata. The court held:

Here, Robert, Jr. and FLP are “substantially the same” party. Robert, Jr., as a limited partner was before the court in 14-2-00463-2, FLP’s action against the estate for, *inter alia*, an accounting of assets and distributions and claims for breach of fiduciary duty.

(CP 140-41). Although Robert did hold a minority interest in the FLP, that

does not mean that he and the FLP were “in privity” or the same “party” with respect to Robert’s title claim. First and foremost, this is because Robert’s title claim was against the FLP. It is clear that the FLP could not represent Robert’s interests in the title claim and defend itself against those claims at the same time. The FLP did not and could not represent Robert’s interests in the 2014 case with respect to the title issue.

**G. Robert was not obligated to litigate his title issue in the 2014 case.**

Recognizing the conflict between Robert and the FLP with regard to Robert’s title claim, the trial court held in its initial Memorandum

Opinion:

To the extent that Robert, Jr.’s and the FLP interests diverged on the ownership of the subject property, Robert, Jr. could have, and should have litigated that issue in 14-2-00463-2.

(CP 143). There is no reasoned analysis for this conclusion. First, it is unclear how Robert could have done this when he wasn’t a party to the 2014 lawsuit and neither he nor his attorney were ever served or provided a copy of any of the documents filed in that lawsuit. (CP 124). Even if they had been provided a copy, subsequent review of the Complaint and well as the two judgments in the 2014 case later identified by by the trial court as the basis for its decision res judicata holding in this case, (CP 79), shows that Robert’s title issue was never addressed by any of the parties in

the 2014 case. In addition, Robert's title claim was already the subject of his pending 2013 case.

Presumably, the trial court was saying that Robert should have moved to intervene in the 2014 lawsuit.<sup>3</sup> But the title issue was already the subject of an existing lawsuit which involved the same parties in interest. Even if Robert had been made a party to the 2014 case, he would not have been required to raise his already existing title claims again, in that cause.

CR 13(a) deals with compulsory counterclaims. It has the same purpose as the doctrine of res judicata; that is to promote the efficient litigation of cases and avoid a multiplicity of lawsuits. CR 13(a) requires a pleader to state, as a counterclaim, any claim the pleader has against an opposing party if it arises out of the same transaction or occurrence. But this requirement is qualified by the following language: "But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action..."

Even if Robert had been a named party to the 2014 case, under CR 13(a) he would not have been required to bring before the court in that case his claims filed in his previous 2013 action. That being true, he cannot be barred by res judicata from pursuing these claims.<sup>4</sup>

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<sup>3</sup> In a later Memorandum Opinion, the trial court framed the issue as whether Robert had an "affirmative duty to engage the title issue of the subject property in some capacity" (CP 122, Memo Op. at 4).

<sup>4</sup> That is not to say that one of the parties could not have moved or the

**H. The trial court erroneously gave preclusive effect to a subsequently filed action.**

In the trial court, Robert cited the case of *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 319 P.3d 868 (2014), for the proposition that res judicata could not be applied to give preclusive effect to a judgment entered in a subsequently filed action. See Motion for Reconsideration or, in the Alternative, Clarification (CP 126-29).

In *Jumamil*, the plaintiff, a terminated employee, filed a lawsuit against her employer, Lakeside Casino, LLC, together with the LLC's "corporate" manager, Noel Coon, and the Casino's poker floor manager, Doug West, claiming wrongful wage withholding and rebating. Prior to trial, the trial court dismissed her claims against Coon and West. Following trial and entry of a judgment against the Casino, the Casino filed bankruptcy. Jumamil timely appealed dismissal of her claims against Coon and West. She thereafter filed a new, separate lawsuit against the Casino's manager, Jack Newton. While the appeal of the first case was pending, Jamamil settled the second lawsuit against Newton.

On appeal, Coon and West argued that the settlement of the second lawsuit by Newton barred her further pursuit of her claims against Coon and West under the doctrine of res judicata. The appellate court

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court could not have ordered consolidation of the two cases under CR 42. But that issue was never raised and, in particular, never raised by the persons or entities that were parties to both of the cases.

ruled that her claims against Coon and West, brought in the first lawsuit, could not be barred by the settlement in the second lawsuit even though the claims were the same and arose out of the same set of facts, because the doctrine of res judicata only gives preclusive effect to a resolution reached in a *prior* action. In *Jumamil*, West and Coon were trying to give preclusive effect to the subsequently filed, second lawsuit against Newton. The Court ruled that “because the claims against West and Coon were not subsequent to the claim against Newton, Jumamil’s wage claims against West and Coon are not barred by res judicata.” 179 Wn. App. at 680. Seeing the issue as a question of law, the Court described res judicata as a rule which “bars the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action,” stating “[t]he *threshold requirement* of res judicata is a final judgment on the merits *in the prior suit*. 179 Wn. App. at 680-81 (emphasis added); *see also Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 856, 865, 93 P.3d 108 (2004).

It is only after “that threshold is met” that the Court determines whether the required elements of “sameness of subject matter, cause of action, people and parties,” and “the quality of the person for or against whom the claim is made” is determined. *Jamamil*, 179 Wn. App. at 680-81. As stated by the court, “Because res judicata “prevents the relitigation of claims from a *prior* action [court’s emphasis] and “because there was

no other action prior to Jamamil's claims against West and Coon, res judicata does not bar Jamamil's wage claims against West and Coon." 179 Wn. App. at 681.

Here, the trial court rejected the approach of the Washington Appellate Court in *Jumamil* and declared that he would, instead, follow federal precedent, citing *American Fabrics, Inc. v. L&L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985), for the proposition that the determination as to whether a judgment may have preclusive effect is based upon the first judgment to be entered and not the first case to be filed. Memorandum Opinion On Reconsideration, (CP 119-21).

In the case at bar, Robert Tuttle, Jr. timely filed his lawsuit (cause no. 13-2-01120-7). This lawsuit preceded the subsequent lawsuit filed by the Tuttle Family Limited Partnership (FLP) under cause 14-2-00463-2. It would be ironic if the dismissal on procedural grounds of the subsequently filed "untimely" lawsuit could preclude Robert's ability to pursue his previously filed timely action. This is particularly true where the basis for the dismissal of the second lawsuit was lack of timeliness. Such an application of res judicata creates a catch-22.

Whatever the future holds in terms of Washington law on the applicability of res judicata on the basis of which lawsuit was filed first or which judgment was entered first, in the context of this case, the judgment

dismissing, on procedural grounds, the subsequently filed lawsuit should not be given preclusive effect where Robert did everything in a timely fashion. This is not the case to overturn existing Washington precedent on this issue.

**III. Robert's trespass and wrongful logging claims against the Hicklins should be allowed to go forward.**

In their summary judgment motion, the Hicklins moved to dismiss all of Robert's claims against them, alleging, in part, that Robert's Complaint "fails to state with any specificity what Hicklin ... did that allegedly caused damage" and "Tuttle does not allege any specific acts by the community of Patricia Hicklin and Sidney Hicklin, husband and wife." (CP 250, 253). Hicklins asked that Robert's complaint against he community of Patricia Hicklin and Sidney Hicklin "be dismissed for failure to state a claim." (CP 253). At that point the Hicklins had conducted no discovery. (CP 158). In his Declaration in response, Robert set forth compelling evidence that it was the Hicklins, possibly acting under the purported authority of a power of attorney from Anita Tuttle, who had caused a portion of his property to be logged in 2011. (CP 185, 190-91); Exhibits D, E and F (CP 214-226). He stated:

There has been and was absolutely no interference with our exclusive use of this property until 2010 when I believe Patricia Hicklin began taking over management of my mother's affairs. In 2010 I noticed timber cutters on a portion of my property (in an area which is now part of the 22.5

acres). I did not know what they were doing there and I told them to get off. They did and they did not come back. Approximately a year later I learned that a different logger had been hired to take trees off what I considered to be our property. I suspected Patricia Hicklin was involved with this. Attached hereto as Exhibit D is a copy of an Application, Checklist and Notice of Decision (cutting permit) from DNR issued 11/24/2010 and good for one year (which we have obtained, among other documents, from DNR). I believe this is the permit used for the logging in 2011. On the Application, the contact person listed is "Sid Hicklin," Patricia's husband. The logger was Darren Dachs. In 2011, DNR issued a violation notice and a "Notice to Comply" with re-seeding requirements that were part of the permit. See Exhibit E dated 11-30-2011. Subsequently, notes from an informal conference with DNR show a resolution for this violation was reached. The conference notes were signed (at the bottom/middle) by "Patti Hicklin" with a notation "Power of Attorney" documentation. See Exhibit F dated 12/20/11. This logging in 2011 was the first and only time there has been any infringement on our exclusive use of what we believe to be our property.

(CP 190-91 (exhibits D, E, and F incorporated by reference)).

In an abundance of caution, Robert also moved to amend his complaint to further elucidate this claim. (CP 157-65). The Defendants' motions to dismiss were heard by the trial court before Robert's motion to amend. The trial court's Order is framed as a dismissal of all of Robert's claims against the Hicklins. (CP 92, 95). This could be read to include Robert's trespass claim, which is still dependent upon the success of his title claim. On appeal here, he challenges the trial court's dismissal of his trespass claim in conjunction with the dismissal of his title claims and the

award of attorney's fees to the Estate and to the Hicklins on this basis.

**IV. The trial court's award of attorney's fees, based upon an erroneous decision, must be reversed.**

The trial court entered an order awarding the Hicklins, personally, and Patricia Hicklin, as co-trustee, \$17,185.00 in attorneys fees to be paid by Robert E Tuttle. (CP 85-86). The trial court did not apportion this award. *Id.* The trial court did not award fees to the Trust. *Id.* The Court also entered a subsequent Order awarding the Estate \$14,977.07 in attorney fees against Robert. See Supplemental Notice of Appeal, (CP 07) and Order Re: Attorney Fees, (CP 09). The court provided no rationale as to how either fee award was calculated. Robert also filed a motion for an award of attorney's fees, conditioned on his successful appeal of the trial court's ruling in this matter. (CP 111). The fee awards and Robert's request were made under RCW 11.96A.150 (a provision in TEDRA).

Robert challenges the trial court's decision in several respects on appeal, particularly related to the trial court's application of res judicata as a bar to Robert's claims. The standard for review of a trial court's award of attorney's fees under RCW 11.96A.150 is abuse of discretion which means that the appellate court will uphold the award unless it is "manifestly unreasonable" or "based on untenable grounds or reasons." *Bale v. Allison*, 173 Wn. App. 435, 294 P.3d 789 (2013). Should Robert be successful on appeal and the trial court is reversed, the basis for the award of attorney's

fees to the Estate and to Hicklin, as prevailing parties, would no longer be tenable. At the same time, the denial of an award of attorney's fees to Robert in the trial court would no longer stand and remand would be necessary for determination on this request. Finally, if successful on appeal, Robert requests the appellate court to award attorney's fees in his favor under RCW 11.96A.150 and related authorities under that statute.<sup>5</sup>

### Conclusion

The trial court misapplied res judicata to bar Robert's title claims and trespass claims in this action. This Court must reverse the trial court's res judicata holding, and remand the case to resolve these issues on their merits.

In addition, since the trial court's award of attorney fees was based entirely on the erroneous res judicata ruling, this Court must reverse the trial court's awarding fees, and award Robert his fees for this appeal.

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<sup>5</sup> *Arguendo*, even if the trial court did properly apply res judicata to dismiss this case, the unique issues in this case preclude an attorney fee award. See *In re Estate of Burks*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004) (holding that a court may decline to award attorney fees under RCW 11.96A.150 when the case raised unique issues); accord *In re Estate of D'Agosto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (holding a fee award to either party was unwarranted due to novel issues of statutory construction).

Respectfully submitted this 30<sup>th</sup> day of January, 2017,

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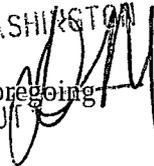
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I certify that on January 30, 2017, I sent a copy of the foregoing document by mail to:

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