

NO. 349195

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

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PAUL A. SCHOLZ,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

CARL P. WARRING  
Assistant Attorney General  
WSBA #27164  
1116 W. Riverside, Suite 100  
Spokane, Washington 99201  
(509) 456-3123  
OID #91106

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## I. INTRODUCTION

In 2014, a labor arbitrator determined that Commercial Vehicle Enforcement Officer Paul Scholz lied to his employer, the Washington State Patrol, during an investigation. The arbitrator determined that Scholz lied in an attempt to minimize his role in causing a 2012 multi-car accident on I-90. In reaching the determination that Scholz lied, the arbitrator expressly rejected Scholz's contention that Post-Traumatic Stress Disorder or anxiety caused his untruthfulness. Based upon these determinations, the arbitrator concluded that the Patrol had just cause for discharging Scholz for violating various Patrol policies, including the policy on Untruthfulness.

The arbitrator's determinations collaterally estop Scholz from pursuing his 2015 superior court disability discrimination claim. In order to succeed on a disability discrimination claim, Scholz is required to establish that a disability was a substantial factor in his discharge. He cannot do so in light of the arbitrator's determinations that: (1) Scholz lied; (2) Scholz's lies were not the result of Post-Traumatic Stress Disorder or Anxiety; and (3) the Patrol had just cause for discharging Scholz for violating policies, including the policy on Untruthfulness. Thus, this Court

should affirm the trial court's order granting the Patrol's motion for summary judgment.<sup>1</sup>

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

The Honorable Frances Chmelewski of the Kittitas County Superior Court properly granted the Washington State Patrol's motion for summary judgment on Paul Scholz's disability discrimination and breach of an implied contract claims. Therefore, the Patrol makes no assignment of error.

### B. Issue Pertaining To Appellant's Assignments Of Error

Do the Arbitrator's determinations that: (1) Scholz lied; (2) Scholz's lies were not caused by Post-Traumatic Stress Disorder or anxiety; and (3) the Patrol had just cause for discharging Scholz for Untruthfulness collaterally estop Scholz's disability discrimination claim?

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<sup>1</sup> Scholz has pleaded a cause of action for the breach of an implied contract. CP at 4-5. The Patrol sought dismissal of the implied contract claim because a collective bargaining agreement provided the complete, express and exclusive terms of Scholz's employment. CP at 17-18, 105; *see Hibbert v. Centennial Villas, Inc.*, 56 Wn. App. 889, 892, 786 P.2d 309 (1990). The superior court's order granting summary judgment dismissed all of Scholz's claims in their entirety, not just his disability discrimination claim. CP at 127. In this appeal, Scholz has failed to argue any error related to the dismissal of his breach of an implied contract theory.

### III. STATEMENT OF THE CASE

#### A. Statement of Facts: Scholz's 2013 Termination And 2014 Arbitration Proceedings

On January 19, 2012, Commercial Vehicle Enforcement Officer Paul Scholz was involved in a multi-vehicle accident on Interstate 90. CP at 2, 26. After investigating the accident, the Patrol determined that Scholz's conduct was a cause of the accident and that Scholz violated four separate Patrol policies, including one related to being untruthful. CP at 67-68. The Patrol terminated Scholz's employment. CP 67-68. Scholz challenged the Patrol's decision pursuant to a collective bargaining agreement's grievance and arbitration procedures. *See* CP at 26, 77-86, 119-25.

On June 17, 2014, Sandra Smith Gangle, J.D., commenced a four-day arbitration hearing to determine whether the Patrol had just cause to fire Paul Scholz for untruthfulness and other violations of Patrol Rules of Conduct. CP at 1-2. Assistant Attorneys General Susan DanPullo and Kari Hanson represented the Patrol. CP at 27. Jacob Fox Metzger, union representative and licensed attorney represented the Union and Scholz.<sup>2</sup> CP at 27. No party objected to the substantive or procedural arbitrability of the grievance. CP at 27. The Patrol carried the burden of proof and presented its case first. CP at

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<sup>2</sup> Metzger has been licensed to practice law in the State of Washington since 2007. *See* [https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr\\_ID=39211](https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=39211).

27, 48. The Patrol called ten witnesses. CP at 27-28. Scholz called three witnesses, one of whom was Scholz's treating psychologist, Dr. James Cole. CP at 28. All the witnesses were placed under oath and subject to cross-examination. CP at 27. The Patrol offered 21 exhibits and the Union offered 9 exhibits. CP at 28. The parties made their final arguments by written briefs following the four day evidentiary hearing. CP at 28.

Ultimately, the arbitrator concluded, under a clear and convincing standard of proof, that just cause supported the Patrol's decision to terminate Scholz's employment. CP at 48, 64. A determination of "just cause" required the arbitrator to consider four factors; one of those factors was whether Scholz had engaged in the misconduct with which he was charged. CP at 48. The arbitrator expressly found that Scholz, "... knowingly and intentionally lied to his superiors during the OPS investigation in an attempt to minimize his role in causing an unsafe condition to exist on I-90 on January 19, 2012." CP at 64; *see also* CP at 57-60. More specifically, the arbitrator found that Scholz's, "... role in parking in Lane 1 and then flagging down the Garcia truck in Lane 2 was clearly a precipitating factor, which the Grievant intentionally denied." CP at 64.

At the arbitration, Scholz claimed that, "... the traumatic event [the accident] caused him to be unclear or mistaken in his explanations about what had happened." CP at 43. Scholz presented testimony from psychologist

James Cole to support his claim that he misrepresented events because of psychological trauma. CP at 44, 55-56. Dr. Cole testified that Scholz suffered from an acute anxiety disorder as a result of the traumatic event, which could have affected Scholz's ability to perceive and communicate about the event. CP at 44, 55-56.<sup>3</sup> The arbitrator expressly rejected Scholz's contention that psychological trauma excused his untruthfulness:

Having weighed all the evidence, the arbitrator concludes that the Grievant was not deceptive when he talked with other officers at the scene of the incident. He candidly pointed out where he had parked the patrol vehicle before it was hit by the Moore truck and he admitted he had flagged the Flores-Garcia truck to stop or slow down. He also told those officers, as well as an EMT, that he felt fine and did not need any medical treatment. He was aware that he could ask to see Dr. Clark, WSP Psychologist, if he felt unable to cope with his feelings and needed emotional support, but he did not request that. Other troopers did not refer him to Dr. Clark, because he had not been in his vehicle when it was hit.

The Grievant [Scholz] did not tell the truth, however, when he told Sgt. Overbay, two hours later, that he had parked on the shoulder behind the Stigner vehicle. He also denied having flagged the Flores-Garcia vehicle. Both of those denials had been overheard by Trooper Sackman and CVEO Henry, and all of them testified credibly.

Nevertheless, in fair consideration of the opinion given by Dr. Cole at the hearing, the arbitrator concludes it was possible Scholz was still suffering from emotional trauma and confusion during the meeting at the scale house. It is possible that his memory was unintentionally inaccurate or he

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<sup>3</sup> Dr. Cole would have diagnosed Scholz with Post-Traumatic Stress Disorder, but Scholz's symptoms abated before that diagnosis would have been appropriate. CP at 45.

misspoke because of a life-long communication difficulty that became aggravated at that time because of stress.

Clearly, however, the Grievant [Scholz] was no longer suffering from the stress of the incident on May 31, 2012, when he was interviewed by Sgt. Gundermann and Sgt. Tina Martin. Dr. Cole had released him as a patient at least two months earlier without diagnosing long-term PTSD, because the Grievant's symptoms had ended within 30 days of the January 19 incident. In spite of the passage of time and the improvement in his emotional condition, however, Scholz seemed to dig in his heels and defend the inaccurate statements he had made to Sgt. Overbay on January 19, though he had had ample opportunity to reflect about the events and explain the entire incident truthfully to the interviewers.

CP at 56-58, *see also* CP at 58-60 (discussing inaccuracies by Scholz well after his symptoms resolved). The arbitrator's ultimate conclusion, upholding Scholz's termination, was:

Based upon the totality of the evidence, the arbitrator finds that the Employer's decision that the Grievant's version of the facts was still untruthful was justified. They concluded he had spoken with Flores-Garcia about his speed and that that constituted speed enforcement. Also, he violated the policy requiring satisfactory performance by parking in Lane 1 and then stopping the Garcia truck in Lane 2, which had effectively blocked the entire highway and created an unsafe condition for oncoming traffic. The arbitrator finds the evidence clearly and convincingly supports these conclusions.

CP at 60.

**B. Procedural Posture: Scholz's 2015 Superior Court Lawsuit**

On October 19, 2015, Scholz commenced a suit against the Patrol in the Kittitas County Superior Court. CP at 1. Scholz claimed that his

termination from the Patrol constituted disability discrimination under the Washington Law Against Discrimination. CP at 4. As a factual predicate, Scholz described that the January 19, 2012, multi-car accident caused him to suffer from post-traumatic stress disorder, which caused him to be inaccurate in his description of the event to the Patrol. CP at 3-4. In short, Scholz pleaded he could not be held accountable for his untruthful statements regarding the accident because he was suffering from a disability that caused him to be untruthful. CP at 3-4.

On August 25, 2016, the Patrol moved for summary judgment. CP at 7-13. The Patrol argued that collateral estoppel, based upon the findings and conclusions of the 2014 arbitration, precluded Scholz's disability discrimination claim because the nucleus of facts underlying that claim had been definitively determined in Scholz's arbitration, and, consequently, there was no remaining factual ground for a discrimination claim. CP at 7-13. Ultimately, the Kittitas County Superior Court agreed with the Patrol and dismissed Scholz's claims. CP at 128-29. Scholz sought reconsideration. CP at 130. The Court denied Scholz's motion and Scholz has now appealed to this Court.

#### IV. ARGUMENT

##### A. Standard Of Review

Appellate courts review summary judgment orders *de novo*. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). In other words, an appellate court will consider “all of the evidence presented to the trial court and ‘engages in the same inquiry as the trial court.’” *Id.* (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Thus, this Court must determine if the doctrine of collateral estoppel bars Scholz’s disability discrimination claim.

##### B. **The Arbitrator’s Determinations Collaterally Estop Scholz’s Disability Discrimination Claim Because The Arbitrator’s Determinations Foreclose A Conclusion That Post-Traumatic Stress Disorder Or Anxiety Was A Substantial Factor In The Patrol’s Decision To Discharge Scholz**

The Patrol and Scholz agree on the four basic elements of collateral estoppel: (1) an identity of issues; (2) a final judgment on the merits; (3) same party or privity with a party; and (4) the application of collateral estoppel must not work an injustice. *See Robinson v. Hamed*, 62 Wn. App. 92, 98-99, 813 P.2d 171 (1991) (applying the four basic elements of collateral estoppel to an arbitration decision); *see* Brief of Appellant at 11. Beyond this point however, Scholz’s description of the legal principles of collateral estoppel is seriously flawed for two reasons.

First, Scholz errs by suggesting three supplemental elements of collateral estoppel apply. Brief of Appellant at 11, 16-19. The three supplemental elements of collateral estoppel apply only where an administrative agency has rendered a decision from which collateral estoppel arises. Compare *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 508, 745 P.2d 858 (1987) (applying three supplemental elements to a civil service commissions' decision) and *Robinson*, 62 Wn. App. at 98-103 (applying only the four basic elements of collateral estoppel to an arbitrator's decision). Here there was no administrative agency decision. The decision giving rise to collateral estoppel here is a mandatory, binding arbitration decision. See CP at 26, 29-30, 85; see also See RCW 41.80.030(2)(a) (2002) (providing for final and binding arbitration of public employee grievances). So, Scholz's repeated arguments relating to the three supplemental elements of collateral are inapposite.<sup>4</sup>

Second, Scholz repeatedly relies on *res judicata* jurisprudence in his discussion of the doctrine of collateral estoppel. See Brief of Appellant at 11-12, 21-23. For example, Scholz correctly identifies "an identity of issues" at

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<sup>4</sup> Even if Scholz was correct and the three supplemental elements of collateral estoppel did apply here, each of those three elements is satisfied. First, the arbitrator clearly acted within her competence in making the factual determination that Scholz's purported disability was not the cause of his untruthfulness. See CP at 56-60. Second, the procedures in the arbitration provided a full and fair opportunity for Scholz to litigate his position. See *infra* at IVB4. Finally, no public policy consideration justifies denying collateral estoppel under the circumstance of this case. See *infra* at IVB4.

the first basic element of collateral estoppel, Brief of Appellant at 11, but then he cites to eleven separate cases that deal with the “identical subject matter” element from the doctrine of *res judicata*. See Brief of Appellant at 11-12, n. 30-33.<sup>5</sup> Scholz makes the same mistake when he relies on *Civil Serv. Comm'n of City of Kelso v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999) to support his arguments in this matter. See Brief of Appellant at 21-23. The Court in *Civil Service Commission* considered only the doctrine of *res judicata*. 137 Wn.2d at 171-76. Nowhere in the text of the *Civil Service Commission* decision does the Court consider collateral estoppel. *Id.*

Scholz’s confusion is fatal to his arguments. *Res judicata* is entirely distinct from collateral estoppel. *Res judicata* precludes the re-litigation of the same claim or same cause of action. *Hisle*, 151 Wn. 2d at n. 9. On the other

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<sup>5</sup> The following are the eleven cases decided on *res judicata* grounds cited by Scholz when he discusses the first basic element of collateral estoppel: *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 33-34, 891 P.2d 29 (1995) (decided issue on basis of *res judicata*); *Storti v. Univ. of Washington*, 181 Wn.2d 28, 39-40, 330 P.3d 159 (2014) (rejecting the application of *res judicata*); *Norco Const., Inc. v. King Cty.*, 106 Wn.2d 290, 293-95, 721 P.2d 511 (1986) (rejecting the application of *res judicata*); *Hayes v. City of Seattle*, 131 Wn.2d 706, 712-14, 934 P.2d 1179 (1997), *opinion corrected*, 943 P.2d 265 (Wash. 1997) (rejecting the application of *res judicata*); *Richert v. Tacoma Power Util.*, 179 Wn. App. 694, 704-710, 319 P.3d 882 (2014) (rejecting application of *res judicata*); *Berschauer Phillips Const. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227-32, 308 P.3d 681 (2013) (approving the application of *res judicata*); *Karlberg v. Otten*, 167 Wn. App. 522, 532-40, 280 P.3d 1123 (2012) (approving the application of *res judicata*); *Ensley v. Pitcher*, 152 Wn. App. 891, 898-907, 222 P.3d 99 (2009) (approving the application of *res judicata*); *Garner v. City of Fed. Way*, 162 Wn. App. 1060 (2011) (rejecting the application of *res judicata*); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009) (rejecting the application of *res judicata* and collateral estoppel, but explaining the two theories are distinct); and *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865-66, n. 9, 93 P.3d 108 (2004) (rejecting application of *res judicata*, but explaining *res judicata* is distinct from collateral estoppel).

hand, collateral estoppel precludes a second litigation of the same issues, even though a different claim or cause of action is presented in each action. *Id*; see also *Shoemaker*, 109 Wn. 2d 504. Because Scholz relies upon the wrong law and the wrong analysis of preclusion throughout his briefing, this Court should reject the legal framework suggested by Scholz and consider only the four basic elements of collateral estoppel and only collateral estoppel jurisprudence in determining this case.

**1. An Identity Of Issues Exists Between Scholz's Arbitration And His Disability Discrimination Claim Because Both Hinge On Whether Post-Traumatic Stress Disorder Or Anxiety Caused His Dishonesty With The Patrol**

The Washington Supreme Court has held that identity of causes of actions "cannot be determined precisely by mechanistic application of a simple test," and instead considers the following criteria for a pragmatic result:

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

*Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983) (citations omitted). *Shoemaker*, 109 Wn. 2d 504 is dispositive of the identity of issues element here.<sup>6</sup>

In *Shoemaker*, a Deputy Chief of Police was demoted to the rank of captain four days after he testified before the Bremerton Civil Service Commission regarding alleged irregularities in department performance evaluations. 109 Wn.2d at 505-06. The Deputy Chief petitioned for reinstatement and argued that he was demoted in bad faith and in violation of RCW § 41.12.09. *Id.* at 506. However, after a hearing, the Commission found that the Deputy Chief was not demoted due to his testimony, but rather was relieved of his position as part of a reduction in force. *Id.* The Deputy Chief asked the Commission to reconsider its decision after he was again demoted, this time from captain to sergeant. *Id.* Once again, the Commission found that the Deputy Chief's demotion was a valid reduction in force and was not retaliatory. *Shoemaker*, 109 Wn. 2d at 507. The Deputy Chief appealed to the Superior Court to review the Commission's decision, but then voluntarily dismissed the appeal, electing to file a 42 U.S.C. § 1983 claim in federal court. *Id.*

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<sup>6</sup> Similar to the reasoning of the Court in *Shoemaker*, the Court in *Robinson*, 62 Wn. App. 92 determined that the issue presented in an arbitration was identical to the subsequent court action. *Robinson*, 62 Wn. App. at 99-100. The *Robinson* Court wrote, "Whether Robinson was telling the truth was an ultimate fact in the arbitrator's decision just as it would necessarily be in the defamation action." *Id.* at 100.

In federal court, the City moved for summary judgment and argued that the Deputy Chief's § 1983 action was barred by collateral estoppel. *Id.* That court granted summary judgment and the Deputy Chief appealed to the Ninth Circuit Court of Appeals which certified to the Washington State Supreme Court the question of whether the Deputy Chief was collaterally estopped from contesting the administrative finding that his demotion was not retaliatory. *Id.* The Washington State Supreme Court determined that an identity of issues existed between the civil service proceedings and the § 1983 claim. *Id.* at 511. The Court explained:

In Shoemaker's section 1983 action, he would be required to prove that the testimony he gave concerning department irregularities was a "substantial factor" or a "motivating factor" in his demotion. *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983). The Commission could not have reached the conclusion it did without finding that this was not the case, unless it applied a very high standard in construing RCW 41.12.090; that is, that Shoemaker's demotion was "for cause" unless a bad faith motive predominated in the decision. Nothing in the case law construing RCW 41.12.090 suggests that the standard for showing a bad faith demotion under section .090 is so high. The question the Commission decided was whether there was any retaliation at all; whether a bad faith motive played any substantial part in the demotion. Therefore, the issues before the Commission and the trial court—whether retaliation was a substantial motive behind Shoemaker's demotion—are identical, and collateral estoppel is appropriate.

*Id.* at 512.

The Court's rationale in *Shoemaker* regarding the identity of issues element is controlling here. Just as the Deputy Chief in *Shoemaker* had to

prove retaliation was a substantial factor in his demotion, Scholz must prove that his alleged disability was a substantial factor in the Patrol's decision. *See* 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.01 (6th ed.).<sup>7</sup> Just as the Commission's finding that the Deputy Chief's demotion was not retaliatory, and was "for cause," prevented the Deputy Chief from proving the substantial factor element of his § 1983 claim, the arbitrator's determination that neither PTSD or anxiety caused Scholz's untruthfulness, and that just cause existed to discharge Scholz for Untruthfulness, prevents Scholz from proving the substantial factor element of a disability discrimination claim. Thus, an identity of issues exists between the arbitration and Scholz's disability discrimination claim.

Scholz contends that *Shoemaker's* analysis of the identity of issues is not applicable here. Brief of Appellant at 17. Specifically, Scholz writes that the arbitrator did not "... determine the reliance, as a substantial factor, upon the presence, nature, and extent of Appellant's disability, but merely found the Appellant was untruthful." Brief of Appellant at 17. To make this argument, Scholz simply ignores relevant portions of the record in this case. For example, the Arbitrator wrote:

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<sup>7</sup> At a few places in his briefing, Scholz describes the burden shifting analysis that can apply in employment discrimination cases. Brief of Appellant at 8-9, 20. Scholz's description has no bearing on this case however. The issue presented relates to the applicability of the defense of collateral estoppel, not whether Scholz can make out a prima facie case of discrimination.

Clearly, however, the Grievant [Scholz] was no longer suffering from the stress of the incident on May 31, 2012, when he was interviewed by Sgt. Gundermann and Sgt. Tina Martin. Dr. Cole had released him as a patient at least two months earlier without diagnosing long-term PTSD, because the Grievant's symptoms had ended with 30 days of the January 19 incident. In spite of the passage of time and the improvement in his emotional condition, however, Scholz seemed to dig in his heels and defend the inaccurate statements he had made to Sgt. Overbay on January 19, though he had had ample opportunity to reflect about the events and explain the entire incident truthfully to the interviewers.

CP at 56-58. Given this finding, no genuine dispute exists that the arbitrator specifically considered whether Scholz suffered from PTSD or anxiety and whether that caused him to be untruthful.<sup>8</sup>

Scholz also erroneously relies on *Yakima Cty. v. Yakima Cty. Law Enft Officers Guild*, 157 Wn. App. 304, 237 P.3d 316 (2010). Specifically, Scholz contends that *Yakima* supports his conclusion that issues presented through collective bargaining grievance procedures do not share an identity of issues with superior court discrimination claims. *See* Brief of Appellant at 20-21. Scholz is wrong. Scholz is wrong because he once again confuses principles of *res judicata* with principles of collateral estoppel. Scholz citation to *Yakima County*, 157 Wn. App. at 329, is to the section of the opinion that deals exclusively with the doctrine of *res judicata*. The *Yakima* Court decision

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<sup>8</sup> Scholz contends that a genuine issue of material fact precludes summary judgment because he submitted a declaration in the Superior Court action indicating the arbitration did not involve evidence or argument related to his alleged disability and how it affected his truthfulness. *See* Brief of Appellant at 23; CP at 103-04. This contention is patently false. The arbitrator detailed the evidence presented in this regard and explained why she was rejecting Scholz's contention that any alleged disability excused his untruthfulness. CP at 44, 55-60. This is precisely the "second bite at the apple" that collateral estoppel is intended to prevent. *See Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 454, 951 P.2d 782 (1998).

does not address the issue of collateral estoppel until 157 Wn. App. at 330-31. When the *Yakima* Court reached the issue of collateral estoppel, the Court simply observed that the Union's complaint regarding the failure to follow contractual disciplinary notice procedures was distinct from the aggrieved employee's complaints of discrimination addressed in other proceedings. *Id.* Thus, neither the *Yakima* decision, nor ignoring the record, provide Scholz an escape from the controlling authority of *Shoemaker*.

**2. The Final Judgment On The Merits Element Exists Because The Collective Bargaining Agreement Arbitration Was Final And Binding**

The doctrine of collateral estoppel requires that the first proceeding conclude with a judgment on the merits. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (citing *Reninger*, 134 Wn. 2d at 449). Scholz does not assign any error related to the "final judgment on the merits" element, *see* Brief of Appellant at 1-2, nor could he reasonably do so. The collective bargaining agreement that provided for the arbitration contained an express term making arbitration final and binding upon the Patrol, Union and Scholz. *See* CP at 85. Moreover, RCW 41.80.030(2)(a) requires collective bargaining agreement arbitrations to be final and binding. *See* RCW 41.80.030(2)(a) (2002) ("A collective bargaining agreement shall contain provisions that: (a) Provide for a grievance procedure that culminates with final and binding arbitration of all

disputes arising over the interpretation or application of the collective bargaining agreement and that is valid and enforceable under its terms when entered into in accordance with this chapter.”). Thus, there is no dispute that the arbitrator’s decision is a final judgment on the merits for purposes of collateral estoppel.

**3. The Same Party Or Privity Element Exists Because Scholz Was A Represented Party At The Arbitration Proceeding**

Scholz also does not assign any error related to the “same party or privity” element. Brief of Appellant at 1-2. *Christensen*, 152 Wn. 2d at 308 n.5 is dispositive of this element. In *Christensen*, the Washington State Supreme Court determined that an employee whose interests are represented by a union is in privity for purposes of collateral estoppel. *Id.* The Court wrote:

Although, as explained in this opinion, *Christensen* complains that the action was brought by the union, and he was represented by a union lawyer, he does not claim that privity is lacking. Samaritan is correct that this requirement is satisfied. Because *Christensen*’s interest was represented by his union, he was in privity with the union.

*Id.* Here there is no factual dispute that Scholz’s union pursued the arbitration on his behalf and that Scholz was represented by the union attorney at the arbitration. CP at 27. (“The Grievant [Scholz] and Union were represented by Jacob Fox Metzger, Union Representative, PTE Local 17. The Grievant

[Scholz] was present throughout the hearing.”) Thus, the element of “same party or privity” exists here.

**4. The Application Of Collateral Estoppel Would Not Work An Injustice On Scholz.**

The injustice element is generally concerned with procedural rather than substantive irregularity. *Christensen*, 152 Wn.2d at 309. The touchstone for procedural fairness is whether a party had a full and fair opportunity to litigate an issue. *See Christensen*, 152 Wn.2d at 309. Scholz agrees this is the proper focus of injustice element. Brief of Appellant at 12-13.

Washington Courts have already held that the application of collateral estoppel from an arbitration decision does not work an injustice. *Robinson*, 62 Wn. App. at 100–01.<sup>9</sup> In *Robinson*, the Court wrote:

The application of collateral estoppel must not work an injustice. This requirement focuses primarily on whether the prior adjudication offered a full and fair hearing on the issue. Hamed's claim was the subject of a 2-day arbitration proceeding. The parties made opening statements, introduced 36 exhibits, examined and cross-examined witnesses and made closing arguments. The general counsel for the union submitted an extensive post-hearing brief and the arbitrator entered exhaustive findings supporting his conclusions. The proceedings clearly furnished a full and fair hearing.

*Id.* at 100. Just like the arbitration proceedings in *Robinson*, the arbitration proceedings here provided procedural fairness. The arbitrator, Sandra Smith

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<sup>9</sup> Washington Courts have also found that collateral estoppel may be applied to claims brought under the Washington Law Against Discrimination. *Carver v. State*, 147 Wn. App. 567, 572-73, 197 P.3d 678 (2008).

Gangle, is a lawyer who was selected to preside over the arbitration by the mutual agreement of the parties. CP at 26-28. Scholz personally appeared at the arbitration. CP at 26-28. Counsel “thoroughly and competently” represented the parties. CP at 26-28. The arbitration hearing spanned four days. CP at 26-28. Both parties presented witnesses and exhibits. CP at 26-28. The Union and Scholz used the evidence they presented to argue that Scholz’s state of mind following a traumatic event caused him to make inaccurate representations to the Patrol. CP at 43-44. Dr. James Cole, Ph.D., testified on behalf of Scholz in this regard. CP at 44-45. The arbitrator specifically considered Scholz’s position and the evidence offered in support of it, but ultimately rejected Scholz’s position. CP at 55-60. In reaching her findings and conclusions, the arbitrator applied a clear and convincing standard of proof. CP at 48, 60. Thus, the procedures observed at the arbitration afforded Scholz a full and fair opportunity to litigate the issue.

Scholz argues that disparity of available relief can create procedural unfairness.<sup>10</sup> Brief of Appellant at 13, 16, and 18-19. But Scholz never actually points out what disparity of relief exists between the arbitration proceedings and his superior court proceedings. Regardless, the Washington State Supreme Court has already disposed of Scholz’s argument on two

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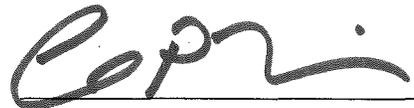
<sup>10</sup> Scholz also presents the disparity of relief argument as a public policy consideration. Brief of Appellant at 18-19. The argument fails as a public policy argument for the same reasons it fails as an injustice argument. See *Reninger*, 134 Wn.2d at 452-54.

grounds. *See Reninger*, 134 Wn. 2d at 452–54. First, the *Reninger* Court observed that a proceeding that allows for back pay and full reinstatement, including employment benefits, does not present with sufficient disparity to defeat collateral estoppel just because general damages are unavailable. *Reninger*, 134 Wn.2d at 452-53 (citing *Shoemaker*, 109 Wn.2d at 513). Second, the *Reninger* Court also observed that when a party actually, vigorously pursues their rights in the first forum, any disparity of available relief becomes inconsequential. *Reninger*, 134 Wn.2d at 453-54. Here the arbitrator had the authority to award economic damages sufficient to return Scholz to the economic position he would have been in if he had not been terminated. CP at 124. And Scholz, through his grievance procedures and arbitration proceedings, vigorously pursued his rights. *See* CP at 26-28. Thus, the disparity of relief issue is simply a red herring meant to distract this Court from the obvious conclusion that the arbitration provided a full and fair opportunity for Scholz to present his case.

**V. CONCLUSION**

Because each of the four basic elements of collateral estoppel are satisfied, this Court should affirm the trial court's dismissal of Scholz's claims against the Washington State Patrol.

RESPECTFULLY SUBMITTED this 30 day of June, 2017.

A handwritten signature in black ink, appearing to read 'Carl Warring', written over a horizontal line.

CARL WARRING, WSBA No.

27164

Assistant Attorney General

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