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COA No. 361543

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LORI A. SWEENEY and JEROLD L. SWEENEY, husband and wife,
Plaintiffs - Appellants

v.

JAMES DUNLAP, M.D. and JANE DOE DUNLAP, husband and wife and the
marital community composed thereof; and PROVIDENCE HEALTH
SERVICES, dba PROVIDENCE ORTHOPEDIC SPECIALITIES, a Washington
Corporation,
Defendants-Respondents

RESPONSE BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

The Plaintiffs (collectively "Mrs. Sweeney") brought two iterations of a medical negligence claim based upon treatment for a shoulder injury that Lori Sweeney suffered on April 25, 2010. Mrs. Sweeney's claims allege medical negligence based upon care that she received both in 2010 and in 2012.

The first iteration of Mrs. Sweeney's claim was filed in April 2013 in Grant County. That iteration was moved to Adams County, has previously gone up on appeal, and remains pending (against other defendants). This second iteration was filed in Spokane County in June 2014. It was filed while the Adams County iteration was on appeal, it was stayed while the Adams County iteration was on appeal, and it is before the Court of Appeals on the Defendants' successful motion for summary judgment based upon *res judicata* and collateral estoppel.

Mrs. Sweeney attempts to distinguish the two iterations of her case, contending that the Adams County iteration exclusively asserts care that she received in 2010, whereas this Spokane County iteration exclusively asserts the 2012 care.

Mrs. Sweeney's contentions are contrary to the undisputed facts of this case. Mrs. Sweeney's contentions are also contrary to the positions that she took in the Adams County iteration. Despite her protestations to the contrary, Mrs. Sweeney's complaint (in this Spokane County iteration) directly alleges medical

negligence based upon the 2010 care.¹ Also contrary to her assertions, Mrs. Sweeney alleged that Dr. Dunlap's 2012 care was negligent in her prior Adams County iteration. Looking past Mrs. Sweeney's arguments and assertions to the actual allegations that she has made and is making, the Court can see that Mrs. Sweeney's two iterations are functionally identical, insofar as it relates to Dr. Dunlap. Preclusive principles, therefore, bar Mrs. Sweeney from re-litigating her failed claims against Dr. Dunlap.

Res judicata bars both claims that were brought in a prior proceeding and claims that the plaintiff had the opportunity to bring. Mrs. Sweeney argues that no preclusive effect should apply because she approached Dr. Dunlap's care from a slightly different angle in the prior Adams County iteration than the angle that she is using in this iteration. However, the undisputed facts demonstrate that Mrs. Sweeney had every opportunity to bring her claims against Dr. Dunlap, from whatever angles she saw fit, in the Adams County iteration.

Mrs. Sweeney had a full and fair opportunity to litigate her claims. She made strategic decisions regarding which claims to bring, at which times, and against which defendants. She was dissatisfied with the outcome, she pursued an appeal, and she lost. Mrs. Sweeney had every right to pursue her claim through

¹ In fact, the complaint's plain language only asserts a claim based upon the 2010 care.

each of those steps, but she does not have the right to subject Dr. Dunlap or the Courts to repetitive claims in multiple counties. The Trial Court correctly dismissed this matter on *res judicata* and collateral estoppel grounds.² And Dr. Dunlap respectfully asks the Court of Appeals to affirm that dismissal.

II. RESTATEMENT OF THE ISSUES PRESENTED

- *Res judicata* precludes re-litigation of claims that were made in a prior proceeding. In the Adams County iteration, Mrs. Sweeney asserted claims based upon Dr. Dunlap's alleged negligence in 2010 and 2012. In this Spokane County iteration Mrs. Sweeney is making the same claims based upon the same alleged negligence. Was the Trial Court, therefore, correct to summarily dismiss Mrs. Sweeney's Spokane claims?
- *Res judicata* precludes re-litigation of claims that the plaintiff had an opportunity to bring in prior proceeding. Mrs. Sweeney had the opportunity to assert a direct medical negligence claim based upon Dr. Dunlap's 2012

² Mrs. Sweeney purports that the Trial Court's dismissal was based on *res judicata* alone. *See generally*, Mrs. Sweeney's Opening Brief. Dr. Dunlap, however, argued both preclusive principles, and the Trial Court's Order is not limited to one or the other. *See* CP 50-63, 250-52. Furthermore, the Court of Appeals is empowered to affirm the Trial Court on any basis supported by the record. *Matter of Harvey*, 3 Wn. App. 2d 204, 219 (2018). Both preclusive principles are, therefore, before the Court.

care in the Adams County iteration. Was the Trial Court, therefore, correct to reject Mrs. Sweeney's attempt to assert such a claim?

- Collateral estoppel bars re-litigation of issues that were previously raised. In the Adams County iteration, Mrs. Sweeney alleged that Dr. Dunlap was negligent in his 2012 care. The Court of Appeals held that Mrs. Sweeney failed to make a *prima facie* showing of negligence based on the 2012 care.³ Was the Trial Court, therefore, correct to reject Mrs. Sweeney's allegation that Dr. Dunlap was negligent in 2012?

III. STATEMENT OF FACTS

A. THIS CASE BEGAN WITH A SHOULDER INJURY FROM A SLIP AND FALL.

This is the second iteration of Mrs. Sweeney's medical negligence claim. Though the prior Adams County iteration remains pending against other defendants, the claim against Dr. Dunlap was summarily dismissed. CP 35-39. That dismissal was appealed and affirmed. *Id.* Mrs. Sweeney filed this second Spokane County iteration while the Adams County iteration was on appeal. *See* CP 13.

Both iterations began on April 25, 2010 when Lori Sweeney slipped/tripped and fell at an Adams County gas station. CP 5, 20.

³ CP 39, n.2

Mrs. Sweeney's fall resulted in a shoulder injury, and that shoulder injury is the headwaters for this claim. *See id.*

B. MRS. SWEENEY SOUGHT CARE AT THE EAST ADAMS RURAL HOSPITAL, WAS TRANSPORTED TO SACRED HEART MEDICAL CENTER, AND UNDERWENT SURGERY.

Mrs. Sweeney sought care at the East Adams Rural Hospital and was treated by PA-C Allen Noble. CP 5-6. Mr. Noble ordered x-rays, consulted with Dr. Dunlap (via telephone), and diagnosed a dislocated shoulder. *Id.*

In consultation with Dr. Dunlap, Mr. Noble decided to attempt a closed reduction⁴ of Mrs. Sweeney's shoulder. *Id.* After the closed reduction proved unsuccessful, Mr. Noble ordered additional x-rays. *Id.* Those x-rays revealed that Mrs. Sweeney's right humeral head was separated from the humerus – her shoulder was broken. *Id.*

Mrs. Sweeney was transported to Sacred Heart Medical Center where she was treated by Dr. Dunlap. CP 7. On April 28, 2010 (three days after the initial injury) Dr. Dunlap performed a surgical repair of Mrs. Sweeney's shoulder. *Id.*

⁴ A closed reduction consists of a physical manipulation of the shoulder to "pop" it back into its socket. A "closed" reduction is distinguished from a surgical or "open" reduction.

C. DR. DUNLAP PERFORMED A SECOND SURGERY ON MRS. SWEENEY'S SHOULDER IN 2012, AND MRS. SWEENEY UNDERWENT HER FINAL SHOULDER SURGERY IN 2013.

Two years later (April 4, 2012) Dr. Dunlap performed a second surgery on Mrs. Sweeney's shoulder. CP 7. The 2012 surgery was to repair a torn rotator cuff. *Id.*

Mrs. Sweeney underwent a third shoulder surgery on June 11, 2013. CP 47. That surgery was a complete reverse shoulder replacement, and it was the last shoulder surgery that Mrs. Sweeney underwent. *See id.*

IV. STATEMENT OF CASE

A. THE ADAMS COUNTY ITERATION ENDED IN A SUMMARY DISMISSAL AND THE APPELLATE COURTS AFFIRMED.

On or about April 23, 2013, Mrs. Sweeney filed the Adams County iteration of this suit. CP 13. As originally filed, Mrs. Sweeney did not include Dr. Dunlap as a Defendant. *Id.* However, after conducting initial discovery, Mrs. Sweeney brought a motion to amend her complaint to assert a claim against Dr. Dunlap. *Id.*, *see also* 17-28, 192-93. And on or about January 15, 2014, Mrs. Sweeney filed an amended complaint naming Dr. Dunlap as a Defendant. CP 17-28.

1. Dr. Dunlap successfully moved to dismiss Mrs. Sweeney's Adams County claim based upon the statute of limitations.

Dr. Dunlap moved for summary judgment based upon the statute of limitations. CP 216. The Adams County Superior Court granted Dr. Dunlap's motion and dismissed Mrs. Sweeney's claims. *Id.*

2. Mrs. Sweeney appealed the Trial Court's dismissal order, and the Appellate Courts affirmed the dismissal.

Mrs. Sweeney appealed the Trial Court's summary dismissal of her claims against Dr. Dunlap, making two arguments. CP 35-39, 218-34. First, Mrs. Sweeney argued that the *continuing course of negligent treatment* doctrine saved her claims from untimeliness. *Id.* And second, that Dr. Dunlap had misled Mrs. Sweeney, thereby inducing her **not** to include him as a Defendant in the Adams County iteration's original filing. *Id.*

The Court of Appeals rejected both of Mrs. Sweeney's arguments. CP 35-39. The Court of Appeals held that Mrs. Sweeney failed to present sufficient evidence to establish the *continuing course of negligent treatment*. CP 39. The Court of Appeals also held that Mrs. Sweeney's decision not to include Dr. Dunlap as a defendant was the result of her own inexcusable neglect. CP 38.

Mrs. Sweeney brought a petition for review to the State Supreme Court. CP 14. The State Supreme Court denied Mrs. Sweeney's petition for review. *Id.*

B. WHILE THE ADAMS COUNTY ITERATION WAS ON APPEAL, MRS. SWEENEY FILED THIS SPOKANE COUNTY ITERATION.

On or about June 16, 2014 (approximately six weeks after the Adams County Superior Court dismissed Mrs. Sweeney's claims), Mrs. Sweeney filed this Spokane County iteration of her suit. CP 13.

C. DR. DUNLAP SUCCESSFULLY MOVED TO DISMISS MRS. SWEENEY'S CLAIM ON GROUNDS OF ISSUE AND CLAIM PRECLUSION.

The Spokane County iteration was stayed while the Adams County iteration worked its way through the Appellate Courts. CP 14. After the stay lifted, Dr. Dunlap brought a motion for summary judgment. *See id.*, CP 65-67. Dr. Dunlap's motion asked the Trial Court to dismiss the Spokane County claims based upon *res judicata* and collateral estoppel principles. *Id.*

Dr. Dunlap's motion was heard and granted by the Trial Court on May 25, 2018. *See* VRP 250-52, CP 250-52. Mrs. Sweeney filed a timely notice of appeal. CP 253-55.

D. THE ALLEGATIONS.

It is important to keep Mrs. Sweeney's allegations in the two iterations clearly delineated. Understanding what has been alleged and what is being alleged helps keep the issues clear.

1. Adams County

In the Adams County iteration Mrs. Sweeney made claims against both PA Noble⁵ and Dr. Dunlap. Mrs. Sweeney alleged that PA Noble provided negligent care on the day of her fall (April 25, 2010). CP 17-28, 47-48. In simple terms, Mrs. Sweeney alleged that PA Noble was negligent in attempting the closed reduction. *Id.* As asserted in her amended Adams County complaint, Mrs. Sweeney alleged that Dr. Dunlap was negligent in his consultation with PA Noble on April 25, 2010, in his hands-on treatment of Mrs. Sweeney on April 25, 2010 (after her transfer to Sacred Heart), and in his April 28, 2010 surgery on Mrs. Sweeney's shoulder. *Id.* After Dr. Dunlap moved for summary judgment, Mrs. Sweeney added the assertion that Dr. Dunlap's 2012 rotator cuff surgery on Mrs. Sweeney was part of a continuing course of negligent treatment. CP 38-39, 47-49 *see also* CP 17-28.

2. Spokane County

In this Spokane County iteration Mrs. Sweeney has **only** made a claim against Dr. Dunlap. As discussed below, there are serious questions regarding what claim(s) Mrs. Sweeney actually pled. However, for purposes of understanding the issues, it is important to start with the claim that Mrs. Sweeney

⁵ Mrs. Sweeney also made claims against Adams County Hospital District No. 2 based upon PA Noble's care. CP 17-28.

purports to be bringing. Based upon her arguments to the Trial Court and to the Court of Appeals, the sole claim in this Spokane County iteration is a direct and discrete claim that Dr. Dunlap's 2012 rotator cuff surgery was performed in a negligent manner. CP 73, 88-89.

V. ARGUMENT

A. REVIEWING THIS MATTER *DE NOVO*, THE COURT OF APPEALS SHOULD AFFIRM THE TRIAL COURT'S SUMMARY DISMISSAL.

Summary judgment rulings are reviewed *de novo*. See *Tanner Elect. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668 (1996). The Trial Court's application of both *res judicata* and collateral estoppel is reviewed *de novo*. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305 (2004); *Scholz v. Washington State Patrol*, 3 Wn. App.2d 584, 596 (2018); *Berschauer Phillips Const. v. Mutual of Enumclaw*, 175 Wn. App. 222, 227-28 (2013); *Ullery v. Fullerton*, 162 Wn. App. 596, 603 (2011). Reviewing this matter *de novo*, the Court of Appeals engages in the same inquiry as the Trial Court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15 (1976); *accord, Mahoney v. Shinpoch*, 107 Wn.2d 679, 683 (1987).

Summary judgment is proper if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 (1989). A

material fact is one "upon which the outcome of the litigation depends . . ."

Morris v. McNicol, 83 Wn.2d 491, 494 (1974).

This matter involves no disputed issues of fact, and the law demonstrates Dr. Dunlap's entitlement to dismissal. The substance and nature of Mrs. Sweeney's claims are undisputed. The timeline of Mrs. Sweeney's claims and filings are undisputed. Mrs. Sweeney made strategic decisions with respect to which claims to bring, against which defendants to assert her claims, and when to bring her claims. That Mrs. Sweeney's strategy proved improvident does not justify her request for a second bite at the apple. Reviewing this matter *de novo*, the Court of Appeals should affirm the Trial Court's dismissal of Mrs. Sweeney's Spokane County claims.

B. *RES JUDICATA* PRINCIPLES REQUIRE THE TRIAL COURT'S ORDER TO BE AFFIRMED.

The doctrine of *res judicata* bars a party from bringing a claim "which has been litigated, or on which there has been an opportunity to litigate." *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312 (1982) (quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287 (1949)) (emphasis added). The doctrine "acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn. App. 460, 462 (1978). In the

State of Washington, "[f]iling two separate lawsuits based on the same event - claim splitting - is precluded." *Landry v. Luscher*, 95 Wn. App. 779, 780 (1999).

"Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action." *Rains v. State*, 100 Wn.2d 660, 663 (1983). *Res judicata* bars a subsequent suit where a prior lawsuit resulted in a final judgment and where there are common (i) subject matters; (ii) causes of action; and (iii) parties. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860 (1986); *Rains*, 100 Wn.2d at 663.

All criteria for *res judicata* are satisfied in this matter. Mrs. Sweeney acknowledges that there is commonality of parties, but she disputes (i) that the Adams County iteration ended in a final judgment; (ii) that the two iterations involve the same claims; and (iii) that the two iterations involve the same subject matter. As discussed below, each of Mrs. Sweeney's arguments is contrary to the record and to settled law.

1. Res judicata applies to all final judgments.

In Washington State a summary judgment order is deemed to be "a final judgment on the merits with the same preclusive effect as a full trial." *Ensley v. Pitcher*, 152 Wn. App. 891, 899 (2009) (citing *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892 (2000)). There is no dispute regarding the fact that the Adams County iteration ended with a summary judgment of dismissal in Dr. Dunlap's

favor. CP 13. That order was affirmed by the Court of Appeals, and the State Supreme Court denied Mrs. Sweeney's petition for review. CP 13-14.

Mrs. Sweeney's assertion that the Adams County Superior Court's summary judgment order is insufficient for *res judicata* is not supported by Washington State law. *See* Mrs. Sweeney's Opening Brief, pp. 12-14. Likewise, Mrs. Sweeney's assertion that there is some ambiguity in the law with respect to *res judicata's* application to summary judgment orders is directly contrary to Washington State law. *See id.* The law in Washington is clear: a summary judgment constitutes a final judgment for *res judicata* purposes. *Ensley*, 152 Wn. App. at 899.

As a preliminary matter, there is no support for Mrs. Sweeney's assertion that resolving a case based upon an affirmative defense is not a resolution of the merits. *See Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 267 (2008). The undisputed facts (in the Adams County iteration) established that no reasonable jury could find against Dr. Dunlap on his limitations-based affirmative defense. That is no less a resolution on the merits than a jury making a factual finding that Dr. Dunlap had prevailed on his limitations-based affirmative defense. The logical extension of Mrs. Sweeney's argument would, therefore, deny preclusive effect to a jury verdict. That logical failure ably highlights that Mrs. Sweeney's argument is improper, false, and contrary to law.

Moreover, Mrs. Sweeney's argument is a *sub rosa* attempt to interject a requirement that the prior judgement actually **adjudicate** the merits in order for preclusive effect to apply. Two recent Washington State cases demonstrate that there is no such requirement in the law. In each case, *res judicata* was applied despite there being no prior adjudication of the merits.

a. *Res Judicata* applies to dismissals based upon procedural defaults.

In *Emeson v. Department of Corrections*, 194 Wn. App. 617 (2016), the plaintiff (Dezmond Emeson) brought an employment discrimination suit against the Washington State Department of Corrections ("DOC") alleging failure to accommodate his disability, a hostile working environment, disparate treatment, retaliation, and wrongful termination. *Id.* at 620. The suit was filed in the Western District of Washington. *Id.* DOC moved for summary judgment. *Id.* at 624. **Mr. Emeson filed no response**; instead, he brought a Rule 41 motion for a voluntary dismissal without prejudice. *Id.* The Western District granted DOC's motion and dismissed Mr. Emeson's suit with prejudice based upon his failure to file a timely response to DOC's motion. *Id.*

After dismissal of his Federal action, Mr. Emeson brought suit in Pierce County Superior Court, asserting State law claims arising from his termination. *Id.* DOC successfully moved to dismiss the Pierce County action on *res judicata*

grounds, based upon the Western District's dismissal. *See generally, id.* Mr. Emeson appealed, and the Court of Appeals affirmed. Despite there being no adjudication on the merits, the Court of Appeals held that the Federal Court order was a final judgment for *res judicata* to apply. *Id.* at 627.

b. *Res Judicata* applies to stipulated dismissals.

In *Berschauer Phillips Construction, Co. v. Mutual of Enumclaw Insurance, Co.*, 175 Wn. App. 222, Berschauer Phillips Construction Company ("B. Phillips") retained Concrete Sciences Services of Seattle ("Concrete Sciences") to perform work on a construction project at Redmond Junior High School. *Id.* at 225. B. Phillips filed suit against Concrete Sciences in King County Superior Court alleging deficiencies in the work. *Id.* Concrete Sciences did not appear, and B. Phillips obtained a default judgment. *Id.*

A few years later, B. Phillips brought suit against Concrete Sciences' insurer, Mutual of Enumclaw ("Mutual"). That suit ended in a stipulated order of dismissal, without any adjudication of the merits. *Id.* at 226-27. B. Phillips then filed a second suit against Mutual, attempting to enforce the initial default judgment. *Id.* at 227. The King County Superior Court dismissed B. Phillips' claim on the basis of *res judicata*, and the Court of Appeals affirmed. *Id.* at 227-28. In its opinion, the Court of Appeals observed that B. Phillips failed to

demonstrate any justification for its failure to bring all its claims in its first suit against Mutual. *Id.* at 231.

c. The Trial Court properly dismissed this Spokane County iteration because the Adams County judgment was a final judgment on the merits.

Washington law is clear in its directive that *res judicata* be applied to any final judgment that resolves a case. Thus, a summary judgment order – so long as it is final and case dispositive – constitutes a final judgment for purposes of *res judicata*. See *Eugster v. Washington State Bar Association*, 198 Wn. App. 758, 786-87 (2017) ("*Res judicata* . . . requires that the prior judgment be final."). The caselaw's requirement for the judgment to be on the merits is to distinguish interlocutory orders from final judgments and to distinguish resolution of ancillary or collateral issues from the final resolution of claims.

The Adams County Superior Court's Order fully resolved Mrs. Sweeney's claim. It resolved the claim in a full and final manner. It resolved the claim itself, rather than resolving an ancillary or collateral issue. That the Adams County order was a final judgment (rather than an interlocutory order) is well-illustrated by the fact that Mrs. Sweeney's first appeal began with a notice of appeal (rather than a motion for discretionary review). See CP 36. And that the Order resolved Mrs. Sweeney's claim on the merits (rather than resolving an ancillary or collateral issue) is well-illustrated by the fact that Mrs. Sweeney filed her notice

of appeal without first seeking a CR 54(b) finding of finality. *See generally* CP 35-39. The Trial Court was, therefore, correct in giving preclusive effect to the Adams County Superior Court's Order, and the Court of Appeals should affirm.

2. *Mrs. Sweeney's two iterations assert the same causes of action based upon the same subject matter.*

The subject matter of two suits is identical where the actions allege tortious harm resulting from a common source. *See Kuhlman v. Thomas*, 78 Wn. App. 115, 124 (1995), *see also Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396 (1967) (finding identical subject matter in two proceedings which each addressed "the cause of plaintiff's nosebleed"). If identical subject matter is implicated in a claim or issue that "was litigated[] or might have been litigated" *res judicata* bars any subsequent suit. *See Spokane County v. Miotke*, 158 Wn. App. 62, 67-68 (2010).

It is undisputed that Mrs. Sweeney asserted causes of action for medical negligence (pursuant to RCW Ch. 7.70) in each iteration of her claim. *Compare* CP 24-26 *with* CP 8-9. Mrs. Sweeney's only argument is the assertion that her two iterations make different allegations against Dr. Dunlap – she asserts that the prior Adams County iteration alleged negligence from 2010 while this Spokane County iteration alleges negligence from 2012. Mrs. Sweeney's Opening Brief, pp. 13-14. That argument is directly contrary to the undisputed facts.

Mrs. Sweeney's complaints are virtually identical; both allege negligence from 2010. And Mrs. Sweeney alleged that Dr. Dunlap's 2012 care was negligent in her prior Adams County iteration.

a. Mrs. Sweeney's complaints are virtually indistinguishable from one another – both assert claims arising from Dr. Dunlap's 2010 care.

Mrs. Sweeney's assertion that this Spokane County iteration is solely based on the 2012 rotator cuff surgery is contrary to the actual allegations that she made in her complaint. *See* CP 3-11. Analysis of the complaints from Mrs. Sweeney's two iterations demonstrates parity in the causes of action, subject matter, and allegations. *Compare* CP 17-28 *with* CP 3-11.⁶

By way of illustration, Mrs. Sweeney's complaints each begin with a section entitled "Introduction." *See* CP 4, 18. That section outlines the subject matter of Mrs. Sweeney's claim, the causes of action asserted, and the damages sought. *Id.* The comparison is striking.

Adams County (Amended Complaint adding Dr. Dunlap):

This is a medical negligence action borne out of the breach of the standard of care by all Defendants, individually, jointly, and severally in their care of [Mrs. Sweeney] on or about April 25th, 2010, and continuing thereafter wherein the resulting breaches of

⁶ Dr. Dunlap respectfully asks the Court to examine and compare the two complaints. *Compare* CP 17-28 *with* CP 3-11. The two complaints are nearly identical.

the standard of care led to permanent and debilitating injuries and harm . . .

CP 18.

Spokane County (this iteration):

This is a medical negligence action borne out of the breach of the standard of care by all Defendants, individually, jointly, and severally in their care of [Mrs. Sweeney] on or about April 25th, 2010, and continuing thereafter **into 2012** wherein the resulting breaches of the standard of care led to permanent and debilitating injuries and harm . . .

CP 4.

The undisputed facts refute Mrs. Sweeney's attempt to distinguish her two iterations. Mrs. Sweeney's complaint in this Spokane County iteration undeniably asserts a cause of action alleging negligence from 2010.⁷ Mrs. Sweeney's Spokane County iteration is, therefore, the proverbial second bite at the apple that preclusion principles are designed to prevent.

b. A careful reading of Mrs. Sweeney's Spokane County complaint shows that she did not actually assert a claim based upon Dr. Dunlap's 2012 care.

A close review of Mrs. Sweeney's complaint in this Spokane County iteration illustrates a troubling fact – even in this iteration (which Mrs. Sweeney

⁷ Mrs. Sweeney attempted to dismiss the plain language of her complaint as having been "inartfully pled." VRP 11:20-25. Mrs. Sweeney's attempt to dismiss her own complaint highlights the recurring theme of Mrs. Sweeney recasting and reforming her allegations as is most convenient at the time. The Court, however, is obliged to evaluate the claims that Mrs. Sweeney actually brought.

purports to be all about the 2012 care), the complaint does not actually allege that Dr. Dunlap was negligent in performing the 2012 rotator cuff surgery. *See generally* CP 3-11. Instead, the complaint **only says** that the 2012 surgery was "related to [the] injuries that Mrs. Sweeney sustained in April of 2010." *Id.*, *see specially* CP 7. The plain language of the complaint shows that the only actual claim of medical negligent that Mrs. Sweeney has made is based upon the 2010 care.

The Court, therefore, need look no further than the complaint's plain language to affirm the Trial Court's dismissal. However, the Trial Court must be affirmed even if the Court analyzes this matter based upon the claims that Mrs. Sweeney is telling the Court that she intended to bring. No matter how the Court approaches this case, the record demonstrates that both 2010 and 2012 were the subject matter of each iteration.

c. Mrs. Sweeney made allegations based upon Dr. Dunlap's 2012 care in the Adams County iteration.

Even accepting Mrs. Sweeney's assertion that this Spokane County iteration is solely about 2012, *res judicata* requires the Trial Court to be affirmed because Mrs. Sweeney asserted a claim based upon the 2012 care in the prior Adams County iteration. The Court need look no further than the Court of

Appeals opinion from the Adams County iteration to see that the 2012 surgery was put at issue. CP 38-39, *see also* CP 19-21.

Mrs. Sweeney acknowledges that the 2012 surgery was put at issue in the prior Adams County iteration. She attempts to distinguish the iterations by arguing that her 2012-based allegations in the Adams County action focused on the "continuing course of negligent treatment" doctrine and that those allegations ought not bar her from asserting a discrete medical negligence claim (based upon the 2012 care) in this Spokane County iteration.⁸ See generally, Mrs. Sweeney's Opening Brief.

Res judicata principles do not justify slicing the onion so thinly. Mrs. Sweeney asserted that Dr. Dunlap's 2012 care was negligent in each iteration. And in each iteration the only cause of action that Mrs. Sweeney brought against Dr. Dunlap was medical negligence, pursuant to RCW Ch. 7.70. The undisputed facts, therefore, establish commonality of the claims and commonality of the subject matter. *See Kuhlman*, 78 Wn. App. at 124.⁹

⁸ There is a bizarre irony in Mrs. Sweeney's argument considering the complaint's plain language. Even in this Spokane County iteration, Mrs. Sweeney has not actually asserted the direct and discrete claim of medical negligence based upon the 2012 care that she purports to. *Supra*.

⁹ Even crediting Mrs. Sweeney's attempt to distinguish the causes of action asserted in her two iterations, collateral estoppel principles require the Trial Court to be affirmed. Collateral estoppel acts as a counterpart to *res judicata*,

d. Mrs. Sweeney's judicial estoppel arguments are not supported by the record.

Rather than addressing her prior allegations and the record, Mrs. Sweeney adopts the "best defense" adage and asks the Court to hold that Dr. Dunlap should be judicially estopped from pointing out the parity in Mrs. Sweeney's two iterations. Mrs. Sweeney's Opening Brief, pp. 15-16.¹⁰ None of Mrs. Sweeney's arguments or protestations can change the undisputed fact that she made allegations regarding the 2012 care during her Adams County iteration.

The claims made in Mrs. Sweeney's Adams County complaint were limited to the 2010 care (*see* CP 17-28); however, Mrs. Sweeney interjected 2012 into the case in response to Dr. Dunlap's motion for summary judgment. *See* CP

preventing "a second litigation of issues between the parties, even though a different claim or cause of action is asserted." *Seattle First Nat'l Bank v. Kawashi*, 91 Wn.2d 223, 225-26 (1978). Collateral estoppel applies where: (i) a prior and the pending case involve the same issues; (ii) the prior case ended in a final judgment; (iii) the party against whom collateral estoppel is asserted was a party to the prior action (or was in privity with a party to the prior action); and (iv) application of collateral estoppel does not work an injustice. *Malland v. State, Dep't of Ret. Sys.*, 103 Wn.2d 484, 489 (1985). It is undisputed that the issue of **Dr. Dunlap's 2012 negligence was raised as an issue** in the Adams County iteration. And it is undisputed that the Court held that Mrs. Sweeney failed to present sufficient evidence to support her 2012 allegations. The undisputed facts, therefore, require the Trial Court to be affirmed on collateral estoppel grounds as well.

¹⁰ Further, Mrs. Sweeney did not properly present this issue to the Trial Court. In fact, Mrs. Sweeney specifically acknowledged that she did not assert judicial estoppel at the Trial Court level. VRP 12:7-11.

35-39. Specifically, Mrs. Sweeney asserted that the "continuing course of negligent treatment doctrine" saved her Adams County iteration from dismissal. *See id.* In reply, Dr. Dunlap argued that Mrs. Sweeney's arguments should be rejected because she had not included the 2012 care in her complaint **and** because Mrs. Sweeney failed to present sufficient evidence to support her new contentions regarding the 2012 care. *See id.* The Court of Appeals agreed with Dr. Dunlap on **both** counts. *Id.*

Thus, Dr. Dunlap argued that the 2012 care was not part of the Adams County case because (at that time) it was not – Mrs. Sweeney had not pled it. However, by the time that the Spokane County iteration proceeded to summary judgment Mrs. Sweeney had interjected 2012 in the Adams County case. In each instance, Dr. Dunlap was **reacting to the allegations that Mrs. Sweeney made**. As a defendant, that is all that Dr. Dunlap can do. Mrs. Sweeney's attempt to contort the undisputed timeline into a judicial estoppel argument should be rejected.

3. *Res Judicata also bars claims that could have been brought in a prior action.*

Even if the Court accepts Mrs. Sweeney's invitation to draw a distinction between her Adams County arguments and her Spokane County arguments, *res judicata* required Mrs. Sweeney's Spokane County iteration to be dismissed

because Mrs. Sweeney had a full and fair opportunity to bring all her claims in the Adams County iteration. The doctrine of *res judicata* bars a party from bringing a claim "which has been litigated, **or on which there has been an opportunity to litigate.**" *Marino Prop. Co.*, 97 Wn.2d at 312 (boldface added); *see also Martin v. Wilbert*, 162 Wn. App. 90, 94-95 (2011). It "acts to prevent relitigation of claims that were **or should have been decided among the parties in an earlier proceeding.**" *Norris*, 95 Wn. App. at 462 (boldface added).¹¹

a. **Mrs. Sweeney bears the burden to justify her failure to bring a direct claim, based on the 2012 care.**

In *Eugster v. Washington State Bar Association*, 198 Wn. App. at 790, the Court of Appeals acknowledged that there is no all-inclusive test to determine whether claims should have brought in a prior suit. However, the Court of Appeals observed that the relevant inquiries include whether the two claims involve the same facts, whether the claims involve the same evidence, and whether the claims implicate the same rights/interests. *Id.* Further, **Washington law places the burden on the plaintiff to justify his or her failure to previously bring the claim.** *See Martin*, 162 Wn. App. at 96; *Berschauer Phillips Construction Co.*, 175 Wn. App. at 231.

¹¹ That *res judicata* applies equally to claims brought and claims that could have been brought also illustrates the impropriety of Mrs. Sweeney's initial argument that *res judicata* ought to require an actual adjudication of a claim's merits. *See supra.*

Mrs. Sweeney made no effort to justify her failure to bring a claim of medical negligence (based upon the 2012 care) in Adams County. That failure is fatal to her case. The undisputed facts demonstrate that all of Mrs. Sweeney's claims had accrued and that Mrs. Sweeney had full knowledge of her claims when she amended her Adams County complaint to include Dr. Dunlap. *Infra*. There is, therefore, no justification for Mrs. Sweeney's failure to assert all claims that she had against Dr. Dunlap in that first iteration.¹²

b. Undisputed facts demonstrate that Mrs. Sweeney had the full ability to assert a direct claim based upon the 2012 care in the Adams County iteration.

Mrs. Sweeney amended her complaint in the Adams County iteration to assert a claim against Dr. Dunlap on January 15, 2014. CP 17-19. That was approximately 21 months after Dr. Dunlap's April 4, 2012 rotator cuff procedure. *Compare id. with* CP 46. It was, therefore, well within the 36-month limitation period provided for by RCW 4.16.350.

By that time Mrs. Sweeney had already undergone a reverse total shoulder procedure (the procedure was performed on June 11, 2013). CP 47. The 2013 surgery concluded Mrs. Sweeney's shoulder treatment, and she alleges that the 2013 shoulder surgery was "the likely consequence of a failure in 2012 of

¹² Had Mrs. Sweeney asserted a direct medical negligence claim based upon the 2012 surgery, the claim would have been undeniably timely.

Dr. Dunlap to take appropriate care during his attempt to perform rotator cuff repair . . ." *See id.* That final surgery was about six months past when Mrs. Sweeney amended her Adams County complaint to assert a claim against Dr. Dunlap. *Compare id. with* CP 17-19.

The undisputed facts, therefore, establish that Mrs. Sweeney had all the information necessary to assert whatever claim she saw fit (including the claim that she purports to be bringing in this Spokane County iteration) against Dr. Dunlap by the time that she added Dr. Dunlap as an Adams County defendant. Neither Dr. Dunlap nor the Court will ever know why Mrs. Sweeney or her former counsel chose not to assert a direct claim of negligence against Dr. Dunlap with respect to his 2012 care. However, it is beyond dispute that Mrs. Sweeney had the opportunity to do so. Having chosen not to, Mrs. Sweeney cannot assert that claim now – *res judicata* forbids it.

C. RES JUDICATA ALSO PRECLUDES MRS. SWEENEY FROM ASSERTING THAT DR. DUNLAP MISLED HER INTO OMITTING HIM AS AN INITIAL DEFENDANT IN ADAMS COUNTY.

Ms. Sweeney's final argument asks the Court to hold that Dr. Dunlap misled her into omitting him from the Adams County iteration, as originally filed. As a preliminary matter, the argument is contrary to the undisputed timeline discussed above. When Mrs. Sweeney named Dr. Dunlap to the Adams County iteration there was no information that she lacked or claims to have

misunderstood. More fundamentally, however, Mrs. Sweeney has already presented those allegations to the Court (in the Adams County iteration and the appeal taken therefrom), and those allegations were rejected. *See* CP 38.

Mrs. Sweeney's assertions are just that – assertions. There has never been any facts or evidence presented to demonstrate that Dr. Dunlap misled anyone. The undisputed evidence shows that Dr. Dunlap simply did not recall the specifics of Mrs. Sweeney's case when her former counsel interviewed him. CP 169-73, 180-81, 192-93.¹³ Mrs. Sweeney's argument regarding Dr. Dunlap's alleged misleading is improper, unsupported, and it should be disregarded.

VI. CONCLUSION

Mrs. Sweeney made strategic decisions with respect to which Defendants to sue, when to sue, where to sue, and what claims to bring. Mrs. Sweeney had a full and fair opportunity to pursue all of her claims in the Adams County iteration of her suit. That Mrs. Sweeney's strategies proved unsuccessful does not justify her ongoing attempts to recast and redefine her claims.

¹³ The evidence shows that Dr. Dunlap's mistake was the result of a spelling error on Mrs. Sweeney's records. It is undisputed that Dr. Dunlap looked Mrs. Sweeney's x-rays up on a computer while he was meeting with Mrs. Sweeney's counsel. CP 169-73, 180-81. It is also undisputed that Dr. Dunlap's search did not capture Mrs. Sweeney's pre-reduction x-ray because those x-rays were mistakenly filed under "Sweeny" – that is without the final "e" in her name. *Id.*

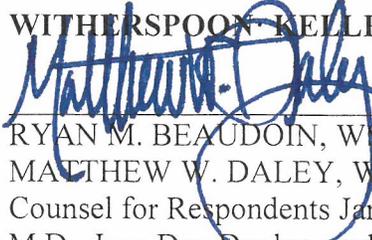
Res judicata bars both claims that were brought and that could have been brought. Therefore, no matter how Mrs. Sweeney's claims are viewed they are fatally flawed.

The record does not support Mrs. Sweeney's attempt to distinguish the claims brought in the two iterations of her case. Dr. Dunlap's alleged 2010 negligence was raised in each iteration. And Dr. Dunlap's alleged 2012 negligence was presented in the prior Adams County iteration – as a claim and as an issue. Both claim and issue preclusion, therefore, require the Trial Court to be affirmed.

Mrs. Sweeney had every opportunity to bring whatever claims she saw fit. There is no justification in the record or in the law to permit Mrs. Sweeney a second bite at the apple. Justice demands finality. Dr. Dunlap, therefore, respectfully asks the Court to affirm the Trial Court's dismissal of Mrs. Sweeney's Spokane County claims.

RESPECTFULLY SUBMITTED this 27th day of March, 2019.

~~WITHERSPOON KELLEY, P.S.~~



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DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 27th day of March, 2019, the foregoing was delivered to the following persons in the manner(s) indicated:

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