

64274-0

64274-0

NO: 64274-0-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

JOHN BENJAMIN FREEMAN,

Appellant,

v.

GARY C. BERGAN, THOMAS  
WHITTINGTON BERGAN STUDEBAKER,  
INC., P.S., a Washington law firm

Appellee(s)

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
The Honorable Steven Gonzales

AMENDED APPELLANT OPENING BRIEF

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## I. INTRODUCTION

The “dismissal” rule imposes a harsh remedy in derogation of the common law. Thus, only where the moving party for judgment on the pleadings clearly establish that they are entitled to judgment on the pleadings as a matter of law, should a trial court grant such a motion. In this case, the trial court concluded that Appellant John Benjamin Freeman did not have standing to seek vacation of an August 15, 2007 judgment which had been entered against Appellant in a prior adjudication by another trial court judge of King County Superior Court. The trial court made a determination that even though the August 15, 2007 judgment had been entered against Appellant Freeman only Appellant’s son Robert Lee Freeman had standing to suit for vacation of the August 15, 2007 judgment.

A motion for judgment on the pleadings tests the sufficiency of the pleadings and presents to the court a question of law as to whether the facts alleged in the complaint constitute a cause of action, or whether the facts alleged in the answer constitute a defense. The motion raise such questions as are on a general demurrer and must be determined upon the same principles. The party moving for judgment on the pleadings admits,

for the purpose of the motion, the truth of every fact well pleaded, and the untruth, of his own allegations which have been denied. CP 157-158.

Ruling on a motion for judgment on the pleadings, the court must accept all material allegations of fact in the complaint as true, and resolve all doubts in favor of the nonmoving party. *Bastek v. Federal Corp. Insurance Corporation*, 145 F.3d 90 (2<sup>nd</sup> Cir. 1998), certiorari denied, 119 S. Ct. 539, 525 U.S. 1016, 142 LEd.2d 448. *Mullins v. Kaiser Steel Corporation*, 642 F.2d 1302 n.26, 206 (D.C.App. 334 (1980))(quoting *Wright & Miller*, reversed on the merits, 102 S. Ct. 851, 455 U.S. 72, 70 LEd.2d 833 (1982). *Walker Distributor Company v. Lucky Brewing Company*, 323 F.2d 1 (9<sup>th</sup> Cir. 1963).

An issue of fact is deemed to be material if the outcome of the case might be altered by the resolution of the issue one way rather than another. Thus, the moving party cannot secure a judgment on the pleadings when their answer raises issues of fact, if proved, would defeat recovery. *Sheppard v. Beerman*, 18 F.3d 147 (2<sup>nd</sup> Cir. 1994), certiorari denied, 115 S. Ct. 73, 513 U.S. 816, 130 LEd.2d 28 (district court improperly resolved factual issue in dispute). Similarly, the moving party would not succeed on a motion under Rule 12(c) if there are allegations in the nonmoving

party's complaint that, if proved, would permit recovery on his or her claim. *Institute for Scientific Information, Inc. v. Gordon & Breach, Science Publishers, Inc.*, 931 F.2d 1002, 1005 (3<sup>rd</sup> Cir. 1991), (quoting *Wright & Miller*, certiorari denied, 112 S. Ct. 302, 502 U.S. 909, 116 LEd.2d 245.

In order for the doctrine of collateral estoppel to apply, the issue resolved in the prior proceeding must be established by competent evidence in order for the decision maker in the subsequent proceeding to undertake the necessary analysis of whether the issue in each proceeding are, in fact, identical. The proponent of the *Lemond v. State of Washington Department of Licensing*, 143 Wash.App. 797, 180 P.3d 829 (2008).

The proponent of the application of the doctrine of collateral estoppel has the burden of proving four elements to demonstrate the necessity of its applicability:

(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior

adjudication; (4) application of the doctrine does not work an injustice; and because all four elements must be proven, the proponent's failure to establish any one element is fatal to the proponent's claim. *Lemond v. State of Washington Department of Licensing*, 143 Wash.App. 797, 180 P.3d 829 (2008). *Thompson v. Department of Licensing*, 138 Wash.2d 783, 790, 982 P.2d 301 (1999) (quoting *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wash.2d 25, 262-63, 956 P.2d 312 (1998)).

Collateral estoppel is an affirmative defense. The party asserting it has the burden of proof. *State Farm Mutual Auto Insurance Company v. Avery*, 114 Wash.App. 299, 304, 57 P.3d 300 (2000). Thus, the application of collateral estoppel is limited to situation where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." *Standlee v. Smith*, 83 Wash.2d 405, 408, 518 P.2d 721 (1974) (quoting *Neaderland v. Commissioner of Internal Revenue*, 424 F.2d 639, 642 (2<sup>nd</sup> Cir. 1970)).

The proponent of the doctrine of res-judicata as to a particular issue involved in the pending case must prove by competent evidence that the issue was actually determined and necessarily adjudicated in the prior

action, where the records do not clearly reflect the determination. *Refener v. Scott*, 46 Wash.2d 240, 245, 280 P.2d 253 (1955). The burden of properly identifying the previously litigated issue through competent evidence applies equally to a proponent of the application of collateral estoppel. *Luisi Truck Lines v. Washington Utilities Transportation Commission*, 72 Wash.2d 894, 435 P.2d 654 (1967).

It is first necessary to understand something of the recognized meaning and scope of res-judicata, a doctrine judicial in origin. The general rule of res-judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishing of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. The judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

But where the second action between the same parties is upon a different cause or demand, the principle of res-judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

Since the second cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at the time.

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715 92 LEd. 989, 48 (1948).

## **II. ASSIGNMENTS OF ERROR**

1. The trial court on July 16, 2009 erred in ruling Appellant John Benjamin Freeman complaint for vacation of judgment-independent equitable action pursuant to CR 60(c) was not proper before the trial court.

2. The trial court erred on July 16, 2009 ruling that Appellant Freeman's CR 60(c) complaint for vacation of judgment-independent equitable action has been adjudicated repeatedly. CP 70-71.

3. The trial court on July 16, 2009 erred ruling that even though the judgment of August 15, 2007 had been entered against Appellant John Benjamin Freeman in a prior adjudication on August 15, 2007, only Appellant's son Robert Lee Freeman had standing to seek vacation of the August 15, 2007 judgment, not Appellant John Benjamin Freeman.

4. The trial court erred in not ruling on four(4) questions presented by Appellees in Appellees motion for judgment on the pleadings: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) was there a final judgment on the merits? (3) Was the party against whom the plead is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? CP 70-71.

5. The trial court on July 16, 2009 erred granting that Appellees Motion for Judgment on the Pleadings pursuant to CR 12(c).

6. The trial erred on October 2, 2009 ruling that Appellant John Benjamin Freeman motion for vacation of the July 16, 2009 order dismissing Appellant's complaint for vacation of judgment-independent

equitable action was nor proper before the trial court.

7. The trial court erred on October 2, 2009 as did on July 16, 2009 ruling that Appellant John Benjamin Freeman had no standing to seek vacation of an August 15, 2007 judgment which had been entered against Appellant John Benjamin Freeman in a prior adjudication.

### **III. STATEMENT OF THE CASE**

On May 5, 2009 Appellant John Benjamin Freeman pursuant to CR 60(c), filed and served a complaint titled "Complaint for Vacation of Judgment-Independent Equitable action. Appellant was seeking vacation of a judgment which had been entered against Appellant Freeman in a prior adjudication on August 15, 2007 after a bench trial, well what was supposed to be a bench trial on January 30, 2007 before King County Superior Court Judge Theresa Doyle one of the Judges for King County Superior Court. CP 75-94.

For a two(2) year period Appellant Freeman motioned the Superior Court for King County for vacation of the August 15, 2007 judgment placing before the court supportive evidence that Respondent Gary C. Bergan, Thomas Whittington Bergan Studebaker, Inc. P.S., a Washington law firm and their counsel of record Lauren D. Studebaker had obtained

the August 15, 2007 judgment by means of fraud, misrepresentation, dishonesty, deceitful acts.

**A. APPELLANT COMPLAINT FOR VACATION OF  
JUDGMENT-INDEPENDENT EQUITABLE ACTION**

Appellant John Benjamin Freeman on May 9, 2009 filed a complaint in King County Superior Court titled "Complaint for Vacation of Judgment-Independent Equitable Action." CP 75-94.

Appellant John Benjamin Freeman was seeking relief from a judgment entered against him in a prior adjudication on August 15, 2007. Before filing Appellant's complaint for vacation of judgment-independent equitable action, Appellant brought to the attention of the State Court Judge for King County Superior Court that the August 15, 2007 judgment had been obtained by fraud, and misrepresentation committed by Respondents and their counsel of record Lauren D. Studebaker.

The trial court who had on August 15, 2007 denied Appellant's show cause order which had been issued on July 22, 2008 for Respondents to appear and show cause why the judgment on August 15, 2007 should not be vacated. CP 135-136

The trial court who entered the August 15, 2007 judgment ruled on Appellant's motion for vacation of the August 15, 2007 judgment and order to show cause without Appellant John Benjamin Freeman or the Respondents or their counsel of record Lauren D. Studebaker appearing before the court for the August 12, 2008 scheduled hearing [order denying relief entered by the court on August 14, 2008] without oral argument. CP 135-136.

Appellant Freeman's complaint for vacation of judgment-independent equitable action was brought pursuant to CR 60(c), which provides: "**the provisions of the Rule CR 60(c), do not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding. The provision contemplates that a separate action will be filed to provide the relief desired.** Kruger Engineering Inc. v. Sessums, 26 Wash.App. 721, 615 P.2d 502 (1980). Wager v. Goodwin, 92 Wn.App. 876, 882, 964 P.2d 1214, 1217 (1998).

After the pleadings had been closed and pursuant to CR 12(c), the Respondents moved for judgment on the pleadings alleging that Appellant's claims and causes of action alleged in Appellant's complaint for vacation of judgment-independent equitable action were identical in all respect to Appellant's claims and causes of action

alleged when Appellant filed his lawsuit against the Respondents on August 12, 2005 presenting the trial court with four(4) questions to be answered in applying collateral estoppel and res-judicata. CP 29-31.

### **B. COLLATERAL ESTOPPEL**

Respondents argued in their moving papers for judgment on the pleadings CR 12 (c) that Appellant Freeman is collateral estoppel from re-litigating claims and causes of action Respondents alleged had been fully litigated in a prior adjudication on January 30, 2007 and that each of Appellant's claims on page 2, 3, 4, and page 5, line 22 of Appellant's amended complaint had been fully litigated on January 30, 2007 in a prior adjudication. CP 29-31.

Respondents further alleged that all of the causes of action alleged in Appellant's amended complaint for vacation of judgment-independent equitable action were identical with Appellant's first, and second cause of action which had been as alleged by Respondents ruled on against Appellant and therefore collateral estoppel applied directly to Appellant's 2009 complaint for vacation of judgment-independent equitable action.

Collateral estoppel requires that the issue decided in the prior adjudication is identical with the one at hand, Luisi Truck lines, Inc. v.

Washington Utilities and Transportation Commission, 72 Wash.2d 887, 894, 435 P.2d 654 (1967). Where an issue in two entirely different contexts, this requirement is not met. *Luisi*, at 895, 435 P.2d 654. The difference here is that before August 15, 2007 there had been no judgment entered against Appellant John Benjamin Freeman.

In addition, collateral estoppel precludes only those issues that have actually been litigated and determined; it "does not operate as a bar to matters which were not litigated" on January 30, 2007 which is the August 15, 2007 judgment. *Davis v. Nielson*, 9 Wash.App. 864, 874, 515 P.2d 995 (1973), accord *Fluke Capital and Management Services Company v. Redmond*, 106 Wash.2d 614, 620, 724 P.2d 356 (1986).

It is axiomatic that for collateral estoppel by judgment to be applicable, that the facts or issues claimed to be conclusive on the parties in the second action were actually and necessarily litigated and determined in the prior action on January 30, 2007. *Ira v. Columbia Food Company*, 226 Or. 56, 360 P.2d 622, 86 A.L.R. 1378 (1961). *Evergreen v. Numan*, 141 F.2d 927, 152 A.L.R. 1187 (2<sup>nd</sup> Cir. 1994).

Collateral estoppel is an affirmative defense. The Respondents were required and had the burden of proof to show that Appellant's 2005 claims

and causes of action and Appellant's 2009 claims and causes of action are identical and that in each lower adjudication the 2005 claims and causes of action and the 2009 claims and causes of action were identical in all respect and that all of Appellant's claims and causes of action were totally identical in both lower court setting. *Luisi Truck Lines, Inc. v. Washington Utilities Commission*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967).

Respondents did not provide any evidence to the trial court on July 16, 2009 that Appellant Freeman claims and causes of action were identical to Appellant's claims and causes of action alleged in Appellant's complaint for vacation of judgment independent equitable action.

The trial court on July 16, 2009 simply took Respondents counsel of record Lauren D. Studebaker's words that Appellant Freeman was collateral estoppel from Re-litigating Appellant's claims and causes of action alleged in Appellant's complaint Filed on May 9, 2009, without first, requiring that the Respondents met their burden Of proof. *State Farm Mutual Insurance Company v. Avery*, 114 Wash.App. 299, 304, 57 P.2d 300 (200). *Luisi Truck Lines Inc. v. Washington Utilities Transportation Commission*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967).

### **C. RES-JUDICATA**

Not only does the Respondents allege that Appellant Freeman is collateral estoppel from re-litigating claims and causes of action Respondents alleged have already been litigated in a prior adjudication on January 30, 2007. But, that the theory of res-judicata also applies to Appellant's complaint for vacation of judgment-equitable action.

It was first necessary to understand something of the recognized meaning and scope of res-judicata, a doctrine judicial in origin. The general rule of res-judicial applies to repetitious suits involving the same cause of action. It rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. The judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatsoever, absent fraud or some other invalidating the judgment.

Appellant Freeman during the course of over two years placed before King County Superior Court evidence showing that the August 15, 2007 judgment had been obtained by Respondents and Respondents counsel of record Lauren D. Studebaker by means of fraud and misrepresentation.

The lower court [King County Superior Court/King County Superior Court Judge Theresa Doyle] refused to even review the evidence which clearly laid the foundation for the August 15, 2007 judgment to be vacated.

But where the second cause of action between the same parties is upon a different cause or demand, the principles of res-judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as a matter of which might have been litigated and determined, but only as to those matters in issues or points controverted, upon the determination of which the finding or verdict was rendered.

Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate

points which were not at issue in the first proceedings, even though such points might have been tendered and decided at that time.

Before August 15, 2007 there was no judgment in dispute between the parties only after the judgment had been entered against Appellant on August 15, 2007 did there come different issues and points which had not been litigated on January 30, 2007. Commissioner Internal Revenue v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 LEd. 898, 48 (1948).

#### **D. TRIAL COURT PROCEEDINGS**

July 16, 2009 the trial court heard oral argument on Respondents motion for judgment on the pleadings ruling that the Respondents the moving parties for judgment on the pleadings had met the requirement of CR 12(c) and the Respondents had clearly presented sufficient evidence to be entitled to judgment on the pleadings by presenting answers four questions the trial court determined entitled Respondents to be awarded judgment on the pleadings. (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against who the plea is asserted a party to or in privity with a party to the prior

adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

The trial court on July 16, 2009 did not make a ruling on the four questions presented by Respondents but made a determination that the Respondents through competent evidence presented to the court on July 16, 2009 had met Respondents burden of proof for Respondents entitlement to be awarded judgment on the pleadings as the trial court need not address the four questions presented by the Respondents as Respondents counsel of record Lauren D. Studebaker had pleaded Respondents defense and Respondents entitlement to judgment on the pleadings.

July 16, 2009 the trial court did not state for the record which case the trial court was speaking of. Appellant complaint for vacation of judgment-independent equitable action when filed on May 5, 2009 was assigned to the trial court hearing Respondents motion for judgment on the pleadings.

THE COURT: Not only are there the problems I have outlined - - that is, your failure to show standing in the case itself - - but it is a case that has already been adjudicated not just once but repeatedly. And unfortunately, while there may be an earnest belief in the claim, and there

may be something to it - - I frankly don't know - - it is not properly before this Court, and the defense is entitled to a dismissal on the pleadings before the Court today.

None of the claims and causes of action alleged in Appellant's complaint filed. *Franklin National Bank v. Krakow*, 295 F. Supp. 910 (D.C.D.C. 1969). *Dunn v. Samuelson*, 761 P.2d 1270 (Kan App. 1986) (quoting *Wright & Miller*).

Similarly, the Respondents could not have success on their motion for judgment on the pleadings under Rule 12(c) where there are allegations in Appellant's pleadings if proved, would permit recovery on Appellant's claims. *Institute for Scientific Information, Inc. v. Gordon and Breach, Science Publishers, Inc.* 931 F.2d 1002, 1005, (3th Cir. 1991), (quoting *Wright and Miller*), certiorari denied, 112 S. Ct. 302, 502 U.S. 909, 116 LEd.2d 245. CP 75-94.

#### **IV. SUMARRY OF THE CASE**

Appellant John Benjamin Freeman, Pro Se, brought a complaint titled "Complaint for Vacation of Judgment-Independent Equitable Action pursuant to CR60(c). CP 75-94.

The nature of filing Appellant's complaint for vacation of judgment-independent equitable action pursuant to CR 60(c), that Appellant Freeman was seeking vacation of a judgment entered against Appellant in a prior adjudication on August 15, 2007. CP 135-136.

CR 60(c) provides that the Rule do not limit the power of the court to entertain an independent action to provide the relief desired. *Kruger Engineering Inc., v. Sessums*, 26 Wash. App. 721, 615 P.2d 502 (1980). *Wager v. Goodwin*, 92 Wn.App. 876, 882, 964 P.2d 1214, 1217 (1998).

After the pleadings had been closed the Respondents by and through their counsel of record Lauren D. Studebaker moved for judgment on the pleadings pursuant to CR 12 (c) alleging in Respondents moving papers that all of Appellant's claims and causes of action alleged in Appellant's amended complaint for vacation of the August 15, 2007 are the same claims and causes of action ruled against Appellant Freeman on January 30, 2007 during a bench trial which lead to the previous trial court on March 26, 2007 entered CR 11 sanction against Appellant Freeman for as alleged by Respondents for maintaining Appellant's lawsuit against the named Respondents. CP 112-113

The respected parties appeared before the trial court on July 16, 2009 on Respondents motion for judgment on the pleadings.

MR. STUDEBAKER: Then in July and August of 2008, Mr. Freeman brought two separate motions. One was an order to show cause directing the defendants to appear in court and show cause why the judgment shouldn't be vacated. Then he also moved for vacation of that judgment. Both of those motions and order to show cause were denied, and it's Exhibit 11 to the amended complaint. I inadvertently referred to that as having been entered on August 12, 2007 whereas in fact it was August 14, 2008. CP 135-136

MR. STUDEBAKER: The defendants take the position that plaintiff is collateral estoppel from bringing an action to vacate at this time because he's already had those two bites at the apple plus his appeal.

MR. STUDEBAKER: The case is somewhat strange in that plaintiff is looking to, I think, relitigate his original claim, which, of course, would be precluded by res-judicata. But he's bringing an action to overturn the judgment which I believe is ruled by principles of collateral estoppel.

MR. STUDEBAKER: We think that the Rains [phonetic] case, which I cited in my brief, makes it clear the test is insofar as the application of the doctrine of collateral estoppel, and we think that the four-part questions that are posed in the Rains case apply. Number one, is there an identical issue? We say, yes. It's the issue of the vacation of the

judgment. Two, is there a final judgment on the merits? The answer to that, of course, is yes. There was an order of dismissal.

MR. STUDEBAKER: The parties were identical, which satisfied the third element of the doctrine. And fourth, it will not work an injustice against Mr. Freeman in that he's had many opportunities to bring this action and he's actually brought it and had it heard in a neutral forum.

MR. STUDEBAKER: Finally, the plaintiff Mr. Freeman has not identified -and we pointed this out in the reply brief—has never identified the grounds that he claims for vacation judgment, which, of course, are governed by CR 60. And he's not demonstrated by the evidence that he proposes to show why he should have a vacation of the judgment. So, for those reasons, we believe that a judgment of dismissal should be entered.

THE COURT: This is a case that involves a father who paid legal fees to an attorney for his son's dissolution proceeding. It is a case which those payments clearly were made by the father to the attorney, but the attorney-client relationship resided between the lawyer and the party to the marriage.

THE COURT: There may have been dissatisfaction with the work done by the lawyer. I make no judgment one way or the other about

whether the attorney did his job or not. That's not before me today. The fee dispute would rightly reside between the party to the dissolution and the attorney.

THE COURT: There is a process through the bar association, but that doesn't preclude lawsuit, but the standing for that was with the son, not the father.

THE COURT: Not only are there the problems I have outlined—that is, your failure to show standing in the case itself—but it is a case that has already been adjudication not just once but repeatedly. And unfortunately, while there may be an earnest belief in the claim, and there may be something to it—I frankly don't know—it is not properly before this Court, and the defense is entitled to a dismissal on the pleadings before the Court today. I will so order.

MR. FREEMAN: Yes, I do, Your Honor. In the first place, where is his proof? He hasn't submitted anything. His burden of proof, it's on him. He's the moving party, right?

MR. FREEMAN: If you look at rule, rule 12, defenses and objections, motion in judgment and plea and summary judgment, this case,

it centers around whether or not the defendants are entitled to judgment on the pleadings. That is his motion he' got. Am I correct?

THE COURT: You are.

Appellant Freeman informed the trial court that there has never been two motions for vacation of the August 15, 2007 judgment with the first filed in July 2008, and the second filed in August 2008.

Appellant Freeman informed the trial court that on July 22, 2008 Appellant obtained an order to show cause and filed a sub-joined motion for vacation of the August 15, 2007 setting forth legal argument in support of Appellant's motion for vacation of the August 15,2007. Appellant Freeman further informed the trial court that Appellant, with his counsel of record and Respondents counsel of record Lauren D. Studebaker appeared in King County Superior Court Ex-Parte Court seeking the release of the May 9,2002 retainer agreement Appellant John Benjamin Freeman signed when Appellant hired Attorney Gary C. Bergan the main Respondent. CP 138-139.

Appellant Freeman further brought attention to the trial court that he nor did Respondents or Respondents counsel of record Lauren D. Studebaker appeared before King County Superior Court Judge Theresa Doyle on Appellant's show cause order and that on August 14,2008 Judge Doyle

revised Appellant's motion without oral argument and denied the same on August 14, 2008. CP 135-136.

Therefore, Appellant John Benjamin Freeman has not been heard in a neutral forum for seeking relief from the August 15, 2007 judgment. As the record is clear that Judge Doyle ruled on the motion without oral argument and that in itself is not a neutral forum. CP 135-136.

CR 60(e)(2) is clear and provides: "**Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.**" CP 35-36.

CP 135 clearly shows that Judge Theresa Doyle on August 14, 2008 lined the word "**Heard**" out and in its place wrote in the word "**Reviewed**".

CP 136 clearly shows that on August 14, 2008, Judge Theresa Doyle placed a line in the word "Open" meaning that Respondents nor did Appellant Freeman appear before Judge Doyle on August 14, 2008, the date the court denied Appellant's motion for vacation of the August 15, 2007 judgment.

Appellant Freeman left the court on July 16, 2009 in amazement as to how the trial court determined that Respondents had met their burden of proof and Respondents entitlement to judgment on the pleadings. A motion for judgment on the pleadings under CR 12(c) may be and should have been granted on July 16, 2009 only if all the material issues could have been resolved on the pleadings by the trial court. Otherwise, a summary judgment or a full trial was necessary. An issue of fact is deemed to be material if the outcome of the case might have been altered by the resolution of the issue one way rather than, another. Thus, the Respondents could not and should not have been granted an order of dismissal on the pleadings, where Freeman raised issues in his response to the moving party's motion for judgment on the pleadings, that if proved, would defeat recovery. *Forest v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), *Honey v. Distelrath*, 195 F.3d 532 (9th Cir. 1999), certiorari denied, 120 S. Ct. 1557, 529 U.S. 1054, 146 LEd.2d 462, (court erred in granting Rule 12(c) motion because allegations in complaint demonstrated the suit might not be barred by governmental precedent). *Sheppard v. Beerman*, 18 F.3d 147 (2nd Cir. 1994), certiorari denied, 115 S. Ct. 73,

513 U.S. 816, 130 LEd.2d 28 (district court improperly resolved factual issue in dispute).

## **VI. ARGUMENT**

August 15,2007 in a prior adjudication one of the Judges for County Superior Court the Honorable Theresa Doyle entered judgment in favor of Respondents in the sum of \$ 5,691.00 based on misrepresentation Respondents counsel of record Lauren D. Studebaker presented to the trial court on January 30,2007 which lead 10 the court entered judgment against Appellant Freeman. CP 66-67 .

Thereafter, Appellant Freeman spent the past two years filing motion and motion along with evidence providing that Respondents and their counsel of record Lauren D. Studebaker had engaged in fraud, misrepresentation, dishonesty and deceitful Acts to obtain the August 15, 2007 judgment.

July 22,2008 Appellant Freeman obtained from the Superior Court for King County an order pursuant to CR 60(e)(2) for the Respondents to appear and show cause why the August 15, 2007 judgment should not be vacated. CP 35-36.

July 31, 2008 in conjunction with Appellant's motion pursuant to CR 60(e)(2) Appellant Freeman also filed a motion for vacation of the August 15, 2007 judgment. CP 39-50.

Respondents responded to Appellant's motion for vacation of the August 15, 2007 judgment alleging that Appellant Freeman has had his day in court and that there was no need for the trial court [King County Superior Court Judge Theresa Doyle] to entertain Appellant's motion for vacation of the August 15, 2007 judgment.

Appellant's motion for vacation of the August 15, 2007 judgment was set pursuant to CR 60(e)(2) for oral argument before the trial court which had on August 15, 2007 entered the judgment against Appellant Freeman. However, the trial court which had entered the August 15, 2007 judgment did not comply with CR 60(e)(2), which provides: **"Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted."** CP 35-36.

Judge Theresa Doyle did not hear oral argument from the parties involved in the first adjudication for vacation of the August 15, 2007,

Judge Doyle ruled on Appellant's motion without oral argument.

Therefore Appellant Freeman was not afforded his day in court seeking vacation of the August 15, 2007 judgment denying Appellant the right to have his day in a neutral forum. CP 135-136.

October 24, 2008 Appellant Freeman wrote a letter to King County Superior Court Judge Theresa Doyle informing the court what Respondents and their counsel of record Lauren D. Studebaker had engaged in to obtain the August 15, 2007 judgment. CP 423-424.

Appellant Freeman also made King County Superior Court Commissioner Nancy Bradburn-Johnson of Respondent Gary C. Bergan and his defense counsel Lauren D. Studebaker misrepresenting facts to the court on July 14, 2008, July 17, 2008, August 18, 2008. CP 426-427.

May 5, 2009 Appellant Freeman filed a complaint Titled "Complaint for Vacation of Judgment-Independent Equitable Action pursuant to CR 60(c). CP 75-94 seeking relief from the August 15, 2007 judgment. CP 24-25.

Respondents by and through their counsel of record Lauren D. Studebaker entered an answer and affirmative defense to Appellant's

claims and causes of action asserted in Appellant's complaint for vacation of judgment-independent equitable action. CP 26-27.

Pursuant to CR 15(a) Appellant motioned the trial court for leave to amend Appellant's complaint since Appellant could not do so as a matter of right since Respondents had appeared and answered. CP 75-94.

The trial court granted Appellant's motion for leave to amend Appellant's complaint for vacation of Judgment-Independent Equitable Action and soon thereafter Respondents Were served with a copy of Appellant's amended complaint.

Respondents responded to Appellant's amended complaint for vacation of the August 15, 2007 judgment. In their second answer and affirmative defenses, the Respondents admitted to paragraphs 1 through 7, and 9 through 20 of Appellant's amended complaint. CP 156.

Respondents alleged that the Honorable Theresa Doyle founded that Freeman had violated CR 11 by maintaining his lawsuit against Defendants. Except as admitted deny the allegations of paragraph 8, **[There is no evidence in the January 30, 2007 bench trial transcript which shows that Judge Theresa Doyle entered CR 11 sanction**

**against Appellant Freeman for maintaining Appellant's lawsuit against the Respondents.] CP 54-63.**

Respondents alleged that the Respondents have no knowledge of the allegations set forth in paragraph 21 and 22 and therefore denies the same. CP 156.

Respondents admits that Appellant Freeman attempted to avoid the judgment entered against him by Judge Doyle. Except as admitted deny the allegations of paragraph 1 on page 5. CP 156.

Respondents further admit that Judge Doyle denied a motion to set aside the judgment. Except as admitted deny the allegations of paragraph 2 on page 6. CP 156-157.

Respondents admit that Commissioner Nancy Johnson denied Appellant's motion to require Respondents to produce written and signed "retainer agreement" except as admitted deny the allegations of paragraph 3 on page 6. CP 157.

Respondents admitted that Appellant filed two separate ethics complaints against Respondent Gary C. Bergan and one against Respondent Bergan's counsel of record Lauren D. Studebaker. CP 157.

Respondents deny the allegations of paragraph 5 and 6 one page 6; admit to the allegations of paragraph 7 on page 7 and 10 on page 8. CP 157. Deny the remaining allegations of Appellant's complaint, including I CLAIMS, I PROXIMATE CAUSE OF ACTION, II FIRST CAUSE OF ACTION, SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION, FOURTH CAUSE OF ACTION, FIFTH CAUSE OF ACTION, SIXTH CAUSE OF ACTION and SEVENTH CAUSE OF ACTION, CP 157.

Moving for judgment on the pleadings pursuant to CR 12(c), and filing Appellant's Response to Respondents motion for judgment on the pleadings. CP 161-183. Appellant Freeman brought to the attention of the trial court on July 10, 2009, that Respondents Answer and affirmative defenses conflicted with Appellant's complaint. CP 180.

The trial court on July 16, 2009 to be able to grant Respondents motion for judgment on the pleadings, the trial court on July 16,2009 was required find beyond a doubt that Appellant John Benjamin Freeman the nonmoving party could prove not set of facts in support of his complaint for vacation of the August 15,2007 judgment pursuant to CR 60(c). Bruce v. Riddle, 631 F.2d 272, 274 (4th Cir. 1980).

Respondents on page 1 of Respondents answer to Appellant's amended complaint paragraph 3 asserts: "**Defendants have no knowledge of the allegations set forth in paragraph 21 and 22 and therefore deny the same.**" Appellant Freeman's amended complaint carries two different claims asserted in Appellant's amended complaint, page 5, paragraph 21, page 5, paragraph 22, CP 79, page 10, paragraph 21, CP 84, paragraph 22, page 10, CP 84.

Respondents counsel of record Studebaker failed to identify which of the two different paragraphs 21-22 page 5, CP 79, page 10, CP 84 the Respondents have no knowledge of. Respondent's counsel of record Lauren D. Studebaker responded to Appellant's letters dated October 24, 2008, to King County Superior Court Judge Theresa Doyle and King-County Superior Court Commissioner Nancy Johnson.

It is becoming more and more confusing for Appellant Freeman to understand why is Respondents counsel of record denied paragraph 5, page 6, CP 80, page 5, paragraph 6, CP 80, where CP 53 through 63 shows Respondents counsel of record Lauren D. Studebaker arguing the Respondents case before King County Superior Court Judge Theresa Doyle on January 30, 2007.

It is still becoming more confusing and to wonder if defense counsel Studebaker is confused as to the dates, time and places the matter of John Benjamin Freeman v. Gary C. Bergan, Thomas Whittington Bergan Studebaker, Inc. P.S., a Washington law firm.

CP 53 through 63 shows that on January 30,2007 Appellant John Benjamin Freeman, his counsel of record Stan Lippmann; defense counsel Lauren D. Studebaker and his client Respondent Gary C. Bergan appeared for bench trial before King County Superior Court Judge Theresa Doyle.

Denying the remaining of Appellant's allegations, including I CLAIMS I PROXIMATE CAUSE OF ACTION, II FRIST CAUSE OF ACTION; THIRD CAUSE OF ACTION; FOURTH CAUSE OF ACTION, FIFTH CAUSE OF ACTION, SIXTH CAUSE OF ACTION AND Appellant's SEVENTH CAUSE OF ACTION on Appellant's amended complaint for vacation of judgment independent equitable action CR 60(c). Respondents answer conflicts with CP 96 through 149; CP188 through 249.

With the Respondents moving for judgment on the pleadings pursuant to CR 12(c), the factual allegations of Appellant Freeman's complaint are taken as true, but those of the Respondents are taken as true

only where and to the extent they have not been denied or do not conflict with the complaint. *Pleadger v. North Carolina Department of Health and Human Services, Dorothea Dix Hospital*, 7 F. Supp.2d 705 (1998). *Jadoff v. Gleason*, 140 F.R.D. 330, 331 (M.D.N.C. 1991). CP156-157

Respondents motion for judgment on the pleadings on July 16, 2009, before the trial court tested the sufficiency of the pleadings and presents to the court a question of law as to whether the facts alleged in the complaint constitute a cause of action, or whether the facts alleged in the answer constitute a defense. Respondents motion for judgment on the pleadings raised a general demurrer and should have been determined upon the same principles. *Joslin v. Joslin*, 45 Wash.2d 357, 274 P.2d 847 (1954). CP 251-253

Respondents did not produce any evidence for the trial court to determine that the Respondents were indeed entitled to a dismissal pursuant to CR 12(c). The trial court should have carefully scrutinized Respondents motion for judgment on the pleadings, lest Appellant Freeman was precluded from a full and fair hearing on the merits. Respondents were held to a strict standard on July 16, 2009 and were required to show that no material issue of facts exists and that they were

clearly entitled to a dismissal by judgment on the pleadings. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S. E.2d 494 (1974). *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F.2d 478 (6<sup>th</sup> Cir. 1973).

From August 15, 2007 through the filing of Appellant's complaint for vacation of judgment-independent equitable action on May 9, 2009. Appellant Freeman has placed as well as produced evidence and provided King County Superior Court with this evidence that Respondents and Respondents counsel of record Lauren D, Studebaker obtained the August 15, 2007 judgment by means of fraud and misrepresentation.

King County Superior Court Judge Theresa Doyle and King County Superior Court Judge Steven Gonzales were well aware of the allegations and the evidence Appellant Freeman had presented to the court for vacation of the August 15, 2007 judgment that Respondents and their counsel of record Lauren D. Studebaker had engaged in fraud, and misrepresentation and had concealed evidence beginning on September 12, 2005 through October 2, 2009.

While fraud has no all-embracing definition and is better left undefined lest crafty men find a way to committing fraud which avoids the definition, the following essential elements of actionable fraud are

well established had the trial court took time, to review Appellant's evidence instead of relying on Respondents and their counsel of record Lauren D. Studebaker are well established, **(1) False representation or concealment of a material fact; (2) reasonably calculated of deceive, (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injury party.** Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Johnson v, Owens, 263 N.C. 754, 140 S.E.2d 311 (1965); Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956); Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951); Insurance Company v. Gullford County, 226 N.C. 441, 38 S.E.2d 519 (1946); Laundry Machinery Company v. Skinner, 225 N.C. 285, 34 S. E.2d 190 (1945); Ward v. Heath, 222 N.C. 470, 24 S.E.2d 5 (1943); Pritchard v. Dailey, 168 N.C. 330, 84 S.E. 392 (1915).

July 16, 2009 the trial court was without a right to draw inferences favorable to Respondents for judgment on the pleadings. In that situation, all reasonable intendments and inferences from the pleadings, are as a matter of law, should have been taken against Respondents as the moving party for judgment on the pleadings and in favor of Appellant John

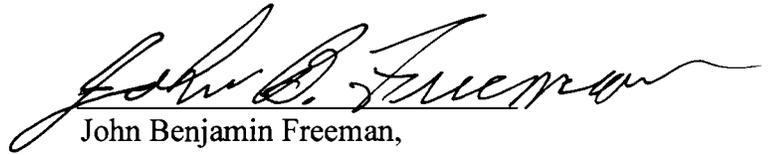
Benjamin Freeman. Forest v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000).

**VII. CONCLUSION**

This Court should not permit Appellant Freeman to be railroaded and should reverse the lower trial court judgment of dismissal.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of February, 2010.

Presented by:

A handwritten signature in cursive script that reads "John B. Freeman". The signature is written in black ink and is positioned above the printed name and title.

John Benjamin Freeman,  
Appellant, Pro Se



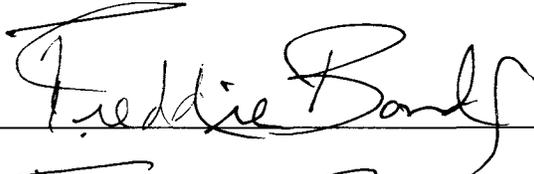
1  
2 Lauren D. Studebaker  
3 Thomas Whittington Bergan Studebaker, Inc. P.S.  
4 1505 Northwest Gilman Blvd. #1  
5 Issaquah, Washington 98027

6 I declare under penalty of perjury under the laws of the State of Washington that the  
7 foregoing is true and correct.

8 Signed and dated this 28<sup>th</sup> day of February 2010, at Seattle, Washington.  
9

10 Service Fee Paid \$75.00 2/22/2010 – Cash  
11

12  
13 By:





14  
15  
16 **FB** Freddy Bonds  
17 77 South Washington Street  
18 Seattle, Washington 98104  
19 (206) 926-9069  
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