

NO. 66151-5-I

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

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ALLAN PARMELEE,

Petitioner - Appellant,

v.

LISA HOWE, et al.,

Respondent - Appellee.

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**BRIEF OF THE RESPONDENT**

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## I. STATEMENT OF THE CASE

Appellant, Allan Parmelee, appeals the dismissal of his civil rights action. Appellant's federal claims were dismissed with prejudice for failure to exhaust his administrative remedies. Appellant's state claims were dismissed without prejudice for failure to follow the state tort claim act. Even though Appellant never filed a grievance and has re-filed his state claims, he appeals the dismissal of his action.

## II. COUNTER STATEMENT OF THE CASE

### A. Procedural History

On June 17, 2010, Appellant filed his initial complaint. CP 253-70. On July 15, 2010, Appellant filed his first amended complaint. On July 26, 2010, and August 17, 2010, Answers for the Respondents, who were served, was filed. Sub No. 11 and 12, Answer and Affirmative Defense. In their answer, Respondents denied Appellant's allegations. *Id.*

On September 3, 2010, Respondents filed a motion to dismiss Appellant's federal claims with prejudice due to his failure to exhaust his administrative remedies and dismiss his state claims due to his failure to comply with RCW 4.92.110. CP 213-36. Appellant filed a response. CP 43-212. Respondents filed a reply<sup>1</sup>. On October 6, 2010, the trial court

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<sup>1</sup> The trial court did not consider Respondents' reply as the court did not receive a copy of it. CP 42. However, the trial court did not strike the reply, and allowed oral argument regarding the issues raised in the reply.

heard Respondents' motion to dismiss. The trial court granted the Respondents' motion, dismissing Appellant's federal claims with prejudice and state claims without prejudice. CP. 42. Appellant filed a motion for reconsideration. CP 31. That motion was denied. CP 1. Appellant now appeals the dismissal of his case.

On November 24, 2010, Appellant filed a copy of his amended complaint, alleging the same federal and state claims in Snohomish County Superior Court. *See* Snohomish County Superior Court Cause Number 10-2-10003-1, Sub No. 1, Summons and Complaint.

**B. Relevant Statement Of Facts**

The Washington Offender Grievance Program (OGP) has been in existence since the early 1980's and was implemented on a Department-wide basis in 1985. CP 226. Under Washington's OGP, an offender may file a grievance over a wide range of aspects of his/her incarceration. CP 227. Inmates may file grievances challenging: 1) DOC institution policies, rules and procedures; 2) the application of such policies, rules and procedures; 3) the lack of policies, rules or procedures that directly affect the living conditions of the offender; 4) the actions of staff and volunteers; 5) the actions of other offenders; 6) retaliation by staff for filing grievances; and 7) physical plant conditions. An offender may not file a grievance challenging: 1) state or federal law; 2) court actions and decisions; 3) Indeterminate

Sentence Review Board actions and decisions; 4) administrative segregation placement or retention; 5) classification/unit team decisions; 6) transfers; 7) disciplinary actions; and 8) several other aspects of incarceration. *Id.* A grievance must be filed within 20 days of the grievable incident. CP 228. If a grievance is found not to be grievable, an offender has 5 days to appeal that decision to the Grievance Program Manager. *Id.* The Grievance Program Manager has the authority to reverse a decision of non-grievability. *Id.*

On June 17, 2010, Appellant filed the underlying matter. In his initial complaint, Plaintiff alleged various federal and state claims, including retaliation, assault, and harassment against various Department of Corrections employees at the Monroe Correctional Complex (MCC) and the Department of Corrections Headquarters. CP 253-70. Plaintiff alleged that he was retaliated against when he filed two grievances, which were not processed as emergency grievances and Appellant was told to rewrite them. CP 260-62 and 265. Appellant also brought claims of assault, libel/slander, negligence, and harassment. CP 265-68. Appellant filed an amended complaint, alleging that his First Amendment right was violated when his two grievances were not processed and being placed in segregation<sup>2</sup>. CP 248. Plaintiff also alleged state claims that he was

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<sup>2</sup> Appellant's amended complaint was substantially similar to Appellant's original complaint, although Appellant dropped the negligence claim and added a claim that his shoes were taken. Additionally, in the original complaint, Appellant alleged that

assaulted on the way to segregation, that he was libeled, slandered, and or defamed when it was stated that he assaulted staff and that he was uncooperative, that he was harassed, and had his shoes taken. CP 245-46 and 249-51.

On May 19, 2010, Appellant sent a letter to the Office of Financial Management (OFM), Risk Management Division. CP 236. Plaintiff was informed that his letter did not comply with the requirements of RCW 4.92.100. *Id.* On June 8, 2010, Plaintiff submitted a tort claim form. *Id.*

Since 1999, to the filing of Respondent's motion to dismiss, Appellant has utilized the grievance system 350 separate times. CP 229. Appellant did not file a grievance regarding the underlying claims in this action. *Id.* Appellant did write several letters to high ranking Department of Corrections personnel regarding his claims he alleged in this action. CP 56-58 and 64-69. Even after the alleged incidents, Appellant continued to utilize the formal grievance process when he chose to, filing several complaints, including three at MCC. *See* CP 229.

### **III. STATEMENT OF THE ISSUES**

1. Whether the trial court properly treated Respondents' motion as a motion to dismiss?

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he was assaulted to carry out the threats from the two officers he originally complained about, not for retaliation for filing the grievance. CP 260.

2. Whether the trial court's order of dismissal must be upheld as Appellant failed to exhaust his administrative remedies?

3. Whether the trial court's dismissal of Appellant's federal claims with prejudice must be upheld because Appellant did not exhaust his administrative remedies?

4. Whether the trial court's dismissal must be upheld as Appellant's equitable estoppel argument is meritless?

5. Whether Appellant's claim that the trial court concludes that federal constitutional claims are state torts, subject to the state tort exhaustion, and must be dismissed as meritless?

6. Whether the trial court's order of dismissal must be upheld as Appellant's request for declaratory and injunctive relief was properly dismissed?

#### **IV. STANDARD OF REVIEW**

For purposes of dismissal under CR 12(b)(6), all the facts alleged in Plaintiff's complaint are presumed to be true. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986). A court should dismiss a claim under CR 12(b)(6) if the allegations on the face of the complaint show "an insuperable bar to relief." *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988). A motion to dismiss under CR 12(c) is akin to a motion to dismiss under CR 12(b) with the benefit of

Defendant's answer. *Stevens v. Murphy*, 69 Wn.2d 939, 941, 421 P.2d 668 (1966) (overruled on other grounds by *Merrick v. Sutterlin*, 93 Wn.2d 411 (1980)). Dismissal under a CR 12(b)(6) claim is appropriate where it appears beyond a reasonable doubt that no facts exist that would justify recovery, even while accepting as true the allegations contained in the Plaintiff's complaint. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A motion to dismiss only admits, for the purposes of the motion, all well pleaded facts in the complaint, as distinguished from conclusory allegations. *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976); see also *Shutt v. Moore*, 26 Wn. App. 450, 453, 613 P.2d 1188 (1980) (conclusory allegations unsupported by facts are insufficient to state a claim under 42 U.S.C. § 1983); *Heisey v. Port of Tacoma*, 4 Wn.2d 76, 102 P.2d 258 (1940) (Demurrer does not admit conclusions or facts not well pleaded). Additionally, in a CR 12(b)(6) motion, while the factual allegations are taken as true, legal issues are subject to full judicial analysis. *Ironworkers Dist. Council of the Pacific Northwest v. Woodland Park*, 87 Wn. App. 676, 684 n. 1, 942 P.2d 1054 (1997) (citing *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977)).

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## V. ARGUMENT

### A. The Trial Court Properly Treated Respondents' Motion As A Motion To Dismiss As It Was Ruling On An Issue Of Law

Appellant argues that the Respondents improperly cited to and relied on evidence outside the record when they argued that Appellant failed to exhaust his administrative remedies. Opening Brief, p. 5. Appellant also argues that the trial court failed to let him know that the trial court was converting the motion to dismiss to a summary judgment motion. *Id.* Appellant is incorrect. In this matter, the issue was whether Appellant had exhausted his administrative remedies prior to filing suit. *See* CP 217-22. As discussed below the Prison Litigation Reform Act (PLRA) mandates that prisoners must exhaust all available administrative remedies before filing a suit regarding the conditions of confinement. 42 U.S.C. § 1997e.

The proper format to address the issue of failure to exhaust is an unenumerated Rule 12(b) and not a summary judgment motion. *See Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir. 1988) (per curiam); *see also Inlandboatmens Union of the Pac. v. Dutra Group*, 279 F.3d 1075, 1078 n. 1, 1083-84 (9th Cir. 2002); *Stauffer Chem. Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982); *Studio Elec. Technicians Local 728 v. Int'l Photographers of the Motion Picture Indus.*

*Local 659*, 598 F.2d 551, 552 n. 2 (9th Cir. 1979). Rather, failure to exhaust non-judicial remedies should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment. *Ritz*, 837 F.2d 369. This is based on the general principle that “[s]ummary judgment is on the merits,” *Stauffer Chem.*, 670 F.2d at 108, whereas “dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits.” *Heath v. Cleary*, 708 F.2d 1376, 1380 n. 4 (9th Cir. 1983). The federal courts have also ruled that the defendants have the burden of proving the absence of exhaustion and “[i]n deciding a motion to dismiss for failure to exhaust non-judicial remedies, the court may look beyond the pleadings and decide disputed facts.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119–20 (9th Cir. 2003); *see also Ritz*, 837 F.2d at 369.

While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the Court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6). *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 121, 744 P.2d 1032 (1987). Where a trial judge considered matters outside the pleadings to enable him to understand the context of the CR 12 motion so as to rule on it as a matter

of law, without reaching or resolving any factual dispute, the motion remains a motion to dismiss, as the presentation of extraneous evidence would be immaterial. *Loger v. Washington Timber Prods., Inc.*, 8 Wn. App. 921, 924 and 926, 509 P.2d 1009, *review denied*, 82 Wn.2d 1011 (1973); *see also Haberman*, 109 Wn.2d at 121. When ruling on a motion to dismiss, the court need not accept legal conclusions as correct. *Haberman*, 109 Wn.2d at 121 (internal citations omitted).

In this matter, although the trial court considered matters extraneous to the complaint, it ruled as a matter of law that the Appellant did not exhaust his administrative remedies. The trial court did not make any determination of facts in dispute, so that proper standard for review remained as one for a motion to dismiss for failure to state claim rather than summary judgment. Much as in *Loger*, the trial court used the Declaration of Ron Frederick which provided information about the grievance program and Appellant's participation in it to understand the context of Respondents' motion. *See* CP 226-31. The trial court ruled as a matter of law that Appellant did not exhaust his administrative remedies, without reaching or resolving any factual dispute. The trial court properly treated Respondents' motion as a motion to dismiss. The trial court did not convert the motion to a summary judgment motion, and therefore, there was notice the court was required to give Appellant.

In support of his argument, Appellant relies on *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005) and *McCoy v. Goord*, 255 F. Supp. 2d 233 (S.D. N.Y. 2003), for his argument that facts beyond the complaint cannot be considered. Opening Brief, pp. 5-6. However, *Burton* simply address the general CR 12(b)(6) standard and does not address the issue of what can or cannot be considered. *Burton*, 153 Wn.2d at 422. *McCoy* is equally unhelpful to Appellant. The *McCoy* court recognized that the motion to dismiss with the court looking at extrinsic material was supported by the PLRA, but was constrained by the rulings of its appellate court. As the *McCoy* court noted:

There may exist a middle ground, where limited extrinsic materials may be considered to settle the exhaustion defense, but this procedure has not been explicitly sanctioned in this circuit. The Ninth Circuit, addressing the question recently, considered failure to exhaust remedies “a matter in abatement, which is subject to an unenumerated Rule 12(b) motion, rather than a motion for summary judgment,” in light of the general principle that “summary judgment is on the merits, whereas dismissal for failure to exhaust” is not. *Wyatt*, 315 F.3d at 1119 (internal quotations omitted). Treating the issue as outside the ambit of Rule 12(b)(6) - a notion that is supported to some extent by the text of the PLRA - allowed the court to consider material extrinsic to the complaint without running afoul of Rule 12(b)'s mandate that in doing so a court “shall . . . treat[ ]” the motion as one for summary judgment.

*McCoy*, 255 F. Supp. 2d 250-51. Finally, as the court in *McCoy* acknowledged:

Conversion of the 12(b)(6) motion to a summary judgment motion is not ideal, for it could undermine the goals of the exhaustion requirement. Allowing discovery to proceed, or allowing successive motions for summary judgment, would result in delay and expenditure of resources; little is gained if unexhausted claims are permitted to proceed alongside the broader discovery process.

*Id.* at 250. Therefore, to the extent *McCoy* conflicts with *Loger* and *Haberman*, *McCoy* is inapplicable to the matter at hand.

Respondents' underlying motion was properly filed as a motion to dismiss. Therefore the trial court, as well as this Court, can consider the extrinsic material provided by the Respondents as the issue in front of the Courts is one of a matter of law.

**B. The Trial Court Properly Dismissed Appellant's Federal Claims Because He Failed To Exhaust His Administrative Remedies**

As Appellant never attempted to exhaust his available administrative remedies, his claims must be dismissed. The PLRA at 42 U.S.C. § 1997e mandates that:

*No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other federal law, by a prisoner confined in any jail, prison or other correctional facility, until such administrative remedies as are available are exhausted.*

42 U.S.C. § 1997e (emphasis added).

“There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought to court.” *Jones v. Bock*, 549 U.S. 199, 199-200, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007). Inmates must exhaust their prison grievance remedies before filing suit if the prison grievance system is capable of providing any relief or taking any action in response to the grievance:

Congress meant to require procedural exhaustion regardless of the fit between a prisoner’s prayer for relief and the administrative remedies possible . . . . [T]he amendments eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be “plain, speedy, and effective” before exhaustion could be required . . . .

. . . [W]e think that Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures.

*Booth v. Churner*, 532 U.S. 731, 739, and 741, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). It is clear where an inmate is seeking monetary, injunctive, or mixed relief, *i.e.*, injunctive relief and damages; those inmates are required to exhaust their administrative remedies prior to filing suit. *Id.* at 741, n 6.

The Supreme Court has determined “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S.

516, 532, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002). Exhaustion under 42 U.S.C. § 1997e(a) is mandatory. *Id.* at 524. The underlying premise is that requiring exhaustion “reduce[s] the quantity and improve[s] the quality of prisoner suits, [and] affords corrections officials an opportunity to address complaints internally . . . . In some instances, corrective action taken in response to an inmate’s grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation.” *Id.*

Requiring proper exhaustion serves all of the goals of the rulings in *Nussle* and *Booth*, providing inmates an effective incentive to use the prison grievance system and thereby provides prisons with a fair opportunity to correct their own mistakes. *Woodford v. Ngo*, 548 U.S. 81, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). This is particularly critical to state corrections systems because it is “difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.” *Id.* at 94, citing *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973).

Courts have long recognized the general rule that parties should exhaust prescribed administrative remedies before seeking relief from the courts. *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S. Ct. 1081, 117 L.

Ed. 2d 291 (1992). “Exhaustion is required because it serves the twin purpose of protecting administrative agency authority and promoting judicial efficiency”. *Id.* The exhaustion doctrine also recognizes the notion that an agency ought to have an opportunity to correct its own mistakes before it is hauled into court. *Id.* at 146. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. *Id.* citing *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972). Exhaustion of administrative procedure also promotes judicial efficiency because it allows an agency to compile a useful record for subsequent judicial consideration. *Id.* at 146. While a party will not be required to exhaust administrative remedies where resort to them would be futile, this exception to the exhaustion doctrine applies only in rare factual situations. *See Spokoiny v. Washington State Youth Soccer Ass'n*, 128 Wn. App. 794, 802, 117 P.3d 1141 (2005) (citing *Dils v. Labor & Industries*, 51 Wn. App. 216, 219, 752 P.2d 1357 (1988)). Even those remedies the plaintiff “thought to be unavailing” should be pursued. *Id.* (citing *Dils*, 51 Wn. App. at 219); *see also Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 133, 769 P.2d 298 (1989) (A subjective belief that an internal administration procedure is futile is insufficient to establish futility). A

party cannot rely on bare assertions to support a claim of futility. *Spokoiny*, 128 Wn. App. at 802.

Courts have applied the definition provided in 18 U.S.C.A. § 3626g(2) of the PLRA to define the term “prison conditions” found in § 1997e. See *Hollimon v. DeTalla*, 6 F. Supp. 2d 968, 969 (N.D. Ill. 1998); *Morgan v. Arizona Dept. of Corrections*, 976 F. Supp. 892, 895-96 (D. Ariz. 1997). These courts have determined that complaints ranging from failure to protect, to assault by a prison guard, to strip searches, meet this definition and require exhaustion of administrative remedies. See *Hollimon*, 6 F. Supp. 2d at 968 (strip searches); *Moore v. Smith*, 18 F. Supp. 2d 1360 (N.D. Ga. 1998) (assault); *Morgan*, 976 F. Supp. at 895-96 (failure to protect).

The special force of exhaustion principles especially holds true within the context of prison administration. The Supreme Court has recognized that courts have a limited role in reviewing the difficult and complex task of modern prison administration. *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989), quoting *Turner v. Safley*, 482 U.S. 78, 85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The Court in *Turner* held:

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of

the legislative and executive branches of government. Prison administration is, moreover, a responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

*Turner v. Safley*, 482 U.S. at 84-85.

The Supreme Court reaffirmed this in *Woodford, supra*. In that case, the Court not only upheld the requirement that the inmates fully exhaust available administrative remedies, but it also held that those attempts needed to be done in a timely manner. *Woodford*, 548 U.S. at 90-91.

In this case, Appellant filed two grievances as emergency grievances. CP 244-55. Both grievances were rejected as emergency grievances and were to be regularly processed. Appellant was told to re-submit his grievances to specify what allegations he was grieving. CP 228 and 231-33. He was asked to specifically provide information on what was allegedly said to him and who he was specifically grieving about. *Id.* Rather than correct the deficiencies in his grievances, Appellant chose not to respond. CP 228. Additionally, and most importantly, it is undisputed that Appellant has never filed any grievances related to any of the claims he is alleging in this case.

Appellant alleges that administrative grievances were not available to him, and alleges that he was assaulted and placed in segregation in

retaliation for attempting to pursue administrative remedies a “pervasive policy” to take adverse action. The trial court, as should this Court, rejected this allegation. Appellant’s allegations are clearly refuted by the fact that since 1999, Appellant has utilized the grievance system 350 separate times. CP 229. Appellant claims that the grievance process was not available to him to file his complaints are shown to be disingenuous by the fact that Appellant filed complaints at MCC after his alleged assault. *Id.* Appellant continued to utilize the grievance process at the subsequent facility that he was transferred to from MCC. *Id.* In fact, Appellant had no issues with writing letters outside the formal grievance process. *See, e.g.,* CP 56-59. Appellant wrote various letters to high ranking Department of Corrections officials about his placement in segregation and his grievances not being processed. *Id.* Appellant continued to write letters even after his placement in segregation and transfer to another facility, where he made the same allegations as he had at MCC. CP 66-85. Clearly, Appellant is not inhibited or prohibited in any way, shape, or form from filing his complaints. Any implied fear in filing complaints, or alleged attempts to inhibit Appellant from using the grievance process are undercut by Appellant’s continued use of the formal and informal grievance system. Although Appellant has utilized the grievance system hundreds of times, for some reason in this matter, Appellant claims he

could not. Although Appellant tried in his arguments to simply allege he was assaulted for using the grievance system, Appellant provides no evidence that those involved in his alleged assault were aware of his filing of grievance or that there was any connection between the two. Now, however, Appellant is claiming that administrative remedies were not available to him. This is clearly baseless, and was properly rejected by the trial court.

Clearly, Appellant is attempting to circumvent the exhaustion process. However, if all an inmate had to do to side step the exhaustion requirements was to file self-serving declarations or letters, such requirements would render the exhaustion a paper dragon.<sup>3</sup> Additionally, Appellant's submissions at the trial court level show the exact opposite of Appellant's assertions. For example, Appellant attached a letter from the Superintendent of MCC advising Appellant to engage in the grievance process. CP 72. Appellant also attached a letter from the Deputy Director of Prisons not only addressing Appellant's allegations but also advising Appellant on how to engage in the available processes. See CP 70-71.

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<sup>3</sup> While the underlying dismissal was based on a motion to dismiss, Appellant is asking the Court to make a determination on the merits as to whether he had the ability to participate in the grievance program. However, "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Beyond his conclusory statements, Appellant failed to show any objective blocking of his grievance process.

Furthermore, the case law that Appellant submits is also unresponsive to his argument. For example, in *Marcias v. Zenk*, 495 F.3d 37 (2nd Cir. 2007), the Court found that a prisoner did not procedurally exhaust his prison remedies on civil rights claims, as required by the PLRA, by filing administrative tort claims and making informal complaints to prison officials, even if his actions put prison officials on notice of his grievances, where the administrative remedy system was not so confusing that he could have justifiably believed that his actions were his only available remedies. Appellant cannot simply create his own system. He must follow the guidelines just as any other inmate would have to.

In *Turner v. Burnside*, 541 F.3d 1077 (11th Cir. 2008), the inmate alleged that the warden stated “that if I didn't like the way they did things around here he would put my ass in the van with inmate Johnson and transfer me so far south that I would never be able to see my family again till I got out of the Georgia Prison System.” Meadows then tore up Turner's complaint in front of him and said that he “had better not hear of another grievance or lawsuit pertaining to [Turner] getting shocked.” *Turner*, 541 F.3d at 1081. The court then articulated a two-part test on

whether a prison official's action against an inmate makes the administrative remedy "unavailable." The test required that two conditions be met: (1) the threat actually did deter the inmate from lodging a grievance or pursuing a particular part of the process, and (2) the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust. *Turner*, 541 F.3d at 1085. It is clear that the events alleged by Appellant do not rise to the level of *Turner*. Appellant never meet either prong. Appellant, beyond conclusory statements, never set out any facts showing he was deterred from filing grievances, either in this matter or any other matter. The numerous submissions by the Appellant to institution staff and the administration clearly shows that he does not fear any retaliation. CP 51-92.

It is undisputed that Appellant failed to exhaust his administrative remedies, even though they were available to him. Therefore, the trial court's order must be upheld.

**C. Appellants Federal Claims Were Properly Dismissed With Prejudice**

The trial court properly dismissed Appellant's federal claims with prejudice. Failure to exhaust administrative remedies generally results in

dismissal without prejudice. *Wyatt*, 315 F.3d at 1120. Presumably, the purpose of dismissal without prejudice is to allow a plaintiff to exhaust his administrative remedies and return to court. But when a plaintiff has already had the opportunity to exhaust and cannot now exhaust his administrative remedies, dismissal without prejudice serves no purpose. Dismissal without prejudice simply allows such a plaintiff to file his action over and over. The logical remedy is dismissal with prejudice.

Dismissal with prejudice is supported by the analysis in *Woodford*. In *Woodford*, the Court likened the exhaustion of administrative remedies in a PLRA case to the exhaustion in habeas corpus cases. *Woodford*, 548 U.S. at 94.

A state prisoner is generally *barred* from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one “complete round of the State’s established appellate review process.” *Ibid*. In practical terms, the law of habeas, like administrative law, requires proper exhaustion, and we have described this feature of habeas law as follows: “To . . . ‘protect the integrity’ of the federal exhaustion rule, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies . . . .”

*Id.* at 92 (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728 (1999)). The Court emphasized the importance of proper exhaustion with a worst case scenario:

[A] prisoner wishing to bypass available administrative remedies could simply file a late grievance without

providing any reason for failing to file on time. If the prison then rejects the grievance as untimely, the prisoner could proceed directly to federal court. And acceptance of the late grievance would not thwart the prisoner's wish to bypass the administrative process; the prisoner could easily achieve this by violating other procedural rules until the prison administration has no alternative but to dismiss the grievance on procedural grounds. We are confident that the PLRA did not create such a toothless scheme.

*Id.* at 94.

By likening habeas cases to PLRA cases, the Court intended that habeas and PLRA cases be treated equally in terms of the principles of exhaustion. *Id.* And if both are similar in the requirement of exhaustion, both must logically be similar in the remedy for failure to exhaust: dismissal *with* prejudice. This interpretation is supported by federal courts outside the 9th Circuit. *See, e.g., Williams v. Comstock*, 425 F.3d 175 (2nd Cir. 2005) (prisoners may circumvent the exhaustion requirement of the PLRA simply by waiting to bring a § 1983 action until their administrative complaints are time-barred); *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000) (civil rights action under § 1983 that challenged conditions of confinement could be dismissed with prejudice based on inmates' failure to exhaust administrative remedies). Because Appellant did not properly and timely exhaust his administrative remedies on his federal claims and is time-barred from renewing those administrative

grievances or appeals, Defendants request the dismissal of these claims be with prejudice. *See Woodford v. Ngo, supra.*

Appellant relies on the non-binding and non-persuasive case of *Ford v. Johnson*, 362 F.3d 395 (7th Cir. 2004), to argue that the dismissal with prejudice was incorrect. However, *Ford* is simply one of the circuits that split on the issue of dismissal with or without prejudice. Additionally, the holding in *Ford* is distinguishable and in conflict from Washington case law<sup>4</sup>. Washington has a strong public policy favoring resolution of disputes by extrajudicial means. *Lew v. Seattle School District No. 1*, 47 Wn. App. 575, 578, 736 P.2d 690 (1987) (citing *King County v. Boeing Co.*, 18 Wn. App. 595, 570 P.2d 713 (1977)). Therefore, a party's action is barred when they fail to exhaust their administrative remedies. *Id.*

**D. Appellant's Equitable Estoppel Argument Is Meritless And Was Properly Rejected By The Trial Court**

Appellant incorrectly argues that Respondents should be stopped from asserting affirmative defenses in this matter because they raised, among other arguments in a response to a personal restraint petition, that Appellant's claims in that P.R.P. would be more appropriately addressed in this already pending civil lawsuit. Opening Brief, p. 7. Appellant also

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<sup>4</sup> Where the lower federal courts are divided on a federal question such as the interpretation of federal statutes and the United States Supreme Court has not resolved the conflict, the state courts are free to decide the question for themselves. *Modern Supply Co. v. Federal Sav. & Loan Ins. Corp.*, 50 Wn. App. 194, 199, 748 P.2d 251 (1987).

asserts that Defendants alleged actions and policies calls for blanket application of the equitable estoppel doctrine. *Id.*, pp. 8-9. Appellant's assertions are baseless.

The elements of equitable estoppel are:

(1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) [an] action by the other party on the faith of such admission, statement, or act; and (3) [an] injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act.

*Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). When a party seeks to assert equitable estoppel against the State that party must also show: (1) that equitable estoppel is necessary to prevent a manifest injustice, and (2) that the exercise of governmental powers will not thereby be impaired. *Kramarevcky v. DSHS*, 64 Wn. App. 14, 18, 822 P.2d 1227 (1992) (citing *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968)). Because equitable estoppel against the government is disfavored, each of the elements must be established by clear, cogent, and convincing evidence. *Id.* (citing *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 901 n. 7, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065, 1075, 105 S. Ct. 2140, 2154, 85 L. Ed. 2d 497, 510 (1985); *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, *review denied*, 108 Wn.2d 1037 (1987)). The burden of proving each of the elements is on the party seeking to

invoke the doctrine of equitable estoppel. *Id.* (citing *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 760-61, 695 P.2d 996 (1985); *Mercer*, 48 Wn. App. at 500). The party asserting the doctrine must be free from fault in the transaction at issue. *Kramarevcky v. DSHS*, 122 Wn.2d 738, 743 n. 1, 863 P.2d 535 (citing *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651, 757 P.2d 499 (1988)). A party may not base a claim of estoppel on conduct, omissions, or representations induced by his or her own conduct, concealment, or representations. *Id.* (citing *Mutual of Enumclaw*, 110 Wn.2d at 651).

First, Appellant provides no case law, nor can Respondents find any, to support the contention, that because counsel for the Department of Corrections asserted that a personal restraint petition was not the proper forum or mechanism pursuant to RAP 16.4(b) precluded other defendants from raising the affirmative defenses of failure to exhaust and failure to follow the tort claim act<sup>5</sup>. Additionally, Appellant did not file his complaint in the underlying matter “on the faith of such admission, statement” of the Department of Corrections assertion that the personal restraint petition was not the improper forum. Appellant absurdly asserts that based on these ‘assertions’ he had filed his amended complaint. Opening Brief, p. 3. Appellant attempts to ignore that he had already filed

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<sup>5</sup> This was not the sole basis of the Department of Corrections argument. It was also argued that Appellant was not subject to unlawful restraint. CP 144-76.

his civil rights action prior to this argument being made. Therefore, Appellant cannot claim that he relied on any statement made.

Second, Appellant's claim that equitable estoppel barred the application of RCW 4.92.110's 60-day pre-filing requirement is moot. Appellant's state claims were dismissed without prejudice due to failing to follow the tort claim act. Since then, Appellant has just re-filed the exact same complaint that he filed in this matter under a new cause number. See *Parmelee v. Howe, et al.*, Snohomish County Superior Court Cause Number 10-2-10003-1, Sub No. 1. Therefore, the issue of dismissal of Appellant's state claims is moot; nor can the Appellant show an injury or a manifest injustice as those claims have been re-filed. However, even if the Court would consider Appellant's argument that equitable estoppel should have prevented the application of the tort claim process, Appellant's claim fails. Appellant's failure to properly follow RCW 4.92.110 deprived the trial court of jurisdiction. *Levy v. State*, 91 Wn. App. 934, 944, 957 P.2d 1272 (1998). Appellant once again provides no case law or statute to support the claim that by stating Appellant had other remedies somehow served to waive all defenses including jurisdiction. As stated earlier, Appellant had already filed his complaint prior to the personal restraint response. It is unclear how Appellant then relied on any statement.

Finally, Appellant has failed to meet the high burden needed for equitable estoppel. Appellant has the burden of proving each element. Even Appellant's non-binding case requires that equitable estoppel be argued with specificity to each defendant, and not be applied with a blanket application. *See Hemphill v. New York*, 380 F.3d 680, 689 (2004) (Depending on the facts pertaining to each defendant, it is possible that some individual Defendants may be estopped, while others may not be). The trial court dismissed Appellant's complaint on two distinct bases. The state claims were dismissed for failing to follow the tort claim act, and the federal claims based on the First Amendment were dismissed for failure to exhaust. *See* CP 42. Appellant's First Amendment claim was based on his two grievances not being processed and being placed in segregation. *See* CP 248-49. Beyond conclusory statements and unadulterated speculation, that were properly rejected, Appellant provides no evidence that the alleged assault occurred due to his filing grievances or being placed in segregation. Appellant does not allege that those who took part in the alleged assault knew about the filed grievances, or took any roll in either dealing with the grievances or making the decision to place him in segregation. The only evidence that Appellant provided to the trial court and this Court is simply him saying so.

For the first time, Appellant also alleges that the equitable estoppel apply to the Department of Corrections' polices. Generally, this Court will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). However, even if the Court did review Appellant's argument, they would find it was baseless. As the Respondents established, the issues of retaliation, retaliation for filing grievances, as well as the finding of non-grievability, are all grievable. *See* CP 227. The fact that Appellant chose not to engage them did not make them unavailable.

**E. The Trial Court Did Not Conclude That Federal Constitutional Claims Are State Torts Subject To The State Tort Exhaustion**

Appellant claims that the trial court erred when it dismissed Appellant's federal constitutional tort claim for failing to wait the required period as set forth RCW 4.92.110. Beyond Appellant's self made argument, he does not indicate in the record where this finding was made. Respondents never made that argument. CP 213-36. The trial court did not make such finding in its order, clearly separating state claims from the federal claims in its order of dismissal. *See* CP 42.

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**F. Appellant's Claims For Injunctive And Declaratory Relief Were Properly Dismissed**

**1. Declaratory Relief**

Declaratory judgments are authorized by CR 57 and Chapter 7.24 RCW. A declaratory judgment declares the legal rights and obligations of parties to a dispute, but unlike a regular judgment, it has no direct coercive effect. *Brown v. Vail*, 169 Wn.2d 318, 237 P.3d 263 (2010). RCW 7.24.020 specifically allows a person to have the court determine the person's rights under a statute. In order for the court to issue a declaratory judgment, there must be a justiciable controversy. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). A justiciable controversy requires:

[A]n actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

*Id.* (quoting *Diversified Industries Development Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Trial courts have the discretion to deny declaratory relief if granting such relief would not terminate the uncertainty or the controversy giving rise to the proceeding. RCW 7.24.060.

Appellant is no longer confined at MCC. *See* CP 146. Additionally, Appellant is no longer in segregation, and is in general population. *Id.* As Appellant would be seeking a declaratory judgment for events that have already allegedly transpired, any judgment would fail to involve an “actual, present, and existing dispute” and would be inappropriate.

## **2. Injunctive Relief**

Injunctive relief is governed by CR 65 and title 7.40 RCW. In deciding a request for a permanent injunction, a trial court must make comparative appraisal of all the factors in the case, including:

The character of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other available remedies such as damages; plaintiff's delay in bringing suit, plaintiff's misconduct, if any; the relative hardship likely to result to defendant if the injunction is granted and to plaintiff if it is denied; the interest of third parties and of the public, and the practicability of framing and enforcing the order or judgment.

*Brown v. Voss*, 38 Wn. App. 777, 781, 689 P.2d 1111 (1984). Injunctive relief is granted or withheld at the discretion of the trial court. *Id.* An injunction may be granted “only on a clear showing of necessity”. *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 603, 508 P.2d 628 (1973).

Appellant was not able to show a clear showing of necessity for any injunctive relief. As previously stated, Appellant is no longer at the

institution where his allegations arose. Appellant is removed from those that Appellant alleges harmed him in this manner. Additionally, Appellant has now properly followed the requirements of the tort claim requirements; he has other remedies such as damages available to him.

Finally, Appellant's failure to properly follow RCW 4.92.110, deprived the trial court of jurisdiction. *Levy v. State*, 91 Wn. App. 934, 944, 957 P.2d 1272 (1998). Moreover, "[f]ailure to comply with filing requirements leads to dismissal of the action." *Sievers v. City of Mountlake Terrace*, 97 Wn. App. 181, 183, 983 P.2d 1127 (1999); *see also Troxell v. Rainer Public School Dist. No. 307*, 154 Wn.2d 345, 359-60, 111 P.3d 1173 (2005) (affirming summary judgment dismissal of plaintiff's lawsuit where plaintiff waited only 59 days from filing of tort claim until commencement of the action). Thus, while Appellant's amended complaint had asserted other claims for relief such as declaratory and injunctive relief, he was also seeking monetary damages. The fact that he untimely commenced this tort damages action without strictly complying with tort claim filing requirements, necessitated dismissal, for lack of jurisdiction.

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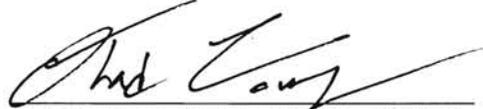
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## VI. CONCLUSION

Appellant failed to attempt to exhaust his administrative remedies or follow the tort claim act. Therefore, the Respondents respectfully request that the trial court's order be upheld and the Appellant's appeal be dismissed.

RESPECTFULLY SUBMITTED this 23rd day of March, 2012.

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**CERTIFICATE OF SERVICE**

I certify that on the date below I served a copy of the Brief of the Respondent on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by WSP / DOC staff on March 23, 2012

TO:

ALLAN PARMELEE, DOC #793782  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA WA 99362

EXECUTED this 23rd day of March, 2012, at Olympia, Washington.

  
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TERA LINFORD  
Legal Assistant

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