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NO. 66407-7

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ANGELA HARRIS,

Appellant,

v.

PROVIDENCE EVERETT MEDICALCENTER

Respondent.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

This case involves the termination of Plaintiff's employment following pregnancy and maternity leave. Plaintiff originally sued in 2009, solely on the basis of the Washington Law Against Discrimination (WLAD), RCW 49.60.180. That suit was dismissed based on a statutory exemption in the WLAD for "religious organizations," and that judgment is on appeal. (*Harris v. Providence Everett Med. Ctr.*, No. 65167-I, hereafter "*Harris I.*") This suit involves alternative causes of action for wrongful termination in violation of public policy and breach of contract. These causes of action were not previously litigated, because the trial court in *Harris I* did not give Plaintiff leave to assert them. Nonetheless, the trial court in this case dismissed Plaintiff's new claims as barred by *res judicata*, and awarded Providence sanctions of over \$5,000 against Ms. Harris under Civil Rule 11. Because the judgment in *Harris I* did not address the causes of action brought in this case and Ms. Harris had no opportunity to litigate those claims, dismissal was not appropriate. Sanctions are unsupported by any authority and were unfounded.

## **II. ASSIGNMENTS OF ERROR**

1. Is dismissal based on *res judicata* appropriate where the causes of action in the case were not previously litigated or decided and there was no opportunity to litigate the causes of action?
2. If *res judicata* dismissal is proper despite there having been no previous litigation, decision, or opportunity to litigate the causes of action at issue, are sanctions appropriate under CR 11 where there has been no finding that any claim was not well grounded in fact or law or a good faith argument for an extension of the law?

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

Plaintiff Angela Harris worked as a nurse for Defendant Providence Everett Medical Center until she became pregnant, took maternity leave, and was fired in August 2007. Clerk's Papers ("CP") 2-3. She filed suit in 2009, alleging gender/pregnancy discrimination under the Washington Law Against Discrimination (WLAD). See CP 7, 82. Providence immediately moved to dismiss, claiming it was immune from the discrimination statute, based on an exemption for "religious organizations." See CP 94. Providence contended that because it has an historical relationship with a Catholic order, it is not subject to suit for any kind of discrimination under the WLAD. See, e.g., CP 106. Ms. Harris opposed Providence's position, but the trial court dismissed

her case. CP 94. Ms. Harris has appealed and that appeal was argued to this Court on March 3, 2010.

In her previous lawsuit, Ms. Harris did not formally assert any causes of action other than statutory sex discrimination, believing that the religious exemption did not apply to Providence. See CP 25. She did point out in her briefs that a claim for wrongful termination in violation of public policy existed on the facts alleged. See CP 30. However, the court did not address this claim in any manner. See CP 94.

Ms. Harris's appeal on the previous case is fully briefed and argued. However, the statute of limitations on Ms. Harris's wrongful termination claim would have expired on or about August 21, 2010. She filed this action in order to preserve that claim in the event that it is not addressed and allowed on appeal.

#### **IV. ARGUMENT**

Dismissal on the basis of *res judicata* was improper, and at the very least was premature. As explained below, the causes of action she asserts in this case are not the same as, much less identical to, the causes of action that were litigated in *Harris I*. The trial court in *Harris I* did not address the causes of action in this case or Ms. Harris's request that she be allowed to plead them. Ms. Harris has not

yet had any opportunity to litigate the claims in this case. And, while this Court may either reverse the entry of judgment in *Harris I* and/or permit Ms. Harris to assert her claim for wrongful termination, or it may dispose of that claim against her in a fashion that would bar her claim in this case as *res judicata*, it may not reach the claim or dispose of it in such a manner.

Regardless, CR 11 sanctions were inappropriate. The trial court did not make any of the required findings to support the extreme measure of awarding such sanctions, and there is no basis to have made such findings. The sanctions award should be vacated.

**A. *Res Judicata* Does Not Bar Plaintiffs' Claims in this Case.**

*Res judicata*, or claim preclusion, is a judicially-created doctrine based on the principle that “a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again.” *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (emphasis added). Unlike collateral estoppel, or issue preclusion, which “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted,” *res judicata* prevents only “a second assertion of the same claim or cause of action” in a subsequent proceeding. *Hisle v. Todd*

*Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (emphasis added). Thus, *res judicata* “does not bar claims arising out of different causes of action” or operate “to deny the litigant his or her day in court.” *Id.* (quoting *Shoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986)).

Defendant bears the burden of proving the defense of *res judicata*. *Id.* To do so, it must establish that the previous action involved the same subject matter, identical causes of action, the same parties, and the same “quality of persons for or against whom the claim is made.” *Id.* at 865-66 (quoting *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)). Plaintiff does not assert the same cause of action in this case as she did in her prior case. The trial court did not previously address the present claims. CP 94.

The courts generally look at four factors to decide if a claim or cause of action is identical to a prior case: (1) would the rights or interests in the prior judgment be impaired by the second litigation; (2) would the cases turn on the same evidence; (3) do the cases involve infringement of the same right; and (4) do the cases arise out of the same transactional nucleus of facts. *Rains*, 100 Wn.2d at 663-64. Applying those factors here confirms that Ms. Harris’s cases involve different causes of action. The rights and interests determined in

*Harris I* are not even implicated in this case, because that judgment was based entirely on the question whether Providence was exempt from the WLAD as a “religious organization.” See CP 94, 110. That question is totally irrelevant to Plaintiff’s claims in this case. For the same reason, this case will turn on different evidence, and on the merits, it will involve the contractual relationships between Providence and its employees which would have been irrelevant in the first action had it proceeded under the WLAD. See e.g CP 4-5.

Plaintiff has never litigated claims of wrongful termination or breach of contract against Providence, and none of the issues decided against her in *Harris I* would preclude her from proving those claims.

The doctrine of *res judicata* is based on public policy. Its purpose is to relieve the court from the burden of twice trying the same issue between the same parties. There is nothing, however, in the doctrine or in its historic application which encourages the court to so apply it as to ignore principles of right and justice and the court should be hesitant to so apply the doctrine as to deprive any person of property rights without having his day in court.

*Luisi Truck Lines, Inc. v. Washington Util. & Transp. Comm’n*, 72 Wn.2d 887, 896, 435 P.2d 654 (1967). In the circumstances of this case where Plaintiff clearly has not had any “day in court” on her claims for wrongful termination and breach of contract, and no duplicative litigation would occur, *res judicata* should not apply.

**B. The Trial Court's Award of Sanctions Against Plaintiff is Improper and Should be Reversed.**

Even if Ms. Harris were barred by *res judicata* from bringing her claims of wrongful termination and breach of contract in the present action, the trial court's decision to sanction her under CR 11 for having attempted to do so is contrary to law and improper. Civil Rule 11 requires attorneys to date and sign every pleading, motion, and legal memorandum filed with the court, certifying that:

to the best of ... the attorney's knowledge, information or belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; [and] (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The purpose behind CR 11 "is to deter baseless filings, not filings which may have merit." *Bryant v. Joseph Tree*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (emphasis added). Accordingly, application of CR 11 requires "consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims." *Id.* at 219.

There are two types of filings subject to CR 11: those lacking a legal or factual basis ("baseless filings"), and those made for improper purposes. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d

1052 (1996). Providence requested CR 11 sanctions against Ms. Harris "for filing a baseless lawsuit." CP 136. A trial court may not impose CR 11 sanctions for a baseless filing "unless it also finds that the attorney who signed and filed the [pleading, motion or legal memorandum] failed to conduct a reasonable inquiry into the factual and legal basis of the claims." *Bryant*, 119 Wn.2d at 220. The court must use an objective standard, asking "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id.* at 220. A trial court should impose sanctions only when it is "patently clear that a claim has absolutely no chance of success." *MacDonald*, 80 Wn. App. at 884 (emphasis added) (quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986)).

This Court reviews an award of sanctions for abuse of discretion. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 417, 157 P.3d 431 (2007). However, the trial court granted Providence's motion without making any findings to support it. CP 139.<sup>1</sup> When a trial court imposes CR 11 sanctions, it must specify the sanctionable conduct in its order. *Id.* (citing *Biggs v. Vail*, 124 Wn.2d

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<sup>1</sup> Similarly, the trial court's order setting the amount of the sanction, CP 161, does not specify how the amount of fees was calculated nor does it make any findings that demonstrate that the amount of fees awarded were limited to only those amounts reasonably expended in responding to the specific sanctionable conduct. *Just Dirt, Inc.*, 138 Wn. App. at 418.

193, 201, 876 P.2d 448 (1994)). “The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” *Id.* at 418 (emphasis in original) (quoting *Biggs* at 201). In the absence of such findings, the trial court’s CR 11 award of fees operates as an improper “fee shifting mechanism.” *Id.*

Here, the trial court did not make, and could not have made, the necessary findings. First, it is well-established that an employee may assert a cause of action for wrongful termination based on sex discrimination, even against an employer who is exempt from the WLAD’s employment discrimination provision, under general public policy principles. *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000). Similarly, Plaintiff has a claim for breach of contract, based on Providence’s explicit policy against sex discrimination. CP 4. Under Washington law, where an employer issues policies that it “expect[s] if not demand[s] that employees follow,” employees “may rely on the policies and expect adherence to them by the employer.” *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 230, 685 P.2d 1081 (1984). “[C]onsideration [is] found in plaintiff actually working for defendant.” *Gaglidari v. Denny’s Restaurants, Inc.*, 117 Wn.2d 426, 432, 815 P.2d

1362 (1991). Thus, Plaintiff's claims were well grounded in fact and law.

As explained above and in Ms. Harris's brief in the trial court, the Washington courts have repeatedly held that *res judicata* is based on public policy, and should not be used to deny citizens their day in court. *Luisi Truck Lines*, 72 Wn.2d at 896; *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d at 865 (*res judicata* is inapplicable where different claims asserted in second action, even if arising from the same set of facts alleged in prior action).

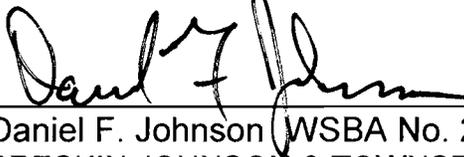
If, as the Washington Supreme Court has said, *res judicata* is an equitable doctrine, and courts "should be hesitant" to apply it in a manner that would "deprive any person of property rights without having his day in court" or "ignore principles of right and justice," then it cannot be said that Ms. Harris's assertion of new and different causes of action in this case, which she had not had an opportunity to litigate before, was unwarranted by "existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." CR 11. At the very least, "a reasonable attorney in like circumstances could believe" her claims to be legally justified, *Bryant*, 119 Wn.2d at 220, and it was not "patently clear" that

her claims had "absolutely no chance of success." *MacDonald*, 80 Wn. App. at 884. CR 11 sanctions were not justified or appropriate.

## V. CONCLUSION

Ms. Harris's claims against her employer for wrongful termination in violation of public policy and breach of contract have never been litigated before, and given the trial court's ruling in her first case, on the threshold and unrelated issue of Providence's religious exemption from the WLAD, she had not had an opportunity to litigate those claims when she filed this action. The trial court should not have dismissed her claims based on *res judicata*. Even if *res judicata* did apply, it is an equitable doctrine, the applicability of which is not "patently clear"; CR 11 sanctions were not appropriate and should be vacated.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of March, 2011



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## CERTIFICATE OF SERVICE

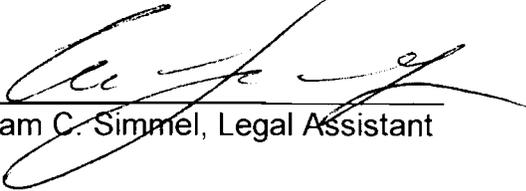
I, Miriam Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 24<sup>th</sup> day of March 2011, I filed in court (original and one copy) and served true and correct copies of the document to which this Certificate is attached on the following in the matter listed below.

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Via Facsimile  
 Via First Class Mail  
 Via Messenger  
 Via Email

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

  
Miriam C. Simmel, Legal Assistant