

No. 696122
COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Alex Ravikovich, Appellant

v.

V-SQUARED, LLC, Respondent

BRIEF OF APPELLANT RAVIKOVICH

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COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting Respondent V-Squared's motion for summary judgment on the grounds that Appellant Ravikovich's legal action was precluded by collateral estoppel. (RP 19. CP 187-189).
2. The trial court erred in finding that Ravikovich's CPA claims were collaterally estopped. (RP 19).
3. The trial court erred in finding that the issues decided in prior litigation between Ravikovich and V-Squared were identical. (RP 19. CP 13-27).
4. The trial court erred in finding that adjudication of the issues presented in *Ravikovich v. V-Squared, LLC, Et al*, have ended in a final judgment on the merits. (RP 19. CP 13-27. CP 187-189).
5. The trial court erred in not considering the fact that Appellant Ravikovich's had no fair opportunity to present his present CPA claims in former arbitration. (RP 1-20. CP 13-27. CP 187-189).
6. The trial court erred in finding that Respondent V-Squared demonstrated that the determinative issue was litigated in a prior proceeding. (RP 19. CP 13-27. CP 187-189).

7. The trial court erred in finding that Respondent V-Squared demonstrated that the fact determined in the first action was essential and not merely collateral or incidental, to the right asserted by Appellant Ravikovich in his second action. (RP 19).
8. The trial court erred in finding that the judgment in the first cause of action between Appellant Ravikovich and Respondent V-Squared was conclusive in Ravikovich's subsequent and different cause of action under Consumer Protection Act claims. (RP 19).
9. The trial court erred in dismissing Ravikovich's CPA claims. (RP 19. CP 187-189).

Issues Pertaining to Assignments of Error

1. In July 2008, V-Squared arbitrated its breach of contract for moneys due lawsuit against Ravikovich. In arbitration only the issues of enforceability of contract and existing easement were decided. In June 2011, Ravikovich filed his lawsuit against V-Squared, LLC, claiming violation of the Consumer Protection Act (CPA). Does the doctrine of collateral estoppel foreclose the assertion of Ravikovich's present violation of CPA claims?

(Assignments of error 1, 2, 6, and 9).

2. In 2008 action brought by V-Squared against Ravikovich, only V-Squared, LLC, made claims against Ravikovich for breach of contract and

money due. Ravikovich asserted defenses to such V-Squared claims, but Ravikovich did not counterclaim against V-Squared. In 2011, Ravikovich filed separate lawsuit against V-Squared, LLC, alleging CPA violations. Was the doctrine of collateral estoppel properly invoked against Appellant's present CPA claims merely because V-Squared and Ravikovich arbitrated breach of contract and easement claims in their earlier action, even though Ravikovich's CPA claim was not in issue and was not adjudicated?

(Assignments of Error 3, 4, 5, 7, 8 and 9).

B. STATEMENT OF THE CASE:

1. The Parties

Alex Ravikovich, appellant herein, is a resident in Seattle, King County, Washington.

V-Squared, LLC, respondent herein, is a Limited Liability Company, licensed to operate business in the state of Washington.

2. Factual Background

Appellant Alex Ravikovich is the legal owner of the real property in Bellevue, King County Washington, located at 2190 140th PL S.E. Bellevue, WA 98007.

Robert Long is the legal owner of the real property located at 2186 140th PL S.E. Bellevue, WA 98007. Robert Long's parcel is adjacent to Ravikovich's property. Robert Long is not a party to this appeal.

Respondent V-Squared LLC, is a Washington Limited Liability Company and registered to operate its business in the state of Washington. On April 28, 2006, Respondent V-Squared LLC as principal through its agent managing member Vadim Tsemekhman, entered into contract with Ravikovich to build a house on Ravikovich's property at the aforesaid address. (CP 28-40).

On July 24, 2006, Respondent V-Squared LLC entered into an agreement with Ravikovich's neighbor Robert Long whereby Robert Long allowed V-Squared LLC construction of a retaining wall on Long's property. (CP 109-112). Respondent V-Squared LLC constructed driveway and retaining wall. Respondent V-Squared LLC billed Ravikovich for Construction of above said Driveway and retaining wall. The work performed by Respondent V-Squared LLC did not satisfy conditions of the agreement with Long.

Respondent V-Squared LLC did not disclose to Ravikovich its agreement with Long. V-Squared LLC did not prepare and did not register any necessary documents regarding the easement. Ravikovich was not aware of any problems developing with Long at the time.

After construction of the driveway, approximately in August 2007, V-Squared LLC abandoned any further work on Appellant's property.

After V-Squared abandoned any further work on appellant's property, Ravikovich has made his first contact with his neighbor Robert Long regarding the driveway. During the first meeting between Ravikovich and Long, Long instructed Ravikovich to prepare the easement for ingress, egress and utilities which Long promised to sign. Under conditions of the agreement, Ravikovich was to clean up the debris left after V—Squared work, to pressure wash his house, to paint his front deck and rear deck. All the work requested by Long was timely performed by Ravikovich. Robert Long agreed to grant a permanent easement allowing construction of a retaining wall on Long's property, in full and fair consideration of Ravikovich's agreement to bear the cost of cleaning and making certain improvements to Long's property. Appellant Ravikovich had fully performed his obligation under the above-described easement agreement with Robert Long - whereby Long would grant a permanent easement allowing construction of a retaining wall on Long's property — by repeatedly bearing the cost of cleaning up and improving Long's property.

Appellant Ravikovich made various improvements to Long's property in reliance on Long's promise to grant a permanent easement

authorizing the retaining wall. Upon completion of all the work for Robert Long, Long refused to sign the easement. Long thereafter began demanding financial compensation from Ravikovich by requesting various sums of money in return for the promise to sign the easement agreement.

In 2008, Long demanded removal or reconstruction of the portions of the Ravikovich's house that encroached on Long's property.

3. Procedural Background

On July 11, 2008, Mr. Long filed a lawsuit against Ravikovich under King Co. Cause No. 08-2-23129-1. (CP 118-123).

On August 12, 2008, Appellant Ravikovich filed Third-Party Complaint against V--Squared LLC.

On June 18, 2010, the Long Lawsuit was dismissed on motion of the Clerk, without prejudice for failure to prosecute. (CP 57).

As a result, on June 6, 2011, Ravikovich refiled de novo his claims against Respondent V-Squared for the Violation of the Consumer Protection Act, RCW 19.86 and Unfair or Deceptive Acts or Practices. (CP 59-67).

On June 20, 2011, V-Squared, LLC, filed its appearance with the trial court.

On August 5, 2011, V-Squared, LLC, filed its answer and affirmative defenses.

On September 28, 2012, V-Squared, LLC, filed motion for summary judgment. (CP 1-9).

On October 26, 2012, after hearing the trial court granted V-Squared, LLC, motion for summary judgment and entered order dismissing Ravikovich's lawsuit. (CP 187-189).

On November 20, 2012, Ravikovich timely filed this appeal.

C. SUMMARY OF ARGUMENT

The current Ravikovich's proceeding was adjudication on whether V-Squared, LLC, violated Consumer Protection Act. That issue was not an issue litigated in previous proceeding with relation to V-Squared breach of contract claim. (CP 13-27).

It is important at the outset to distinguish the re-litigation of claims from the re-litigation of issues. Res judicata only bars re-litigation of the same claim. Collateral estoppel precludes re-litigation of issues in a second suit that have previously been litigated and decided in prior action.

Collateral estoppel only precludes appellant Ravikovich from re-litigating issues that were actually litigated and decided in a prior action with V-Squared, LLC. If an issue could have been raised in the first case but was not explicitly raised and decided, collateral estoppel will not bar Ravikovich from litigating that issue in a subsequent action against V-Squared, LLC.

Collateral estoppel bars Ravikovich from re-litigating specific issues decided in the first action, such as the validity of the contract and its terms between V-Squared, LLC, and Ravikovich; whether V-Squared, LLC; change order process; excessive lien on Ravikovich's property by V-Squared, LLC, for its contractor services; and whether Ravikovich could raise defense to the contract under RCW 18.27.080 based on V-Squared, LLC, initial failure to properly register its business. Ravikovich is collaterally estopped from trying again to prove the issues of validity of contract, V-Squared, LLC, and raising RCW 18.27.080 as a defense to the contract. However, Ravikovich is free to litigate other issues not resolved in the earlier action. Thus, Ravikovich could still claim CPA violations in his later suit against V-Squared, LLC, based on Long's lawsuit for trespass and ejectment and Long's demand to remove the encroaching portion of Ravikovich's house from the Long's property.

Collateral estoppel does not preclude all possible issues that might have been raised in a prior action but only those actually decided in that action. In order to invoke collateral estoppel against Ravikovich's present CPA claim, V-Squared, LLC, must meet the basic prerequisites: *First*, the issue in the second case must be the same as the issue in the first. *Second*, the issue must have been actually litigated. *Third*, even if an issue was litigated in a prior action, collateral estoppel will not bar re-litigation

unless the issue was actually decided. *Fourth*, it is usually said that collateral estoppel will not apply unless the decision on the issue in the prior action was necessary to the court's judgment because in the course of a suit, the judge may decide a number of issues that do not ultimately determine the outcome of the case.¹

V-Squared, LLC, failed to satisfy the above stated criteria. The issues that could be raised and that were raised in previous proceedings and current proceeding were different. As a result, the issues in the current proceeding could not have been litigated in the previous proceeding.

D. ARGUMENT

I. STANDARD OF REVIEW

Appellate courts review orders granting summary judgment de novo, engaging in the same inquiry as the trial court.² A court may grant summary judgment if there are no genuine issues as to any material fact, thus entitling the moving party to judgment as a matter of law.³

The court considers the evidence in the light most favorable to the nonmoving party.⁴ When reasonable persons could reach but one conclusion, summary judgment should be granted.⁵

¹ *Restatement (Second) of Judgments* §27 (1982).

² *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

³ *Vallandigham v. Clover Park Sch. Dist. No. 400*, 144 Wn.2d 16, 26, 109 P.3d 805 (2005).

⁴ *CLEAN v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997).

The trial court granted summary judgment on the basis of collateral estoppel. In doing so it rejected V-Squared, LLC, argument that res judicata also applied.

II. RAVIKOVICH'S ISSUES IN HIS CPA CLAIMS WERE NOT IDENTICAL TO THE ISSUES ARBITRATED IN PRIOR LITIGATION BETWEEN RAVIKOVICH AND V-SQUARED

The purpose of collateral estoppel is to prevent relitigation of a particular issue or a determinative fact after the party estopped has a full and fair opportunity to present its case in order to promote the policy of ending disputes.⁶

Collateral estoppel requires:

- (1) the issue decided in the prior adjudication must be identical with the one presented in the second;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and

⁵ *Hansen v. Friend*, 118 Wn.2d 476, 485, 842 P.2d 483 (1992).

⁶ *Seattle-First National Bank v. Cannon*, 26 Wash.App. 922, 927, 615 P.2d 1316 (1980) (citing *State v. Dupard*, 93 Wash.2d 268, 609 P.2d 961 (1980); *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 929, 610 P.2d 962 (1980)).

(4) application of the doctrine must not work an injustice.⁷

The first prerequisite for collateral estoppel is that the issues in the two suits must be the same. Therefore, analysis of collateral estoppel should always begin with a determination of what was decided in the first action. In this case the issue in the first suit was whether Ravikovich's defense under RCW 18.27.020 defeated V-Squared, LLC, and claim for breach of contract on the grounds that V-Squared, LLC, failed to register. (CP 13-16). The arbitrator entered his finding that Ravikovich's defense under RCW 18.27.020 was not adequate to defeat V-Squared, LLC, claim for breach of contract. The arbitrator made a finding that the contract between the parties was not effected until May 20, 2006. (CP 15). The arbitrator further determined that there was contract between Ravikovich and V-Squared, LLC. (CP 16). The arbitrator further considered two other issues: the elevation problem and change orders. (CP 16).

The issue in Ravikovich's present suit was whether V-Squared, LLC, violated Consumer Protection Act by building Ravikovich's house so that it intruded on the Long's property and required removal or reconstruction to correct the problem. Ravikovich's CPA claim also has absolutely distinct type of remedy, which entitles him to treble damages

⁷ *Bull v. Fenich*, 34 Wn. App. 435, 438, 661 P.2d 1012, 1014 (1983).

if he prevails.

In sum, Ravikovich's CPA claim was based on a different factual issue, which was not raised in the prior suit and must be litigated in the new one.

III. V-SQUARED, LLC, FAILED TO CARRY ITS BURDEN OF PROOF OF SHOWING THAT THE ISSUES IN ITS PRIOR ACTION WERE MATERIAL AND NOT MERELY INCIDENTAL OR COLLATERAL TO RAVIKOVICH'S PRESENT CPA CLAIM

The party asserting the doctrine of collateral estoppel has the burden to show that the determinative issue was litigated in a prior proceeding.⁸ Issues not material in the first adjudication, although determined therein, do not necessarily become precluded by operation of collateral estoppel.⁹

The party asserting the doctrine must prove that the fact determined in the first action is essential, and not merely collateral or incidental, to the right asserted in the second.¹⁰

⁸ *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980) (citing *Luisi Truck Lines, Inc. v. Washington Utilities and Transportation Comm'n.*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967); *Meder v. CCME Corp.*, 7 Wash.App. 801, 807, 502 P.2d 1252 (1972)).

⁹ *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980) (citing *Luisi Truck Lines, Inc. v. Washington Utilities & Transportation Comm'n.*, supra; *Dolby v. Fisher*, 1 Wash.2d 181, 189, 95 P.2d 369 (1939); *McGee v. Wineholt*, 23 Wash. 748, 751, 63 P. 571 (1901). Accord, *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wash.App. 689, 695, 509 P.2d 86 (1973)).

¹⁰ *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980) (citing *McGee v. Wineholt*, supra, 23 Wash. at 751-52, 63 P. 571. See also *Pacific Nat'l*

It is usually said that collateral estoppel will not apply unless the decision on the issue in the prior action was necessary to the court's judgment.¹¹

Our Supreme Court has recently discussed this question and has adopted the distinction between ultimate facts and evidentiary facts contained in the Restatement of Judgments.¹² According to the Restatement, only questions of fact actually litigated and essential to the judgment in the first adjudication become precluded by collateral estoppel:

- (1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .
- (2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.¹³

Actual litigation and determination of an issue is not enough. The issue must have been material and essential to the first controversy.¹⁴ It is

Bank v. Bremerton Bridge Co., 2 Wash.2d 52, 59, 97 P.2d 162 (1939); *In re Richland Hyatt House, Inc.*, 18 Wash.App. 426, 430, 568 P.2d 825 (1977).

¹¹ *Restatement (Second) of Judgments* §27 (1982).

¹² *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980) (citing *Seattle-First Nat'l Bank v. Kawachi*, 91 Wash.2d 223, 588 P.2d 725 (1978)).

¹³ *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980).

¹⁴ *East v. Fields*, 42 Wn. 2d 924, 926, 259 P.2d 639 (1953).

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.¹⁵

Here, the issues are not the same, and the resolution of one should not preclude litigation on the other. Respondent V-Squared brought breach of contract action for moneys due against appellant Ravikovich. Ravikovich raised statutory defenses based on RCW 18.27.080.

On the other hand, Washington Consumer Protection Act claim brought by appellant Ravikovich in the present suit against respondent V-Squared, LLC, has nothing in common and absolutely lacks any identical issues with classic contract at law. Thus, the Washington Consumer Protection Act (“CPA”) prohibits “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹⁶ A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff’s business or property.¹⁷ Whereas the element of contract: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) meeting of

¹⁵ *Dixon v. Fiat-Roosevelt Motors*, 8 Wash.App. 689, 695, 509 P.2d 86 (1973).

¹⁶ See *RCW 19.86.020*.

¹⁷ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986).

the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.¹⁸

It is not clear as to how the trial court found that absolutely two distinct causes of actions had identical issues in prior arbitration to invoke collateral estoppel. As clearly seen the elements of CPA claim and a contract have nothing in common. Furthermore, assuming *arguendo* that in arbitration between V-Squared and Ravikovich some common issue was considered, the trial court still should deny collateral estoppel effect on that issues since it was not essential to the decision of the case. If Ravikovich did appeal arbitration decision on CPA claim, the appellate court would refuse to hear the appeal, since Ravikovich's CPA claim was not resolved at that time and did not affect the outcome of the V-Squared, LLC, breach of contract suit. There has been no final decision on the issue and Ravikovich should not be estopped by the erroneous invocation of collateral estoppel by the trial court.

Consequently, the trial court made an obvious error in dismissing Ravikovich's CPA claim.

IV. THE TRIAL COURT LACKED PROPER RECORD WHEN DECIDED TO INVOKE COLLATERAL ESTOPPEL AGAINST CURRENT RAVIKOVICH'S CPA CLAIMS

¹⁸ *Havsy v. Flynn*, 88 Wash.App. 514, 518-20, 945 P.2d 221 (1997). *Winchek v. American Express Travel Related Services. Co.*, 232 S.W.3d 197, 202 (2007).

When collateral estoppel is asserted as a bar, the record of the prior action must be before the trial court so that it may determine if the doctrine precludes re-litigation of the issue in question.¹⁹

At the time of its motion for summary judgment, V-Squared, LLC, presented the following record to the trial court:

- Exhibit “A”-- Order Confirming Arbitration Award (CP 10-12).
- Exhibit “B”—Arbitration Award (CP 13-27).
- Exhibit “C”—Contract (CP 28-40).
- Exhibit “D”—Motion to Vacate Arbitration Award (CP 41-55).
- Exhibit “E”—Submission to Dispute Resolution (CP 56).
- Exhibit “F”—Clerk’s Order of Dismissal (without prejudice) (CP 57-58).
- Exhibit “G”--Ravikovich’s present CPA Complaint (CP 59-78).

The record before the trial court was incomplete because V-Squared, LLC, conveniently omitted submission to the trial court of a copy of its original complaint for breach of contract against Ravikovich, as well as Ravikovich’s answer to the complaint. These were crucial documents that reflected particular claims by V-Squared, LLC, against Ravikovich, which were necessarily for the trial court’s determination as

¹⁹ *Beagles v. Seattle-First National Bank*, 25 Wash.App. 925, 930, 610 P.2d 962 (1980) (citing *Bodeneck v. Cater's Motor Freight System, Inc.*, 198 Wash. 21, 29, 86 P.2d 766 (1939)). See also *Rufener v. Scott*, 46 Wash.2d 240, 245, 280 P.2d 253 (1955)).

to whether Ravikovich's present issues were not similar to the prior cause of action commenced by V-Squared, LLC.

Consequently, the trial court lacked necessary evidence because V-Squared, LLC, failed to present to the trial court crucial record so that the trial court could determine if the doctrine precludes re-litigation of the relevant issues.

E. REQUEST FOR ATTORNEY'S FEE ON APPEAL

Ravikovich's CPA claims arise from the contract with V-Squared, LLC. Pursuant to RCW 4.84.330 the prevailing party is entitled to all of its attorney's fees and costs incurred in litigation and in this appeal. Pursuant to Rule of Appellate Procedure ("RAP") 18.1, Appellant Ravikovich hereby requests such fees and costs incurred in this appeal. At the conclusion of this appeal, Appellant Ravikovich will submit supporting accounting and calculations reflecting reasonable amount of attorney's fees, costs and expenses.

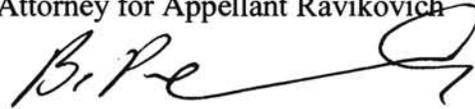
F. CONCLUSION

For the preceding reasons, this Court should reverse the judgment of dismissal as incorrect and remand this case to the Superior Court for further proceedings.

Respectfully submitted this 3rd day of June, 2013.

 PETRENKO LAW FIRM

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Attorney for Appellant Ravikovich



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

ALEX RAVIKOVICH,)
Plaintiff(s),) No. 696122
vs.) DECLARATION OF MAILING
ROBERT LONG and JANE DOE LONG,)
And their marital community composed)
Thereof; and V-SQUARED LLC, a)
Washington Limited Company,)
Defendant(s).)

I am legal assistant at Petrenko Law Firm; under penalty of perjury under the laws of the State of Washington declare:

That on this day, I, Lyubov Aulova, I sent, via mail, first class postage pre-paid NOTICE OF APPEARANCE and BRIEF OF APPELLANT RAVIKOVICH to the

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Containing a true copy of the document to which this declaration is attached.

Dated at Bellevue, Washington this 3rd day of June, 2013



Lyuba Aulova