No. 92359-1

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION I
No: 72614-5-I

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife

Plaintiff/Petitioners

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

APPELLANTS' PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS. Petitioners Steven Hyde and Sandra Brooke are husband and wife and ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition. [1]

B. COURT OF APPEALS DECISION. The decision was filed August 3, 2015. A copy of the decision is found at Appendix A at pages 1-16 . The decision has not been published. Reconsideration was denied September 3, 2015. A copy of the order denying Petitioners' motion for reconsideration is found at Appendix B at pages 1-2.

C. ISSUES PRESENTED FOR REVIEW.

1. Longstanding Washington Supreme Court precedent states *res judicata* cannot apply where there is no final decision on the merits. The Court of Appeals affirmed summary dismissal of this case based on *res judicata* because a prior case involving a different cause of action had been dismissed based on the statute of limitations. Should dismissal of a cause of action based on the statute of limitations be considered a final decision on the merits for purposes of *res judicata* with respect to other causes of action on which the statute had not run?

2. Longstanding Washington Supreme Court precedent states *res judicata* cannot apply unless identical causes of action are involved. The Court of Appeals in the case at bar held that two separate causes of action were involved but invoked *res judicata* to affirm dismissal anyway. Should the Court of Appeals have applied *res judicata* to separate causes of action contrary to Washington Supreme Court precedent?

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[1] The Petitioners are collectively referred to as "Hyde" herein.

3. The Washington Supreme Court has stated the requirement that all claims be brought in a single litigation is the *res judicata* prohibition against claim-splitting and has further stated the prohibition against claim-splitting does not apply to different causes of action. The Court of Appeals in the case at bar affirmatively found there was no claim-splitting in this case and that separate causes of action were involved. Was it error for the Court of Appeals to affirm dismissal based on the requirement that all claims be brought in a single litigation where separate causes of action were involved and there was no claim-splitting?

4. The Washington Supreme Court states *res judicata* cannot apply unless the same subject matter is involved. The Court of Appeals has found that the same subject matter is involved where separate causes of action lead to the same damages. Was the Court of Appeals correct in going against Washington Supreme Court precedent which defines subject matter in terms of the wrongful conduct rather than the result of the wrongful conduct?

D. STATEMENT OF THE CASE.

Steve Hyde was hired by the police department of the City of Lake Stevens to be a law enforcement officer. During the course of his training he was told it was mandatory that he be tased. Hyde stated he did not want to be tased; his training officer told him he had to be tased if he wanted the job. CP 164.

Subsequently, Hyde was tased. The tasing caused him to suffer serious injury. He is permanently disabled. CP 164.

Hyde later learned that the taser had been improperly applied to him. CP 164. He filed suit for negligence against the City of Lake Stevens (the prior lawsuit). CP 178.

During the course of the prior lawsuit against Lake Stevens, the Lake Stevens police chief was deposed June 30, 2011. At that time Hyde learned for the first time that, contrary to the training officer's representation, being tased was not a requirement of the job. CP 165.

Lake Stevens moved for summary judgment in the prior lawsuit on a number of grounds, including the failure to acquire jurisdiction before the statute of limitations expired. CP 245. Hyde pointed out that the statute of limitations could not have run on his claim that the requirement that he be tased had been misrepresented by the training officer. CP 130, CP 134-CP 138. In reply Lake Stevens successfully argued negligent misrepresentation of the tasing requirement was a brand new cause of action that had never been in the case. CP 142-3. Summary judgment was granted and Hyde appealed all bases of the grant of summary judgment to the Court of Appeals. CP 182; CP 146-50.

The Court of Appeals agreed with Lake Stevens' position that negligent misrepresentation had never been in the negligent tasing case. CP 159. It then found the statute of limitations had expired before jurisdiction was acquired over Lake Stevens with respect to Hyde's claim

for negligent tasing. The Court of Appeals did not address any of the other issues that had been appealed by Hyde. CP 160-1.

Hyde subsequently filed this lawsuit based on his negligent misrepresentation cause of action. CP 266-8. Lake Stevens moved for summary judgment, claiming *res judicata*, collateral estoppel and asking for attorneys fees and sanctions under CR 11. CP 213. Hyde opposed, pointing out that *res judicata* does not apply to different causes of action and that collateral estoppel only applies to issues actually decided in the prior litigation. CP 120-9.

The Superior Court granted summary judgment. CP 5-6. Reconsideration was moved for and denied. CP 54-65. The Superior Court additionally awarded Lake Stevens attorney fees totaling $17,145.00 and sanctions of $5,000.00. CP 11-12. An appeal timely followed. CP 1.

The Court of Appeals affirmed in part and reversed in part. It sustained dismissal finding that, although negligent tasing and negligent misrepresentation were separate causes of action, Hyde could have brought his negligent misrepresentation cause of action in the lawsuit for negligent tasing, and *res judicata* thus applied. However, it also found claim-splitting and collateral estoppel did not apply and reversed the award of sanctions and attorney fees to Lake Stevens. Court of Appeals

Opinion, Appendix A. Hyde filed for reconsideration in the Court of Appeals. The motion was denied. Appendix B.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. The Court of Appeals opinion conflicts with longstanding Supreme Court precedent requiring a final judgment on the merits before *res judicata* can apply.

"*Res judicata* requires a final judgment on the merits." Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 860, 726 P.2d 1 (1986). "The threshold requirement of re judicata is a final judgment on the merits in the prior suit." Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853, 866, 93 P.3d 108 (2004). "A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim... [w]hen the judgment is one of dismissal for lack of jurisdiction...." Restatement (second) of Judgments §20(1)(a) (1982).

"Dismissal for want of jurisdiction is not the same as a final decision on the merits." Richards v. City of Pullman, 134 Wn.App. 876, 884, 142 P.3d 1121 (2006). The Washington Supreme Court has stated:

> In this case, the dismissal of respondent's claims against the two construction companies was based on the statute of limitations rather than the merits. . . .

Vern J. Oja & Associates v. Washington Towers, Inc., 89 Wn.2d 72, 77, 569 P.2d 1141 (1977).

For purposes of *res judicata*, the statute of limitations dismissal in the prior lawsuit should not be considered a decision on the merits with respect to any issue other than the statute of limitations applicable to Hyde's negligent tasing claim.

Petitioners have found no case which holds dismissal of a cause of action based on the statute of limitations is a final decision on the merits with *res judicata* impact on other causes of action. The Washington Supreme Court has repeatedly held *res judicata* requires final judgment on the merits. Only after that threshold is met does the court delve into whether subject matter, cause of action, and parties meet the criteria for *res judicata*.

The prior case was dismissed on the basis of a failure to obtain jurisdiction within the statute of limitations. "Dismissal for want of jurisdiction is not the same as a final decision on the merits." Richards v. City of Pullman, 134 Wn.App. 876, 884, 142 P.3d 1121 (2006).

A dismissal of a cause of action for want of jurisdiction based on failure to serve the proper person within the statute of limitations does not constitute a final judgment on the merits for *res judicata* purposes with respect to other causes of action. Hyde respectfully suggests that it is illogical to consider statute of limitations dismissal of one cause of action a decision on the merits with respect to other causes of action.

2. The Court of Appeals Opinion directly conflicts with longstanding Washington Supreme Court precedent holding that, for *res judicata* to apply, the causes of action must be identical.

Storti v. University of Washington, 181 Wn.2d 28, 330 P.3d 159 (2014) stated: "*Res judicata* applies only where the current and prior case involve identical causes of action." Id. at 40 [emphasis added]. "[*R*]*es* judicata does not bar claims arising out of different causes of action. . . . " Hisle v. Todd Shipyards Corps., 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

In its opinion in the case at bar the Court of Appeals found negligent tasing and negligent misrepresentation were separate causes of action: "But that is not what Hyde did herein. In this case, he brought related – but separate – causes of action in successive lawsuits." Court of Appeals Opinion, Appendix A at 14. *Res judicata* accordingly cannot apply in the case at bar without contradicting longstanding Washington Supreme Court precedent.

The Supreme Court has without exception held *res judicata* does not apply to separate causes of action. The Court of Appeals has held that in certain circumstances separate causes of action can be subject to *res judicata* dismissal if not raised. This contradicts precedent.

3. The Court of Appeals opinion conflicts with Supreme Court precedent establishing that only where claim-splitting is involved does *res judicata* operate to dismiss claims that could have been raised in a prior litigation.

Although the Court of Appeals in its Opinion finds negligent tasing and negligent misrepresentation to be separate causes of action, it also finds them to be related because both causes of action led to the same injury. It then finds that, because both causes of action led to the same injury, Hyde could have, and should have, pled negligent misrepresentation in the prior action. Since he did not, it found *res judicata* should be applied to dismiss the case before the court. Hyde respectfully suggests this represents a misapplication of *res judicata*.

The Court of Appeals in its Opinion has carefully and accurately interpreted the law of Washington as applied to claim-splitting. Pursuant to that analysis it found claim-splitting did not apply. Court of Appeals Opinion, Appendix A at 14. This finding mandated that *res judicata* also does not apply.

The Court of Appeals found that language in the case law applying *res judicata* to claims that could have been raised in a prior litigation mandated *res judicata* dismissal even though separate causes of action were involved. Language in the case law has created confusion about the interrelationship between *res judicata* and when a party is required to have brought forward other claims he or she may have had. Petitioners respectfully suggest the Court of Appeals interpretation represents a

misapplication of the "could have been raised" doctrine which should be clarified.

The Court of Appeals states Hyde could have raised his negligent misrepresentation cause of action in his prior case and thus is prevented by *res judicata*/claim splitting from bringing it in this case. It cites language in various cases stating that, where the relief sought could have been determined in a prior action, there is claim splitting and *res judicata* applies.

The argument might appear to have merit. However, the language is misunderstood if applied to different causes of action, and the Washington Supreme Court has so ruled.

The argument the Court of Appeals makes with respect to causes of action that could have been brought was attempted in Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978). In Kawachi the superior court had dismissed a case based on res judicata because it felt the involved cause of action could have been determined in a prior case which had been litigated. The Court of Appeals reversed, and the Supreme Court of Washington affirmed the reversal, in relevant part describing the losing party's argument as follows: "The respondents maintain, however, that the claims should be barred because they could have been decided in that [prior] suit." Kawachi at 226. The Washington Supreme Court then stated:

> While it is often said that a judgment is *res*

> *judicata* of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims it does not require such joinder.

Id. at 226. The Washington Supreme Court then unequivocally stated:

> And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause that was adjudicated.

Id. In the case at bar the negligent taser application was independent of the negligent misrepresentation that Steve Hyde had to be tased if he wanted the job.

There are circumstances where a party must raise all claims he or she could have raised in a prior litigation; however, that circumstance does not arise when separate causes of action are involved. The requirement that all claims that could be raised be raised in a prior litigation is the prohibition against claim-splitting, and in this case the Court of Appeals found there was no claim-splitting.

Supreme Court precedent and CR 18 support the view that the requirement that unraised claims be raised in a prior litigation relates to claim-splitting. The Supreme Court in Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 423 P.2d 624 (1967) stated:

> This Court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is granted is variously referred to as *res judicata* or splitting causes of action. Currier v. Perry, 181 Wash. 565, 44 P.2d 184 (1935); Sayward v. Thayer, 9 Wash. 22, 36 P. 966, 38 P. 137 (1894).

Id. at 441.

The requirement that Hyde raise all claims that he had with respect to a particular transactional nucleus of facts is in fact the prohibition against claim-splitting. In Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 726 P.2d 1 (1986) the Washington Supreme Court made it clear that the requirement that one bring all claims related to a particular transaction or series of transactions was simply a prohibition against claim-splitting and not an independent basis for applying *res judicata*. The court stated:

> This court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. This theory on which dismissal is granted is variously referred to as *res judicata* or splitting causes of action.

Id. at 859 [citation and quotation marks omitted].

Since the court found no claim-splitting in the case at bar and since the requirement that a claimant bring all claims he could have and should have brought in the prior action is a prohibition against claim-splitting, *res*

judicata should not apply. Language in the cases dealing with the issue has created misunderstanding which should be clarified.

4. The Court of Appeals opinion conflicts with Supreme Court precedent establishing that the subject matter requirement of *res judicata* relates to the wrongful act, not the result of the wrongful act.

For *res judicata* to apply the Supreme Court of the State of Washington has stated that the subsequent action must be "...identical with a previous action in four respects: (1) the same subject matter; (2) same cause of action; (3) same persons or parties; (4) the same quality of the persons for or against whom the claim is made." Hayes v. City of Seattle, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). If there is a lack of identity between the two actions with respect to any of the four elements, there can be no *res judicata*. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 997 P.2d 898 (1995).

Element 1 requires that the subject matter be the same in both actions. The Washington Supreme Court emphasized in Hayes that "two lawsuits. . . do not concern the same subject matter simply because they both arise out of the same set of facts." Id.

Hayes involved a man, Michael Hayes, who appealed a Seattle City Council imposition of restrictions on a master use permit which had been previously approved. He filed a complaint for judicial review,

contending the Council had acted arbitrarily and capriciously. The Superior Court ruled the findings of the Council had been conclusory and remanded to the Council with instructions to identify adverse impacts and how the restrictions would mitigate the identified adverse impacts. The Seattle Council reconsidered and approved the master use permit without restriction. Mr. Hayes then filed another action in King County Superior Court asking for damages, costs and attorney fees. Seattle defended, contending *res judicata* barred the action because Hayes' action for damages was not joined with his earlier filed action based on the same transaction. Id. at 710-11.

The Washington Supreme Court in Hayes pointed out that in a prior case, Mellor v. Chamberlin, 100 Wn.2d 643, 673 P.2d 610 (1983), it had held two lawsuits arising from the same real estate transaction did not involve the same subject matter. The Hayes court described the facts of Mellor as follows:

> In the first of those lawsuits, a buyer of land contended that the seller had misrepresented the extent of the property included in the sale. That lawsuit was settled and an order of dismissal with prejudice was thereafter entered. Shortly thereafter, the buyer brought a second lawsuit claiming that the seller breached a covenant of warranty. The buyer prevailed in that action on the theory that an adjoining landowner's encroachment onto the property breached the seller's warranty of quiet and peaceful possession.

Hayes at 712.

After explaining that two lawsuits do not involve the same subject matter simply because they both arise out of the same set of facts, the Hayes court held that, although Mr. Hayes had brought two lawsuits out of the same set of facts, they did not involve the same subject matter for purposes of *res judicata* "because the nature of the two claims is entirely disparate." Hayes at 713. The court explained:

> The action for judicial review focused exclusively on the propriety of the decision making process of the Seattle City Council. On the other hand, the subsequent action was for a judgment for money to compensate Hayes for the damages he allegedly suffered as a result of the Council's action.

Id.

In the case at bar the prior lawsuit was based on the claim that the method of taser application to Hyde was negligent. The current lawsuit is based on the claim that the training officer had negligently misrepresented that Hyde had to undergo tasing. The subject matter of the two claims is clearly different. The two claims even had different statutes of limitation. The statute of limitation with respect to the negligent tasing claim was found to begin running at the moment of tasing in the previous litigation. CP 160-1. The negligent misrepresentation claim did not begin running

until Hyde discovered the misrepresentation, which was when the Lake Stevens police chief was deposed, 2 years after Hyde was tased. CP 165.

The only issue decided in Hyde's prior lawsuit was that the statute of limitations had run on the negligent tasing claim. The subject matter of the case at bar was not decided and there was no finding that the statute of limitations with respect to negligent misrepresentation had run.

The subject matter of the case at bar is not the statute of limitations applicable to the negligent tasing cause of action. If the prior case bars this one, it is in effect a finding that the expiration of the statute of limitations as to one cause of action extinguishes all other causes of action even if they have statutes of limitations which have not yet expired.

Res judicata dismissal was erroneous because the subject matter of this lawsuit is not identical with the subject matter of the prior lawsuit.

5. The courts have long held *res judicata* should not be applied to deny a litigant his day in court.

The Washington Supreme Court has stated:

> Neither the doctrine of *res judicata* nor collateral estoppel are intended to deny a litigant his day in court. The purpose of both doctrines is only to prevent relitigation of that which has been previously litgated.

Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). The Supreme Court continued:

> The doctrine of *res judicata* is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinate facts determined in the previous litigation.

Id. The Court noted:

> The party asserting either doctrine has the burden of proof to show that the determinative issue was litigated in the former proceedings.

Id. [emphasis added].

In discussing *res judicata* the Washington Supreme Court has made it clear that it is not to be applied blindly:

> The doctrine of *res judicata* is based on public policy. . . . 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 shall be hesitant to so apply the doctrine as to deprive any person of property rights without having his day in court.

Id. at 896. "It is generally recognized that the doctrine of *res judicata*. . . is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice." Id. at 897.

First, this case does not involve relitigation of issues determined in the prior case. Second, *res judicata* is not intended to be applied in a way that deprives one of his or her day in court.

Even if *res judicata* were otherwise applicable, it is not applied where doing so would serve as an injustice or would deprive a litigant his or her day in court. Review of the circumstances involved in Hyde's case reveals both injustice and deprivation of Hyde's day in court if *res judicata* is applied.

It is important to understand that the merits of Hyde's cases have never been reached. The prior case was dismissed because jurisdiction over Lake Stevens was not acquired within the statute of limitations. This case is dismissed based on *res judicata*, even though no issue related to the statute of limitations in the prior case is in this case.

Since the prior case is being given *res judicata* effect, it is important to review the circumstances involved in that case to see if *res judicata* results in injustice to Hyde or denial of his day in court. In the prior case Lake Stevens engaged in a series of maneuvers designed to delay the case beyond the statute of limitations, all the while extensive discovery was taking place for over a year and a half. Brief of Appellants, pp.7-8, 44-46.

In the prior action an admitted Lake Stevens speaking agent was served with summons and complaint. The process server stated the Lake Stevens speaking agent represented he was authorized to accept service. A statute stated the mayor could authorize individuals other than himself

and the city clerk to accept service. RCW 4.28.080(2). Counsel appeared for Lake Stevens and filed an answer which included the usual litany of defenses, including insufficiency of service of process, failure to state a claim, immunity, waiver, assumption of risk, contributory negligence, estoppel and release. Hyde served an interrogatory on Lake Stevens asking that it identify all bases supporting its defenses, including insufficiency of service of process. Lake Stevens objected to all interrogatories stating they were unduly burdensome, called for a legal conclusion and "attorney work product privileged information." Lake Stevens also without comment attached a copy of the wrong affidavit of service to its interrogatory answers. Lake Stevens was subsequently sent a letter asking it to answer the interrogatories, which was ignored. Lake Stevens asked Hyde to agree to moving the trial date, claiming it had a conflict with the assigned date. Hyde agreed to the extension. Lake Stevens then claimed unavailability for trial until a date after it felt the statute of limitations had run; it of course did not reveal its purpose at that time. Id.

During the course of the discovery, Lake Stevens' police chief revealed that, contrary to the representation of the training officer, Hyde was in fact not required to endure being tased. Hyde thought his original

complaint for negligence was sufficient to cover a claim for negligent misrepresentation and, accordingly, did not modify his pleading.

Finally, 13 days after it felt the statute of limitations had run, Lake Stevens moved for summary judgment, for the first time asserting the wrong person had been served within the statute of limitations. Id.

Hyde responded by pointing out that no matter what, the statute of limitations on his claim for negligent misrepresentation had not run. The Superior Court entered summary judgment. Hyde filed a motion for reconsideration in which he again stated his claim for negligent misrepresentation was still within the statute of limitations. CP 134.

Lake Stevens took the position that negligent misrepresentation was a brand new, completely independent cause of action that had never been in the case and that had to be separately pled. The trial court and Court of Appeals agreed. Accordingly, Hyde filed this action, alleging negligent misrepresentation.

Application of *res judicata* in this case would both deny Hyde his day in court and also work an injustice. The courts have said the doctrine is not to be so applied. The prior case was determined based on jurisdictional, legal technicality. The prior case never reached the merits.

F. CONCLUSION.

The Court of Appeals decision should be reversed. This cause should be remanded for trial.

Dated this 5th day of October, 2015.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,	)	DIVISION ONE
Appellant,	)	No. 72614-5-I
v.	)	UNPUBLISHED OPINION
CITY OF LAKE STEVENS,	)	
Respondent.	)	FILED: August 3, 2015

DWYER, J. — The doctrine of res judicata prevents a plaintiff from bringing successive actions against the same defendant when the actions arise from the same transactional nucleus of facts. After Steven Hyde, the appellant in this matter, had his claim of negligence against the City of Lake Stevens dismissed, he filed a successive action against the City in which he alleged a claim of negligent misrepresentation. Because the negligent misrepresentation claim arose from the same events that formed the basis of Hyde's negligence claim, the trial court's dismissal of Hyde's negligent misrepresentation claim was justified by the doctrine of res judicata. Therefore, we affirm the dismissal of Hyde's negligent misrepresentation claim. The record herein, however, does not support the trial court's imposition of Civil Rule 11 sanctions against Hyde's counsel. We reverse that order.

I

On June 2, 2009, the City of Lake Stevens offered Steven Hyde a position as a police officer. As part of his training, Hyde participated in taser training. He completed the written taser training on June 10, 2009 and on the next day, June 11, participated in the practical taser application and testing.

During this part of the training, Hyde was subjected to a short burst of the taser weapon in accordance with the taser training protocol. Before the tasing took place, Hyde signed a release from Taser International, the manufacturer of the weapon. Hyde then laid with his back on the floor and with clips attached to his right arm and left ankle. A taser instructor applied the taser to him. Later that same day, Hyde complained of back pain and filed an injury report.

On August 28, 2009, the pain not having resolved, Hyde had surgery on his back. On September 25, 2009, Hyde contacted Taser International, inquiring about the recommended methods of exposure during taser training. On September 30, Hyde received an e-mail from the training manager at Taser International, who informed him that the training guidelines state to target the subject's back or legs and that shoulder and foot exposures were not recommended.

Hyde then brought a lawsuit against the City. Therein, Hyde alleged that he had suffered injury as a result of being tased, and that the injury "was directly and proximately caused by the negligence of Defendant City of Lake Stevens." He requested that judgment be entered against the City for, among other things, general damages, medical costs and expenses (both present and future),

financial loss, pain and suffering, mental anguish, loss of consortium, and emotional distress.

On August 23, 2012, the City moved for summary judgment on Hyde's claim of negligence. Its motion was granted and Hyde's negligence claim was dismissed.

Hyde moved for reconsideration. In doing so, Hyde argued that a claim of negligent misrepresentation was included within his complaint, and that this claim was based on his discovery, on June 20, 2011, that, contrary to assertions made to him at the taser testing, being tased was not a requirement to become a police officer. Hyde's motion for reconsideration was denied.

Hyde appealed. In an unpublished opinion, we affirmed the dismissal of Hyde's negligence claim. Hyde v. City of Lake Stevens, noted at 179 Wn. App. 1007, 2014 WL 232214, review denied, 180 Wn.2d 1029 (2014). Therein, we observed that Hyde had not pleaded a claim of negligent misrepresentation but, rather, first asserted such a claim in his motion for reconsideration. Hyde, 2014 WL 232214, at *4.

Subsequently, Hyde filed this action in Snohomish County Superior Court. Herein, he claims that "[t]he representation that tasing was a requirement of the job was a negligent misrepresentation." His complaint requests that judgment be entered against the City for, among other things, general damages, medical costs and expenses (both present and future), financial loss, pain and suffering, mental anguish, loss of consortium, and emotional distress.

After the complaint herein was filed, the City's attorney informed Hyde's

attorney that the complaint was "a clear violation of the claim-splitting doctrine," and notified Hyde's attorney that the City would seek attorney fees, costs, and sanctions if the complaint was not voluntarily dismissed. Shortly thereafter, the City's attorney reminded Hyde's attorney of the City's intent to seek fees and sanctions and, in doing so, stated, "It is our position that you are in violation of the claim splitting prohibition, res judicata, collateral estoppel, CR 11, and the statute of limitations for statements allegedly made (negligent misrepresentation) in June 2009 has expired."

On July 24, 2014, the City filed a motion for summary judgment. Therein, the City argued that Hyde's second complaint was barred by the prohibition on "claim-splitting," as well as the doctrines of res judicata and collateral estoppel. The City requested that the trial court dismiss Hyde's complaint, award the City attorney fees, and impose monetary terms against Hyde's attorney and in favor of the City.

On September 5, 2014, the trial court granted the motion, dismissing the complaint. Pursuant to CR 11, the court awarded the City reasonable attorney fees and sanctions in the amount of $5,000 against Hyde's attorney. Commenting on the imposition of CR 11 sanctions, the trial court stated, "This second lawsuit was brought in blatant violation of the claim splitting prohibition, *res judicata*, collateral estoppel, was frivolous, and has harassed the City and caused it to incur unnecessary legal bills and expenses."

Hyde's motion for reconsideration was denied. Therein, the trial court determined that a reasonable attorney fee to be awarded to the City was in the

amount of $17,145.

Hyde appeals.

II

Hyde contends that the trial court erred in dismissing his claim of negligent misrepresentation. We disagree. Dismissal was proper under the doctrine of res judicata.

We review a summary judgment order de novo. Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn. App. 490, 495, 311 P.3d 1285 (2013). When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Brown v. Brown, 157 Wn. App. 803, 812, 239 P.3d 602 (2010). "The motion should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Mayer v. City of Seattle, 102 Wn. App. 66, 75, 10 P.3d 408 (2000).

Generally speaking, res judicata bars the relitigation of claims and issues that were litigated or could have been litigated in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995); see In re Marriage of Aldrich, 72 Wn. App. 132, 138, 864 P.2d 388 (1993) (res judicata operates to preclude collateral attack on a final decision). "When res judicata is used to mean claim preclusion, it encompasses the idea that when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should

have been raised, in the prior proceeding." Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997) (footnotes omitted). "[I]t has been held that a matter should have been raised and decided earlier if it is merely an alternate theory of recovery, or an alternate remedy." Kelly-Hansen, 87 Wn. App. at 331 (compiling Washington Supreme Court cases); see also Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc., 118 Wn. App. 617, 631-32, 72 P.3d 788 (2003) (summarizing the application of res judicata by Washington courts and rejecting the position "that a party can bring as many actions as he or she has substantive legal theories, even if all theories involve the same facts, the same evidence, and the same transaction").

In Washington, these principles have been reduced to a four-part test. Res judicata applies "where a prior final judgment is identical to the challenged action in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.'" Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 836, 125 P.3d 202 (2005) (quoting Loveridge, 125 Wn.2d at 763). Whether an action is barred by res judicata is a question of law that is reviewed de novo. Lynn, 130 Wn. App. at 837.

Hyde concedes that the persons and parties, as well as the quality of the persons for or against whom the claim is made, are the same. Accordingly, only the first two elements necessitate analysis.

The first element, which requires a concurrence of identity in subject matter, is met: both actions involve the events that occurred during the June 11, 2009 taser training session.

The second element, which requires a concurrence of identity in the causes of action themselves, is also met. For purposes of this second element, "[a] claim includes 'all rights of the [claimant] to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose,' without regard to whether the issues actually were raised or litigated." Fluke Capital & Mgmt. Servs. Co. v. Richmond, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS, § 24(1) (1982)); accord Hadley v. Cowan, 60 Wn. App. 433, 804 P.2d 1271 (1991).

Hyde filed his first complaint, in which he alleged a claim of negligence, before learning that being tased was not a precondition of becoming a police officer. However, the City did not move for summary judgment on Hyde's negligence claim until over a year after Hyde's discovery that he could have opted not to be tased and remained eligible for employment. During this interim period, Hyde could have sought leave to amend his complaint to include a claim of negligent misrepresentation; alternatively, he could have sought to file a supplemental pleading to the same effect. CR 15(a), (d). Yet, instead of availing himself of the procedures authorized by rule, Hyde waited until his motion for reconsideration to argue that he had, in fact, included a claim of negligent misrepresentation in his complaint.

When this argument was rejected, Hyde filed a second complaint in which he pleaded a claim of negligent misrepresentation. He sought the same relief he had sought in his first complaint. In other words, after failing to recover damages

under a simple negligence theory, Hyde sought to recover the same damages, based on the same transaction, but under a theory of negligent misrepresentation. For purposes of the second element, his claims are, therefore, identical.[1]

The trial court did not err when it dismissed Hyde's claim of negligent misrepresentation on the basis of res judicata.

III

The trial court did, however, err in awarding attorney fees to the City and imposing sanctions against Hyde's attorney pursuant to CR 11. This is so because Hyde's negligent misrepresentation claim was not, contrary to the trial court's conclusion, brought in violation of the prohibition on claim splitting or the doctrine of collateral estoppel. Furthermore, although Hyde's claim was brought in violation of the doctrine of res judicata, CR 11 sanctions are not justified on that basis. Not only was the required notice of a CR 11 violation given to Hyde's attorney inadequate, the attorney had a good faith argument that Hyde's negligent misrepresentation claim could be prosecuted and would not be barred by the statute of limitation, as was his simple negligence claim. Accordingly, the

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[1] Hyde asserts that the City should be judicially estopped from taking the position on appeal that his negligent misrepresentation claim is identical to his negligence claim. This is so, he maintains, because whereas the City obtained summary judgment in the second action by asserting the defense of res judicata, it obtained summary judgment in the first action by asserting that Hyde's purported negligent misrepresentation claim was independent of his negligence claim.

There is no merit to Hyde's argument. The City's position in both actions has been that Hyde's negligent misrepresentation claim is simply an alternate theory of liability to his negligence claim. There is no inconsistency in the City's position and, thus, no applicability for the equitable doctrine of judicial estoppel. See, e.g., Taylor v. Bell, 185 Wn. App. 270, 340 P.3d 951 (2014) (judicial estoppel inapposite where no inconsistent position taken), review denied, No. 91469-9 (Wash. July 8, 2015).

trial court's award must be vacated.

The signature of a party or attorney on a pleading constitutes a certificate by that party or attorney that the pleading is well grounded in fact, warranted by existing law or a good faith argument for a change in existing law, is not interposed for an improper purpose, and contains only factual contentions or denials warranted by the evidence. CR 11(a). Where a pleading is signed in violation of the rule, "the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction," which may include reasonable attorney fees and expenses. CR 11(a). We review an award of sanctions under CR 11 for an abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

In determining whether the trial court abused its discretion, we are mindful that CR 11 is intended to deter baseless filings and to curb abuses of the judicial system. Biggs, 124 Wn.2d at 197. The rule is not "meant to act as a fee shifting mechanism." Biggs, 124 Wn.2d at 197. "Courts should employ an objective standard in evaluating an attorney's conduct, and the appropriate level of pre-filing investigation is to be tested by 'inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.'" Biggs, 124 Wn.2d at 197 (quoting Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992)).

Importantly, "[b]oth practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted." Biggs, 124

Wn.2d at 198 (footnote omitted). "Prompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses." Biggs, 124 Wn.2d at 198. However, notice, as it relates to CR 11, must be meaningful. Were it otherwise, CR 11 would be "simply another weapon in a litigator's arsenal." Biggs, 124 Wn.2d at 199 n.2.

Here, the City's attorney informed Hyde's attorney that the complaint was "a clear violation of the claim-splitting doctrine," and notified Hyde's attorney that the City would seek attorney fees, costs, and sanctions if the complaint was not voluntarily dismissed. Shortly thereafter, the City's attorney reminded Hyde's attorney of the City's intent to seek fees and sanctions and, in doing so, stated, "It is our position that you are in violation of the claim splitting prohibition, res judicata, collateral estoppel, CR 11, and the statute of limitations for statements allegedly made (negligent misrepresentation) in June 2009 has expired."

Subsequently, in imposing CR 11 sanctions, the trial court found that, "This second lawsuit was brought in blatant violation of the claim splitting prohibition, *res judicata*, collateral estoppel, was frivolous, and has harassed the City and caused it to incur unnecessary legal bills and expenses."

As explained herein, the trial court, and the City's counsel, were correct that Hyde is barred from maintaining his claim by res judicata. Notwithstanding this, the City was incorrect in asserting in its notice of intent to seek sanctions that Hyde's negligent misrepresentation claim was brought in violation of the prohibition on claim splitting and in violation of the doctrine of collateral estoppel. As will be explained below, and quite ironically, given the wording of CR 11, the

City's contentions in these regards were not supported by the law or the facts. This form of notice, which was incorrect on the law more than it was correct on the law, did not serve the salutary purpose required by the Biggs decision.

As to "claim splitting," the City was just plain wrong. In Washington, the practice of claim splitting has long been forbidden. Sprague v. Adams, 139 Wash. 510, 247 P. 960 (1926); White v. Miley, 137 Wash. 80, 241 P. 670 (1925); Kinsey v. Duteau, 126 Wash. 330, 218 P. 230 (1923); Collins v. Gleason, 47 Wash. 62, 91 P. 566 (1907); Kline v. Stein, 46 Wash. 546, 90 P. 1041 (1907); see also Ensley v. Pitcher, 152 Wn. App. 891, 222 P.3d 99 (2009); Landry v. Luscher, 95 Wn. App. 779, 976 P.2d 1274 (1999).

The seminal case of Sprague v. Adams, provides a good starting point in understanding that which constitutes claim splitting. 139 Wash. 510. In Sprague, the plaintiff successfully prosecuted a claim for property damage arising out of a motor vehicle collision and then brought a successive action in an effort to recover damages for personal injuries arising out the same collision. The issue before the court was "whether or not a single tort resulting in property damage to the owner and also in personal injury damage to the owner is one indivisible claim or cause of action in favor of the person so damaged, within the rule against splitting of causes of action and subjecting the claimant's opponent to more than one suit therefor." Sprague, 139 Wash. at 515. Resolving the question, the court held "that the decided weight of authority in this country supports the view that damages resulting from a *single tort*, even though such damages be partly property damages and partly personal injury damages, are,

when suffered by one person, the subject of only one suit as against the wrongdoer." Sprague, 139 Wash. at 520 (emphasis added).

The decision in Sprague was founded upon a series of prior Supreme Court decisions, including, most notably, Kline, Collins, Kinsey, and White. Each of these decisions is considered herein.

The plaintiffs in Kline brought successive actions seeking to recover land from the defendants, who had dispossessed them by moving the fences erected by the plaintiffs to where the defendants perceived the true property lines to be. 46 Wash. at 546-47. After prevailing in their first action, the plaintiffs sought "to recover an irregular shaped tract bordering on the west side of the tract recovered in the first action, which they claim they were deprived of by the same acts of forcible trespass." Kline, 46 Wash. at 547. After the trial court dismissed the second action, our Supreme Court affirmed, opining that "[t]he trespass gave rise to but one right of recovery, and since the appellants have exercised that right they are estopped from maintaining a second recovery," before concluding that "there has been a splitting of a *single cause of action*." Kline, 46 Wash. at 548-49 (emphasis added).

The plaintiff in Collins brought successive actions seeking to compel specific performance by the defendants on a contract. 47 Wash. at 64-67. While the plaintiff prevailed in the first action, his effort to compel additional performance was rebuffed by the trial court. After the trial court dismissed the second action, our Supreme Court affirmed, opining that "Appellants' testator never had more than *one cause of action* on the contract. The failure of

respondent to convey all the lands contemplated thereby was but one breach, which authorized one action only." Collins, 47 Wash. at 67 (emphasis added). The court continued, "For one breach of an indivisible contract there can arise but one cause of action, and if in such action the plaintiff does not demand the entire relief to which he is entitled, he cannot afterwards complain." Collins, 47 Wash. at 67.

White involved an action of replevin, in which the plaintiff, after bringing a damages action for conversion of certain personal property, sought to recover different items of personal property from the same defendants. 137 Wash. at 81-82. The Supreme Court noted "that the rule against split causes of action requires the plaintiff to join in one action his claims and demands concerning all the property which can properly be brought into that action." White, 137 Wash. at 82. However, because the plaintiff in the first action was misled by the defendants, the court ruled that the plaintiff was, under the circumstances, permitted to split his cause of action. White, 137 Wash. at 83.

The plaintiff in Kinsey brought an action seeking recovery of a one-half interest in a tract of real property. Kinsey, 126 Wash. at 332. After his first action was dismissed, the plaintiff sought to recover a full interest in the same tract, but his efforts were barred by the trial court. Kinsey, 126 Wash. at 332. The Supreme Court affirmed, noting that the claims arose from the same cause of action. Kinsey, 126 Wash. at 334.[2]

[2] Modern cases are in accord with Sprague and its forebears, but add nothing to the analysis and have not altered the rule. For instance, in Landry, Division Three, citing Sprague,

By 1940, the law in Washington was clear: the prohibition against claim splitting precluded the prosecution of a single cause of action in successive lawsuits. That rule has never changed. But that is not what Hyde did herein. In this case, he brought related—but separate—causes of action in successive lawsuits. Hyde did not commit the sin of claim splitting.

Not only was the City incorrect with regard to claim splitting, the City was also wrong in asserting that Hyde's second lawsuit was brought in violation of the doctrine of collateral estoppel.

"Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties." Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). "Collateral estoppel requires that the issue decided in the prior adjudication is identical with the one at hand." McDaniels v. Carlson, 108 Wn.2d 299, 305, 738 P.2d 254 (1987). Moreover, it "precludes only *those issues that have actually been litigated and determined*; it 'does not operate as a bar to matters which could have . . . been raised [in prior litigation] but were not.'" McDaniels, 108 Wn.2d at 305 (emphasis added) (alterations in original) (quoting Davis v. Nielson, 9 Wn. App. 864, 874, 515 P.2d 995 (1973)).

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opined, "An injured party is limited to one lawsuit for property and/or personal injury damage resulting from a single tort alleged against the wrongdoer." Landry, 95 Wn. App. at 782. The Landry court then applied Sprague, concluding that "there is an identity of causes of action between a suit for property damage and a suit for personal injury damage incurred by one person, or at least the community, and resulting from a single tort." Landry, 95 Wn. App. at 784; see also Ensley, 152 Wn. App. 891 (finding instance of impermissible claim splitting where first action sought to establish vicarious liability of the principal and second action sought to establish direct liability of the agent).

As explained herein, Hyde could have asserted his claim of negligent misrepresentation in his first complaint, but failed to do so. While this failure, under the circumstances, caused his present lawsuit to be barred by res judicata, it was not also barred by collateral estoppel, given that the cause of action asserted herein (negligent misrepresentation) was not actually litigated in the first action. Consequently, the City was wrong in asserting in its notice of intent to seek CR 11 sanctions that Hyde's claim was brought in violation of the prohibition on collateral estoppel.

CR 11 is not a fee-shifting mechanism. The notice requirement of Biggs v. Vail exists to give fair warning to pleading violators and to deter violations at the earliest possible time. The notice given herein did not satisfy the Biggs requirements. The City, while correct in one assertion, was wrong in its two other assertions. The legal equivalent of simply throwing things against the wall to see what sticks does not serve as proper notice of a CR 11 violation.

Moreover, the circumstances suggest that Hyde's attorney filed the negligent misrepresentation claim with a good faith belief that he could maintain that cause of action. The City successfully argued in the prior action that Hyde's negligence claim was distinct from a negligent misrepresentation claim, and this court—in affirming the dismissal of Hyde's negligence claim—ruled that Hyde had not included a negligent misrepresentation claim in the first action. Hyde had a colorable—though losing—argument that he had not had a full opportunity to litigate the negligent misrepresentation claim in the first proceeding. Furthermore, Hyde argued that his claim of negligent misrepresentation was not

subject to the same statutory limitation period pursuant to which his claim of negligence had been dismissed. "The principal concern of the rule is whether the attorney acted reasonably in taking the action." John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 111, 780 P.2d 853 (1989). This record does not support the conclusion that the second action was brought in order to harass the defendant. Moreover, the required CR 11 notice was severely deficient—indeed, the City was more wrong than right in the assertions contained in that notice. Given the entire record, the trial court erred in granting the motion to impose sanctions and award attorney fees.[3]

We affirm the order of summary judgment dismissal. We vacate the order awarding attorney fees and sanctions pursuant to CR 11.

We concur:

[3] The trial court did not, in awarding attorney fees, specify the ground upon which the award was based. While the City maintains that the award of attorney fees should be affirmed on the basis of CR 11, it also argues that RCW 4.84.185—which authorizes fees if an action is "frivolous and advanced without reasonable cause"—provides an alternative ground for affirmance. Awards pursuant to this statute are authorized only where a party is "forced to defend itself against meritless claims asserted for harassment, delay, nuisance or spite." Suarez v. Newquist, 70 Wn. App. 827, 832-33, 855 P.2d 1200 (1993). This is not such a case. We decline to affirm on this basis.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,	)	DIVISION ONE
Appellants,	)	No. 72614-5-I
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
CITY OF LAKE STEVENS,	)	
Respondent.	)	

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 3rd day of September, 2015.

FOR THE COURT:

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,	)	DIVISION ONE
Appellants,	)	No. 72614-5-I
v.	)	ORDER DENYING MOTION TO PUBLISH OPINION
CITY OF LAKE STEVENS,	)	
Respondent.	)	

The appellants having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed August 3, 2015, shall remain unpublished.

Dated this 3rd day of September, 2015.

FOR THE COURT:

Judge