75029-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



DIVISION ONE

---

JESSICA SIMPSON,

Appellant/Plaintiff,

v.

LINDA GIPSON and JOHN DOE GIPSON, husband and wife, and the marital community composed, thereof,

Respondent/Defendant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie Churchill

---

# BRIEF OF APPELLANT

---

Victor Ro
WSBA # 38984
Attorney for Appellant Simpson
**THE RO FIRM, P.S.C.**
5400 Carillon Point
Bldg. 5000, 4th Floor
Kirkland, WA 98033
Tel: (206) 319-7072
Fax:(206) 319-4470
Email: litigation@rofirm.com

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### Cases



### Other Authorities



### Rules

## A. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Respondent's Motion for Summary Judgment and denied Appellant's request for a continuance without allowing Appellant's counsel, who had appeared in the case only a few days before, sufficient time to prepare her case.

### Issues Related to Assignments of Error

Appellant previously appeared pro se in this action, and, four calendar days before Respondent's motion for summary judgment was to be heard, hired counsel. Without time to prepare for the summary judgment hearing, Appellant's counsel orally requested a continuance, which the Court denied. The Court then granted Respondent's motion for summary judgment and dismissed Appellant's claims. Did the Court abuse its discretion in refusing to allow Appellant's counsel, who was just hired, time to prepare her case before ruling on a dispositive motion?

## B. STATEMENT OF THE CASE

### 1. Procedural Facts

Appellant Jessica Simpson was a patient at Whidbey General Hospital where she was assaulted/choked by the Respondent nurse, Linda Gipson. Respondent Gipson was probed in a criminal trial and received a not-guilty verdict. The Washington State Attorney General's Office is

appealing the decision and that case, therefore, has not reached a conclusion.

On or about September 26, 2014, the Appellant filed a civil suit against Whidbey General Hospital. *See* Exh. P1 (Plaint. Orig. Compl. Filed 9/26/14, Case No. 14-2-00622-0; *See also* CP 13. Thereafter, Appellant filed an Amended Complaint on November 24, 2014. *See* Exh. P2.

In the first lawsuit, where Appellant had different counsel, for unknown strategic reasons she did not name Linda Gipson as a defendant. Instead, the civil suit was filed only against the hospital. Without a trial, that lawsuit was dismissed. *See* Exh. P3 ("Order"; Case No. 14-2-00622-0).

More recently, on or about January 7, 2016, Ms. Simpson filed a new Complaint against Linda Gipson, the Respondent here. Her difficult circumstances, financially, emotionally, and developmentally, made it very difficult for her to hire private counsel and so she filed the complaint *pro se.* *See* CP 11.

Ms. Simpson's attorney was retained by Ms. Simpson, and filed a Notice of Appearance, on February 18, 2016. *See* CP 36-38. Then, on February 22, 2016, Ms. Simpson's counsel appeared for Ms. Gipson's summary judgment motion. This gave Ms. Simpson's attorney very little time to prepare even a Notice of Appearance and a Motion for Continuance,

nonetheless to oppose Ms. Gipson's dispositive motion.

Thus, on February 22, 2016, the Island County Superior Court denied Ms. Simpson's motion to continue and granted Ms. Gipson's motion to dismiss Ms. Simpson's claims with prejudice, curtailing and shutting out her ability to hire counsel to advocate properly on her behalf. *See* Exh. P5 (Summ. J. Hr'g Tr. 5, Feb. 22, 2016). The Court made its ruling before Ms. Simpson's counsel had the opportunity to submit substantive written briefing or conduct discovery.

## C. ARGUMENT

### 1. The Summary Judgment Order is Appealable

The trial court abused its discretion when it denied Appellant's request for a continuance and granted Respondent's Motion for Summary Judgment without allowing Appellant's counsel time to investigate and prepare her case. RAP 2.2(a)(1) allows a party to appeal from a "final judgment entered in any action or proceeding…" The Order granting Respondent's Motion for Summary Judgment and denying Appellant's request for a continuance constitutes a final judgment that ended the action. Consequently, the case is properly before this Court.

Alternatively, RAP 2.2(a)(3) provides that "a party may appeal from…any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues

the action." The trial court's Order granting Respondent's Motion for Summary Judgment dismissed Appellant's case in its entirety, thus granting this Court the power to hear the appeal.

Although a discretionary decision, Appellant also appeals the trial court's denial of Appellant's request for a continuance. This portion of the Order falls within the scope of RAP 2.4(b), which allows review of orders not originally designated in the notice of the decision if they prejudicially affect the decision designated in the notice. Because it prevented Appellant from preparing a defense to Respondent's Motion for Summary Judgment, the denial of the continuance prejudicially affected the decision to grant Respondent's motion. As a result, the denial of the continuance is properly before this Court.

### 2. The Trial Court's Summary Judgment Order Should be Overturned Because it Deprived Appellant of Her Due Process Rights

The trial court's Order should be overturned because Appellant Simpson did not get the opportunity the be heard in a meaningful manner, in violation of her due process rights. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Denial of the right to due process

is an abuse of discretion. *See, e.g., State v. Russell*, 125 Wn.2d 24, 75, 882 P.2d 747 (1994).

A trial court abuses its discretion if it makes a ruling without a tenable basis. *Butler v. Joy,* 116 Wn. App. 291, 300, 65 P.3d 671 (2003). As stated, Appellant's attorney was just retained days before the summary judgment motion hearing. The Court nonetheless denied the continuance, curtailing Appellant's right to counsel and its ability to effectively oppose Respondent's Motion for Summary Judgment. See *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990). *See also* U.S. Const. amend V; U.S. Const. amend. VI; U.S. Const. amend XIV.

In *Coggle*, the plaintiff's new attorney filed an appearance one week after a summary judgment motion was filed. The Court of Appeals deemed the denial of the continuance as unfair and punishing to the client, and thus an abuse of discretion. *Coggle*, 56 Wn. App. at 508.

In this case, a continuance would have given Appellant the opportunity to conduct discovery. However, such efforts were snuffed out and foreclosed. Furthermore, insufficient grounds were articulated concerning the denial of Plaintiff's motion for continuance. *See* Exh. P5 (Summ. J. Hr'g Tr. 9:13, Feb. 22, 2016). *See also State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). *"A trial court abuses its discretion when its decision or order is manifestly unreasonable or its discretion is*

*based on untenable grounds or untenable reasons." State v. Weaver*, 140 Wn. App. 349, 166 P.3d 761, 765 (2007), *cited in id.*

In its opposition to Appellant's request, Respondent referred to CR 56(f) concerning the "efforts" plaintiff needed to show." *See* Exh. P5 (Summ. J. Hr'g Tr. 6:2-4, Feb. 22, 2016). Here, the case of *Butler v. Joy,* 116 Wn.App. 291, 65 P.3d 671 (2003) is helpful. In *Butler*, a new attorney was retained one day before the hearing. No written affidavits were prepared, only an oral motion for continuance. There was no evidence as to what the attorney had argued in the trial court, whether or not he needed more time for discovery, or what further evidence he intended to produce. Nevertheless, the higher court held that the trial court abused its discretion. *Butler*, 116 Wn.App. at 300.

The facts here are similar to *Butler*. A new attorney was retained days before a dispositive summary judgment motion. In a world where lawyers, law firms, judges, and clerks constantly endeavor to investigate each and every case, the time and effort required for Appellant's attorney to draft a motion and file it with the court is sufficient reason to warrant a continuance. In *Butler*, the new attorney merely made a last minute oral motion for continuance and the Court of Appeals ruled that the trial court's denial of that motion was an abuse of discretion. *Id*. at 300. In our case,

the Appellant's attorney did more than just appear and make an oral motion, he drafted and filed a motion for continuance.

It would be unreasonable for any court or opposing counsel to strong-arm a recently appearing lawyer into responding literally days before a summary judgment motion, despite Respondent's contention that *"the motion is not that long. You could read it on the ferry coming over here."* Exh. P5 (Summ. J. Hr'g Tr. 7:2-3, Feb. 22, 2016) (emphasis added). No summary judgment motion should ever be prepared, written, and filed on a short ferry ride.

This refusal to allow Appellant's counsel sufficient time to investigate and prepare a case deprived Appellant of her fundamental rights. The United States Constitution gives all persons the right to due process. *U.S. Const. amend V; U.S. Const. amend VI; U.S. Const. amend XIV*. In the trial court, the Appellant asserted her fundamental Sixth Amendment and Fifth Amendment Rights, part of which is to hire counsel of one's own choosing. *See* Exh. P5 (Summ. J. Hr'g Tr. 9:8-9, Feb. 22, 2016).

In addition, Appellant had difficulties hiring a lawyer. Respondent Counsel's position that Appellant's counsel read and respond to the motion on a ferry ride is unreasonable. To illustrate, Appellant's Notice of Appearance was filed on February 18, 2016. The hearing was just four days later.

CR 56(c) states:

> The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing… The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing.

The circumstances at bar would make compliance with these rules impossible. CR 56 also demonstrates the court system's dedication to allowing counsel a reasonable amount of time to prepare his or her case. Appellant's counsel had less time to prepare her opposition in its entirety than CR 56 provides for the moving party's reply.

In addition, Ms. Simpson is entitled to effective counsel under the Sixth Amendment to the US Constitution and Washington Constitution, art. 1, § 22 (amend. 10). *U.S. Const. amend. VI*. Her lawyer's inability to consider alternate defenses to opposing counsel's summary judgment motion prevented Appellant from effectively litigating her case, at a minimum preventing an adequate response to the summary judgment motion. Appellant effectively had deficient representation, disabling her attorney from conducting a reasonable investigation or strategically advocating on her behalf. *See In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (citations omitted).

Depriving Ms. Simpson of a continuance therefore denied her the

fundamental rights to hire an attorney, access the justice system, and litigate her case.

### 3. Granting Respondent's Motion was Manifest Error

Generally, courts aspire to adjudicate matters and avoid "manifest injustice." *See Generally* CR 16; CR 26. In addition, all parties in a lawsuit should be able to apply the laws and rules of the courts in order to seek and obtain justice for their cause. This is a bedrock principle of our judicial system and it would be in the interest of justice to permit such Appellant's litigation efforts by continuing the dispositive hearing.

Allowing continuances for "good cause" is a trademark of the courts. *See State v. Flinn*, 154 Wn.2d 193, 110 P.3d 748 (2005). Continuances allow parties' attorneys to perform discovery, file amended complaints, request changes in trial dates or hearings, and negotiate with opposing counsel regarding important matters of the case. *See also* CR 15; CR 40. Ms. Simpson she has been denied such avenues of litigation in the lower court. The procedural history of this case, and what the court or opposing counsel believe about the merits of Appellant's underlying case, are irrelevant to the continuance.

Hence, the continuance was an important factor in Appellant's case, and the motion before the trial court should have been granted. After fair and full efforts were made to investigate and brief Respondent's Motion for

Summary Judgment, the court could have adjudicated the merits of the motion on a different day. Experts and affidavits from experts could have been secured. Medical records could have been obtained. Depositions could have been had. Interrogatories and other litigation efforts could have been performed. Still, worthy and legitimate requests for continuances from both the Plaintiff and the Defendant could have been argued, stipulated and agreed-upon, or adjudicated.

More importantly, in reference to Defendant's res judicata issue for summary judgment, the Plaintiff could have responded to and successfully opposed the actual privity of Ms. Gipson to Whidbey General Hospital, inter alia. Respondent argues that because the previous case against Whidbey General Hospital, where Appellant was choked, was dismissed, that res judicata prevents Appellant from pursing Respondent, Ms. Gipson. But even if the court were to find that Ms. Gipson was an employee of Whidbey General Hospital, it does not follow that she was necessarily acting within the scope of her employment or agency when she chocked Appellant. She may have stepped outside the scope of her employment or agency and acted for herself in a personal "frolic." *See, e.g., State v. O'Neill*, 103 Wn.2d 853, 859, 700 P.2d 711 (1985). Regardless of whether the Court agrees with this analysis, Appellant's counsel did not have the time to

uncover evidence pertinent to the issue or to compose a brief. Instead, such litigation efforts have been foreclosed, and this is manifest error.

Granting a continuance for newly retained attorneys is an age-old custom with the courts as well as rules and laws deeply established within numerous cases in Washington and throughout the country. The only potential prejudice here is borne by Appellant in being unable to adequately prepare for a dispositive motion; no prejudice would have been done to Respondent had the hearing on the motion for summary judgment been delayed. Time is always necessary to litigate a case, and Appellant should have the same amount of time as opposing counsel to argue the summary judgment motion, which must be more than a ferry ride.

## D. CONCLUSION

The Island County Superior Court abused its discretion in granting Respondent's Motion for Summary Judgment while denying Appellant's request for a continuance. The inability of Appellant's counsel to have adequate time to effectively prepare for a dispositive motion deprived Appellant of her right to counsel and prejudiced the proceedings.

RESPECTFULLY SUBMITTED this 12th day of July, 2016.

Presented by:
Victor Ro, Esq.
WSBA #38984

Michael Kittleson
WSBA #49628
**THE RO FIRM, P.S.C.**
5400 Carillon Point
Bldg. 5000, 4th Floor
Kirkland, WA 98033
Tel: (206) 319-7072
Fax:(206) 319-4470
Email: litigation@rofirm.com

Attorneys for Appellant/Plaintiff

APPENDIX

P1 Complaint against Whidbey Island Public Hospital District

P2 Amended Complaint against Whidbey Island Public Hospital District

P3 Order Granting Whidbey Island's Motion for Summary Judgment

P4 Linda Gipson's Motion for Summary Judgment

P5 Transcript of Hearing for Linda Gipson's Motion for Summary Judgment, Plaintiff's Motion for Continuance, Originally Attached to Plaintiff's Motion for Reconsideration

# P1

IN THE WASHINGTON STATE SUPERIOR COURT
IN AND FOR ISLAND COUNTY

| | |
|---|---|
| JESSICA SIMPSON, an individual,<br><br>Plaintiff,<br><br>v.<br><br>WHIDBEY ISLAND PUBLIC HOSPITAL DISTRICT, a Washington State Corporation,<br><br>Defendant. | Case No. 14 2 00622 0<br><br>COMPLAINT FOR DAMAGES |

TO: The Island County Superior Court Clerk's Office

## I. INTRODUCTION

COMES NOW, the Plaintiff Jessica Simpson, by and through her attorney Gregory M. Skidmore and the law firm of Chung, Malhas & Mantel, PLLC, and brings this Complaint for Damages against the Defendant Whidbey Island Public Hospital District and alleges as follows:

## II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the parties and the subject matter of this action and the venue is proper in Island County of the State of Washington because all facts surrounding this action occurred in Island County.



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite #400 • Seattle, Washington 98104
Office Phone: (206) 264-9999 • Facsimile: (206) 264-9098

## III. PARTIES

3.1 Plaintiff Jessica Simpson (hereinafter, "Simpson") is a resident of Island County, Washington.

3.2 Defendant Whidbey Island Public Hospital District (hereinafter, "the Hospital" or "Whidbey General") is a Washington State Corporation authorized to perform business in Washington State with its principal offices located in Coupeville, Island County, Washington.

## IV. FACTUAL ALLEGATIONS

*Plaintiff re-alleges paragraphs 2.1 through 3.2 and incorporates them herein as if set forth in full.*

4.1 On or about April 30, 2014, Simpson was admitted to Whidbey General for the purposes of treating a variety of medical disorders.

4.2 On or about May 13, 2014, Simpson was scheduled for transfer to an inpatient facility in Mukilteo.

4.3 On or about 7:38 a.m., Simpson was placed in locked "four-point restraints."

4.4 Due to her good behavior and calm demeanor, Simpson was permitted to release one arm and one leg from the restraint.

4.4 At approximately 11:30 a.m., Simpson's restraints were removed by nurse Cammy Campbell (hereinafter, "Nurse Campbell") and nurse Ashley Daprato (hereinafter, "Nurse Daprato") to permit Simpson to use the restroom.

4.5 Simpson was place back in the four-point restraint upon her return to her room.

4.6 Hospital policy states that nurses are required to conduct "safety checks" each 15 minutes.



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite #400 • Seattle, Washington 98104
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9028

4.7 Knowing that Simpson was in a four-point restraint, the Hospital staff only conducted safety checks on Simpson every one hour.

4.8 At about Noon, Nurse Campbell stepped out to get Simpson's required medication.

4.9 Angry at Simpson for an earlier incident in the Hospital, Chief Nursing Officer Linda S. Gipson (hereinafter, "Nurse Gipson") entered Simpson's room intent on retaliating against her.

4.10 Nurse Campbell returned to the room and Simpson was shouting to Nurse Gipson that she did not want to be given the medication Ativan.

4.11 Nurse Gipson then told her, "we have heard enough" and "you need to calm down."

4.12 Nurse Campbell began to administer the medication, with Nurse Daprato in the room.

4.13 While the medication was being administered, Nurse Gipson, unprovoked, pushed Simpson's shoulder with one hand, and grabbed Simpson's neck with the other, tightly clenching it.

4.14 She proceeded to choke Ms. Simpson for at least a few seconds. Simpson was unable to breathe and felt like she was going die.

4.15 Just prior to Simpson losing consciousness, Nurse Gipson stopped choking Simpson. Simpson then gasped, "Stop it. You're hurting me," to which Nurse Gipson responded, "I will not stop until you calm down."

4.16 Nurse Gipson then placed her hand on Simpson's face and squeezed, restraining Ms. Simpson's face for approximately two minutes.

4.17 Simpson then yelled that she wanted to contact a lawyer. Nurse Gipson responded, "You are not talking to anyone. You have lost your privileges."



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite 8400 • Seattle, Washington 98104
Office Phone: (206) 264-8969 • Facsimile: (206) 264-9008

4.18 After the incident, Nurse Gipson asked to speak to Nurse Campbell and Nurse Daprato outside of the room. She told them that her aggressive handling of Simpson was to open her airways. When Nurse Campbell responded that Ms. Simpson showed no signs of either having an obstructed airway or fighting the restraints, Nurse Gipson told Nurse Campbell, "you can sign your patients off, and you're done here."

4.19 Simpson suffered severe mental and emotional damages as a result of the choking incident during which she felt that her life was in jeopardy and was prohibited from being able to stop the choking.

## V. CAUSES OF ACTION

### FIRST CLAIM
### (*BATTERY*)

*Plaintiff re-alleges paragraphs 2.1 through 4.19 and incorporates them herein as if set forth in full.*

5.1 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.2 Nurse Gipson so battered Plaintiff when she intentionally placed her hands around Plaintiff's throat and choked her.

5.3 Simpson suffered severe mental and emotional distress as a result of the choking.

### SECOND CLAIM
### (*ASSAULT*)

*Plaintiff re-alleges paragraphs 2.1 through 5.3 and incorporates them herein as if set forth in full.*

5.4 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.5 Nurse Gipson assaulted Plaintiff when she placed Plaintiff in imminent apprehension of her life by placing her hands around Plaintiff's throat and choking her.



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite #400 • Seattle, Washington 98104
Office Phone: (206) 264-6999 • Facsimile: (206) 264-9098

5.6 Simpson suffered severe mental and emotional distress as a result of the choking.

**THIRD CLAIM**
***(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)***

*Plaintiff re-alleges paragraphs 2.1 through 5.6 and incorporates them herein as if set forth in full.*

5.7 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.8 Gipson engaged in extreme and outrageous conduct by intentionally choking a patient, unprovoked.

5.9 Simpson suffered severe mental and emotional distress as a result of the choking.

**FOURTH CLAIM**
***(CORPORATE NEGLIGENCE)***

*Plaintiff re-alleges paragraphs 2.1 through 5.9 and incorporates them herein as if set forth in full.*

5.10 Whidbey General at all times material herein, was under a continuing duty to provide the staffing, training, monitoring, and supervision of its employees and agents needed to exercise the skill, care, and learing expected of a reasonably prudent hospital acting at that time in the same or similar circumstances.

5.11 As the operator of a hospital and/or nursing unit, Defendant's duties included, in pertinent part, the duty to: (1) adopt and implement appropriate police for the care of its patients and residents, (2) intervene in the treatment of residents if there is negligence, (3) select and supervise competent employees and agents with reasonable care, and (4) monitor and supervise all persons who practice health care within the hospital and/or nursing untit.

5.12 Defendant failed to exercise their duty of care and this failure directly and proximately caused Plaintiff to sustain permanent pain and suffering and mental anguish.

5.13 Plaintiff's injuries were not due to any contribution on her part.

5.14 Defendant is legally responsible for the actions and omissions of its agents and employees. The actions and omissions of the Defendant directly or through their agents or employees constituted neglect under respondeat superior.



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite 5400 • Seattle, Washington 98104
Office Phone: (206) 264-0999 • Facsimile: (206) 264-9098

**FIFTH CLAIM**
***(MEDICAL NEGLIGENCE)***

*Plaintiff re-alleges paragraphs 2.1 through 5.14 and incorporates them herein as if set forth in full.*

5.15 On information and belief, Plaintiff's injuries would not have occurred had the Defendant and the employees, servants and agents of the Defendants, exercised the proper standard of care.

5.16 At all relevant times herein, Defendants, their agents, servants and employees, treated Plaintiff negligently, carelessly and unskillfully. Defendants failed to follow the standard of care and skill of the average qualified member of the profession practicing the specialties practiced by the Defendants, and the employees, servants and agents of the defendants, taking into account advances in the profession.

5.17 Defendant failed to follow the standard of care and skill of an average hospital and/or nursing care unit undertaking the care of patients and/or residents such as Plaintiff.

5.18 As a direct and proximate result of the negligence and carelessness of the Defendant, its agents, servants and employees, Plaintiff has sustained serious pain and suffering and mental anguish.

**FIFTH CLAIM**
***(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)***

*Plaintiff re-alleges paragraphs 2.1 through 5.18 and incorporates them herein as if set forth in full.*

5.19 On information and belief, Plaintiff's mental anguish and emotional distress would not have occurred, had the Defendant and its employees, servants, and agents, exercised the proper standard of care.

## VI. REQUEST FOR RELIEF

**WHEREFORE,** Plaintiff requests that this Court enter judgment in her favor and award the following relief:



CHUNG, MALHAS & MANTEL, PLLC
600 First Avenue • Suite 3400 • Seattle, Washington 98104
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9088

6.1 Damages caused by services that resulted in personal injuries, pain and suffering, and severe mental and emotional distress, including general damages, medical costs and expenses, financial loss, costs and disbursements to be taxed;

6.2 For an award of damages to be determined at trial;

6.3 For an award of reasonable attorney's fees, costs and expenses in bringing this action in an amount to be determined at trial; and

6.3 For such other relief as this Court deems just and equitable.

*Respectfully submitted this 24th day of September, 2014*

Gregory M. Skidmore, WSBA No. 47462
Chung, Malhas & Mantel, PLLC
600 First Avenue, Suite 400
Seattle, WA 98104
gskidmore@cmmlawfirm.com
*Attorney for Plaintiff*

P2

**IN THE WASHINGTON STATE SUPERIOR COURT**
**IN AND FOR ISLAND COUNTY**

| | |
|---|---|
| JESSICA SIMPSON, an individual,<br><br>Plaintiff,<br><br>v.<br><br>WHIDBEY ISLAND PUBLIC HOSPITAL DISTRICT, a Washington State Corporation,<br><br>Defendant. | Case No. 14-2-00622-0<br><br>**AMENDED COMPLAINT FOR DAMAGES** |

TO: The Island County Superior Court Clerk's Office
TO: Defendant's Counsel, Eric L. Freise

## I. INTRODUCTION

**COMES NOW,** the Plaintiff Jessica Simpson, by and through her attorney Gregory M. Skidmore and the law firm of Chung, Malhas & Mantel, PLLC, and brings this Amended Complaint for Damages against the Defendant Whidbey Island Public Hospital District and alleges as follows:

## II. JURISDICTION AND VENUE

2.1 This Court has jurisdiction over the parties and the subject matter of this action and the venue is proper in Island County of the State of Washington because all facts surrounding this action occurred in Island County.



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue • Suite #1088 • Seattle, Washington 98101
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9098

## III. PARTIES

3.1 Plaintiff Jessica Simpson (hereinafter, "Simpson") is a resident of Island County, Washington.

3.2 Defendant Whidbey Island Public Hospital District (hereinafter, "the Hospital" or "Whidbey General") is a Washington State Corporation authorized to perform business in Washington State with its principal offices located in Coupeville, Island County, Washington.

## IV. FACTUAL ALLEGATIONS

*Plaintiff re-alleges paragraphs 2.1 through 3.2 and incorporates them herein as if set forth in full.*

4.1 On or about April 30, 2014, Simpson was admitted to Whidbey General for the purposes of treating a variety of medical disorders. Simpson has been diagnosed with a form of autism.

4.2 On or about May 13, 2014, Simpson was scheduled for transfer to an inpatient facility in Mukilteo.

4.3 On or about 7:38 a.m., Simpson was placed in locked "four-point restraints."

4.4 Due to her good behavior and calm demeanor, Simpson was permitted to release one arm and one leg from the restraint.

4.4 At approximately 11:30 a.m., Simpson's restraints were removed by nurse Cammy Campbell (hereinafter, "Nurse Campbell") and nurse Ashley Daprato (hereinafter, "Nurse Daprato") to permit Simpson to use the restroom.

4.5 Simpson was placed back in the four-point restraint upon her return to her room.

4.6 Hospital policy states that nurses are required to conduct "safety checks" each 15 minutes.

4.7 Knowing that Simpson was in a four-point restraint, the Hospital staff only conducted safety checks on Simpson every one hour.

4.8 At about Noon, Nurse Campbell stepped out to get Simpson's required medication.

4.9 Angry at Simpson for an earlier incident in the Hospital, Chief Nursing Officer Linda S. Gipson (hereinafter, "Nurse Gipson") entered Simpson's room intent on retaliating against her.



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue • Suite #1088 • Seattle, Washington 98101
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9098

4.10 Nurse Campbell returned to the room and Simpson was shouting to Nurse Gipson that she did not want to be given the medication Ativan.

4.11 Nurse Gipson then told her, "we have heard enough" and "you need to calm down."

4.12 Nurse Campbell began to administer the medication, with Nurse Daprato in the room.

4.13 While the medication was being administered, Nurse Gipson, unprovoked, pushed Simpson's shoulder with one hand, and grabbed Simpson's neck with the other, tightly clenching it.

4.14 She proceeded to choke Ms. Simpson for at least a few seconds. Simpson was unable to breathe and felt like she was going die.

4.15 Just prior to Simpson losing consciousness, Nurse Gipson stopped choking Simpson. Simpson then gasped, "Stop it. You're hurting me," to which Nurse Gipson responded, "I will not stop until you calm down."

4.16 Nurse Gipson then placed her hand on Simpson's face and squeezed, restraining Ms. Simpson's face for approximately two minutes.

4.17 Simpson then yelled that she wanted to contact a lawyer. Nurse Gipson responded, "You are not talking to anyone. You have lost your privileges."

4.18 After the incident, Nurse Gipson asked to speak to Nurse Campbell and Nurse Daprato outside of the room. She told them that her aggressive handling of Simpson was to open her airways. When Nurse Campbell responded that Ms. Simpson showed no signs of either having an obstructed airway or fighting the restraints, Nurse Gipson told Nurse Campbell, "you can sign your patients off, and you're done here."

4.19 Simpson suffered severe mental and emotional damages as a result of the choking incident during which she felt that her life was in jeopardy and was prohibited from being able to stop the choking.



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue • Suite #1088 • Seattle, Washington 98101
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9098

## V. CAUSES OF ACTION

### FIRST CLAIM
### (*BATTERY*)

*Plaintiff re-alleges paragraphs 2.1 through 4.19 and incorporates them herein as if set forth in full.*

5.1 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.2 Nurse Gipson so battered Plaintiff when she intentionally placed her hands around Plaintiff's throat and choked her.

5.3 Simpson suffered severe mental and emotional distress as a result of the choking.

### SECOND CLAIM
### (*ASSAULT*)

*Plaintiff re-alleges paragraphs 2.1 through 5.3 and incorporates them herein as if set forth in full.*

5.4 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.5 Nurse Gipson assaulted Plaintiff when she placed Plaintiff in imminent apprehension of her life by placing her hands around Plaintiff's throat and choking her.

5.6 Simpson suffered severe mental and emotional distress as a result of the choking.

### THIRD CLAIM
### (*INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS*)

*Plaintiff re-alleges paragraphs 2.1 through 5.6 and incorporates them herein as if set forth in full.*

5.7 At all times relevant herein, the conduct alleged herein was within the scope of the employees' employment, in furtherance of the hospital's business, and committed during the normal course of employment.

5.8 Gipson engaged in extreme and outrageous conduct by intentionally choking a patient, unprovoked.

5.9 Simpson suffered severe mental and emotional distress as a result of the choking.



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue ♦ Suite #1088 ♦ Seattle, Washington 98101
Office Phone: (206) 264-8999 ♦ Facsimile: (206) 264-9098

## FOURTH CLAIM
## (*CORPORATE NEGLIGENCE*)

*Plaintiff re-alleges paragraphs 2.1 through 5.9 and incorporates them herein as if set forth in full.*

5.10 Whidbey Generral at all times material herein, was under a continuing duty to provide the staffing, training, monitoring, and supervision of its employees and agents needed to exercise the skill, care, and learing expected of a reasonably prudent hospital acting at that time in the same or similar circumstances.

5.11 As the operator of a hospital and/or nursing unit, Defendant's duties included, in pertinent part, the duty to: (1) adopt and implement appropriate police for the care of its patients and residents, (2) intervene in the treatment of residents if there is negligence, (3) select and supervise competent employees and agents with reasonable care, and (4) monitor and supervise all persons who practice health care within the hospital and/or nursing untit.

5.12 Defendant failed to exercise their duty of care and this failure directly and proximately caused Plaintiff to sustain permanent pain and suffering and mental anguish.

5.13 Plaintiff's injuries were not due to any contribution on her part.

5.14 Defendant is legally responsible for the actions and omissions of its agents and employees. The actions and omissions of the Defendant directly or through their agents or employees constituted neglect under respondeat superior.

## FIFTH CLAIM
## (*MEDICAL NEGLIGENCE*)

*Plaintiff re-alleges paragraphs 2.1 through 5.14 and incorporates them herein as if set forth in full.*

5.15 On information and belief, Plaintiff's injuries would not have occurred had the Defendant and the employees, servants and agents of the Defendants, exercised the proper standard of care.

5.16 At all relevant times herein, Defendants, their agents, servants and employees, treated Plaintiff negligently, carelessly and unskillfully. Defendants failed to follow the standard of care and skill of the average qualified member of the profession practicing the specialties practiced by the Defendants, and the employees, servants and agents of the defendants, taking into account advances in the profession.



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue • Suite #1088 • Seattle, Washington 98101
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9098

5.17 Defendant failed to follow the standard of care and skill of an average hospital and/or nursing care unit undertaking the care of patients and/or residents such as Plaintiff.

5.18 As a direct and proximate result of the negligence and carelessness of the Defendant, its agents, servants and employees, Plaintiff has sustained serious pain and suffering and mental anguish.

**SIXTH CLAIM**
***(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)***

*Plaintiff re-alleges paragraphs 2.1 through 5.18 and incorporates them herein as if set forth in full.*

5.19 On information and belief, Plaintiff's mental anguish and emotional distress would not have occurred, had the Defendant and its employees, servants, and agents, exercised the proper standard of care.

**SEVENTH CLAIM**
***(VULNERABLE ADULT PROTECTION ACT)***
**RCW 74.34**

*Plaintiff re-alleges paragraphs 2.1 through 5.19 and incorporates them herein as if set forth in full.*

5.20 At all relevant times herein, Plaintiff was a "vulnerable adult" pursuant to RCW 74.34.020 because she suffers from autism, a developmental disability as defined under RCW 71A.10.020.

5.21 Defendant abused Plaintiff as defined in RCW 73.34.020 by choking her, improperly using physical restraints, and verbally assaulting her through intimidation.

5.22 Defendant neglected Plaintiff as defined in RCW 73.34.020 by falling below the necessary standard of care for a vulnerable adult.

5.23 Plaintiff suffered damages and pain and suffering as a result this abusive and neglectful conduct.

## VI. REQUEST FOR RELIEF

**WHEREFORE,** Plaintiff requests that this Court enter judgment in her favor and award the following relief:



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue • Suite #1088 • Seattle, Washington 98101
Office Phone: (206) 264-8999 • Facsimile: (206) 264-9098

6.1 Damages caused by services that resulted in personal injuries, pain and suffering, and severe mental and emotional distress, including general damages, medical costs and expenses, financial loss, costs and disbursements to be taxed;

6.2 For an award of damages to be determined at trial;

6.3 For an award of reasonable attorney's fees, costs and expenses in bringing this action in an amount to be determined at trial; and

6.4 For such other relief as this Court deems just and equitable.

*Respectfully submitted this 21st day of November, 2014*

Gregory M. Skidmore, WSBA No. 47462
Chung, Malhas & Mantel, PLLC
600 First Avenue, Suite 400
Seattle, WA 98104
gskidmore@cmmlawfirm.com
*Attorney for Plaintiff*



CHUNG, MALHAS & MANTEL, PLLC
1511 Third Avenue ♦ Suite #1088 ♦ Seattle, Washington 98101
Office Phone: (206) 264-8999 ♦ Facsimile: (206) 264-9098

# P3

FILED
DEBRA VAN PELT
ISLAND COUNTY CLERK

2015 DEC 14 AM 10: 58

The Honorable Alan R. Hancock

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

JESSICA SIMPSON, an individual,

Plaintiff,

v.

WHIDBEY ISLAND PUBLIC HOSPITAL DISTRICT, a Washington State Corporation,

Defendant.

No. 14-2-00622-0

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

(Proposed)

THIS MATTER, having come on for hearing on this date upon the MOTION of DEFENDANT for an ORDER SUMMARILY DISMISSING with prejudice all of 6 of 55 plaintiff's claims against ~~them~~, and the Court having considered the following materials:

1) Defendant's Motion for Summary Judgement;
2) Declaration of Linda Gipson. PhD, RN Supporting Defendant's Motion for Summary Judgment (dated November 12, 2015);
3) Declaration of Nathaniel R. Schlicher, MD, JD, FACEP Supporting Defendant's Motion for Summary Judgment (dated November 9, 2015)
4) Declaration of Ann Freise Supporting Defendant's Motion for Summary Judgment (dated November 11, 2015)



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
19109 – 36TH AVE. W., SUITE 204
LYNNWOOD, WA 98036 (206)-587-6570
ERICF@FREISE-FERGUSON.COM

12-8-15 GB

and the other documents contained in the Clerk's file including Plaintiff's ~~request~~ untimely and unserved motion for continuance, JS
~~Defendant's reply if any~~, the Court having heard the oral arguments of counsel for both Plaintiff and Defendant; and the Court having found that there is no dispute of material fact and that defendant is entitled to dismissal with prejudice as a matter of law; NOW, THEREFORE,

It is hereby ORDERED that Plaintiff's Complaint and Cause of Action against defendant is DISMISSED WITH PREJUDICE:

The Court having determined that there is no reason for delay, the Clerk is ordered to immediately enter a final order and judgment dismissing with prejudice all of plaintiff's claims against defendant.

Done in open court this 14th day of December, 2015

The Honorable Alan R. Hancock

Presented by:

FREISE & FERGUSON PLLC

By _____
Eric L. Freise, WSBA #7126
Of Attorneys for Defendant

Approved as to Form, Notice of Presentation Waived

49543

By _____
~~Jason Thompson~~ Jeremiah Styles
~~Pro Se~~ WSBA #
Attorney for Plaintiffs
FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
19109 – 36TH AVE. W., SUITE 204
LYNNWOOD, WA 98036 (206)-587-6570
CRICF@FREISE-FERGUSON.COM

P4

The Honorable Vickie I. Churchill
Dept. 02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

| | |
|---|---|
| JESSICA SIMPSON, an individual,<br><br>Plaintiff,<br><br>v.<br><br>LINDA GIPSON and JOHN DOE GIPSON, husband and wife, and the marital community composed thereof,<br><br>Defendant. | No. 16-2-00012-1<br><br>DEFENDANT'S MOTION FOR SUMMARY JUDGMENT |

## I. RELIEF REQUESTED

Defendant Linda Gipson, PhD, RN, NEA-BC, a single person, ("Dr. Gipson") asks the court to grant summary judgment in her favor on all claims asserted by Plaintiff Jessica Simpson ("Ms. Simpson") in her Complaint filed on January 7, 2016.

## II. STATEMENT OF THE GROUNDS

This Court should grant Dr. Gipson's motion for summary judgment because this lawsuit by Ms. Simpson against Dr. Gipson is barred by the doctrine of *res judicata*. This



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

lawsuit by Ms. Simpson is her second lawsuit for the same alleged injuries arising out of the same alleged incident as a result of the same alleged conduct by the same person—Dr. Gipson. The first lawsuit was filed against Dr. Gipson's employer. A final judgment dismissing that lawsuit with prejudice was entered on December 14, 2015. This current lawsuit was filed shortly thereafter on January 11, 2016. Dr. Gipson was not named as a defendant in the first lawsuit, but her employer was named. In that first lawsuit Ms. Simpson claimed that the employer was vicariously liable for the alleged torts of its employee, Dr. Gipson, that Ms. Simpson now re-alleges in this new lawsuit. There is no cause of action or incident alleged in the new lawsuit that was not alleged in the first lawsuit. The only differences between the previous and the current lawsuits are that fewer causes of action are alleged in the current lawsuit and that the employee is now the defendant, not the employer.

Unfortunately for Ms. Simpson, the doctrine of *res judicata* prevents her from suing the employee after unsuccessfully suing the employer, even though the employee was not a named defendant in the first lawsuit.

Dr. Gipson and her employer, Whidbey Island Public Hospital District, d/b/a Whidbey General Hospital and Clinics ("WGH") are in privity because Dr. Gipson is an employee of WGH and WGH's liability for the claims brought by Ms. Simpson in this lawsuit and in the previous lawsuit against WGH were based its vicarious liability for the alleged actions of its employee, Dr. Gipson. All of the causes of actions asserted against Dr. Gipson were first asserted against WGH. Moreover, the subject matter of the two lawsuits is identical: Dr. Gipson's alleged actions on May 31, 2014, and the harm that Ms.



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

Simpson claims to have sustained. Because the doctrine of *res judicata* unequivocally bars Ms. Simpson's current lawsuit against Dr. Gipson, it is respectfully submitted that the Court should grant this motion by Dr. Gipson to summarily dismiss with prejudice all claims asserted by Ms. Gipson in her this lawsuit, filed January 7, 2016.

Although there is no reason to reach this issue, defendant Dr. Gipson also contends that her summary judgment motion should be granted because Ms. Simpson's claims are barred by the principle of collateral estoppel. Following a nine day trial, a jury reached a special verdict that the force used by Dr. Gipson to restrain Ms. Simpson on March 31, 2013 was lawful. Because all of Ms. Simpson's claims are based on alleged unlawful acts by Ms. Gipson and this decisive issue has already been determine in Dr. Gipson's favor, this Court should grant summary judgment in favor of Dr. Gipson on all of Ms. Simpson's claims. Dr. Gipson does wish to inform the court that Judge Hancock rejected this contention, stating something to the effect that current Washington law did not allow him to so rule, but that "if there ever was a case for [extending the principle of collateral estoppel to a situation like this], this is it. Defendant's primary reason for making this argument at this time is to preserve this issue for appeal, in the unlikely event that plaintiff Simpson appeals any order issued by this court granting defendant's motion for summary judgment. Ms. Simpson did not appeal Judge Hancock's decision dismissing her prior lawsuit against WGH.

## III. STATEMENT OF FACTS

On July 2, 2014, the Island County Prosecuting Attorney filed a single criminal charge against Dr. Gipson in Island County District Court, Assault 4th Degree, RCW



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

9A.36.041 regarding Dr. Gipson's restraint of Ms. Simpson during the Code Gray on May 13, 2014.[1] The criminal case was tried between April 2 and April 10, 2015.[2] Both Ms. Simpson, Dr. Gipson and numerous additional witnesses testified.[3] The jury returned a verdict of not guilty.[4] Immediately thereafter the jury was instructed on RCW 9A.16.110, and asked to determine, by a preponderance of the evidence, if the force exerted by Dr. Gipson was lawful. [5] After further deliberation the jury returned a special verdict, finding by a preponderance of the evidence, that Dr. Gipson had used lawful force in her interaction with Ms. Simpson.[6] The Court subsequently issued Findings of Fact and Conclusions of Law in which it ordered the State to pay restitution to Dr. Gipson in the form of attorney's fees and costs.[7] On September 17, 2015, the Attorney General of Washington State filed a notice of appeal in the district court.[8] The Attorney General did not appeal the lawful force special verdict reached by the jury.

On November 21, 2014, Ms. Simpson filed a complaint solely against WGH for Dr. Gipson's restraint of Ms. Simpson during a Code Gray called for Ms. Simpson's violent and chaotic behavior in the early afternoon at Whidbey General Hospital on May 13, 2014.[9] She subsequently filed an amended complaint.[10] Ms. Simpson asserted seven

---

[1] Declaration of Eric Friese at 2: 4-5 and Exhibit 4 attached thereto (Court Docket in *State v. Gipson*, C14-0093).
[2] Declaration of Eric Friese at 2: 4-5 and Exhibit 4 at 19 -20.
[3] Declaration of Eric Friese at 2: 4-5 and Exhibit 4 at 23 -24 (List of Witnesses for Defense and State).
[4] Declaration of Eric Friese at 2: 6-7 and Exhibit 5 attached thereto.
[5] Declaration of Eric Friese at 2: 9-10 and Exhibit 6 attached thereto.
[6] Declaration of Eric Friese at 2: 11-12 and Exhibit 7 attached thereto.
[7] Declaration of Eric Friese at 2: 13-14 and Exhibit 8 attached thereto.
[8] Declaration of Eric Friese at 2: 15-16 and Exhibit 9 attached thereto.
[9] Declaration of Eric Friese at 1: 22-24 and Exhibit 1 attached thereto (Simpson v. WIPHD complaint).
[10] Declaration of Eric Friese at 1: 24-26 and Exhibit 2 attached thereto (Simpson v. WIPHD amended complaint).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

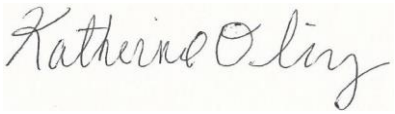
## CERTIFICATE

I declare that on the 12th day of July, 2016, I sent a copy of BRIEF OF APPELLANT to other parties of record in the manner described below: **VIA Electronic Mail**

**DEFENDANT: LINDA GIPSON**
ERIC FREISE
19109 – 36TH AVENUE, WEST, SUITE 204
LYNNWOOD, WA 98036
ericf@freise-furguson.com
annf@freise-furguson.com

I hereby certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

EXECUTED this July 12th, 2016, at Kirkland, WA.



Katherine Olivarez, Legal Secretary
**THE RO FIRM, P.S.C.**



**THE RO FIRM, P.S.C.**
**5400 Carillon Point**
**Bldg. 5000, 4th Floor**
**Kirkland, WA 98033**
**Tel: (206) 319-7072**
**Fax: (206) 319-4470**

claims against WGH in her amended complaint: assault, battery, medical negligence, corporate negligence, outrage/intentional infliction of emotional distress, negligent infliction of emotional distress and violation of the Abuse of Vulnerable Adult Act.[11] On December 14, 2015, Judge Hancock of Island County Superior Court granted summary judgment in favor of WGH on all claims asserted by Ms. Simpson in her May 13, 2014, amended complaint and dismissed her lawsuit with prejudice.[12] Ms. Simpson did not file a motion for reconsideration and did not appeal the dismissal. As a result, her claims against WGH are forever extinguished.

Despite having had her case against Dr. Gipson's employer dismissed on summary judgment, Ms. Simpson filed a lawsuit against Dr. Gipson on January 7, 2016. The facts alleged against Dr. Gipson are identical, word-for-word, to the facts asserted in Ms. Simpson's amended complaint filed against WGH. Ms. Simpson has asserted fewer claims against Dr. Gipson than she asserted against WGH because she subtracted the medical negligence, corporate negligence, and Abuse of Vulnerable Adult Act claims. However, the four claims Ms. Simpson is now asserting against Dr. Gipson were all asserted in her previously dismissed lawsuit against WGH. These are assault, battery, outrage/intentional infliction of emotional distress and negligent infliction of emotional distress. The only difference in the wording of these claims is that the language alleging WGH's vicarious liability has been subtracted. Notably, even the requests for relief in both complaints are identical.

---

[11] *Id.* at 4-6.

[12] Declaration of Eric Friese at 2: 1-3 and Exhibit 3 attached thereto (Order granting WIPHD motion for summary judgment and dismissing Ms. Simpson's all of Ms. Simpson's claims against WIPHD with prejudice).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

## IV. ISSUE PRESENTED

Should this court grant summary judgment in favor of Dr. Gipson on all claims asserted by Ms. Simpson in her complaint filed on January 7, 2016, when Ms. Simpson's claims are barred, as a matter of law, by both the doctrines of *res judicata* and collateral estoppel?

## V. AUTHORITY AND ARGUMENT

### A. Summary Judgment Standard.

In a summary judgment motion, the moving party bears the burden of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law.[13] If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion.[14] The non-moving party may not rely solely on its complaint or other pleadings.[15] Conclusory statements and unsupported assertions cannot defeat a motion for summary judgment.[16] Instead, only evidence admissible at trial can be used to decide a motion for summary judgment.[17]

---

[13] *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307, 313 (1997) *citing Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).
[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–32 (9th Cir.1987).
[15] *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 479 (1977).
[16] *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 170 (1987).
[17] CR 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence....").



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

**B. Dr. Gipson is entitled to a grant of summary judgment on all of Plaintiff's claims asserted in her January 7, 2016, complaint as a matter of law because her claims are barred by the doctrine of *res judicata*.**

*Res judicata* bars the re-litigation of claims that were litigated to a final judgment or could have been litigated to a final judgment in a prior action.[18] "The doctrine of *res judicata* rests upon the ground 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. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings."[19]

The doctrine of *res judicata* requires a concurrence of identity in four respects: (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.[20]

As an initial matter, a judgment must be final and on the merits to have *res judicata* preclusive effect.[21] A grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial.[22] The finality of WGH's grant of summary judgment is further strengthened because Ms. Simpson could have filed a

---

[18] *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004).
[19] *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982)(quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)).
[20] *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 858-59, 726 P.2d 1, 3 (1986) citing *Norco Constr., Inc. v. King Cy.*, 106 Wn.2d 290, 721 P.2d 511 (1986); *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 396, 429 P.2d 207 (1967); *Meder v. CCME Corp.*, 7 Wn.App. 801, 805, 502 P.2d 1252 (1972).
[21] *Pederson v. Potter*, 103 Wn.App. 62, 67, 11 P.3d 833, 835 (2000) *citing Schoeman v. New York Life Ins. Co.*, at 860; *State v. Drake*, 16 Wn.App. 559, 563–64, 558 P.2d 828 (1976).
[22] *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796, 806 (2004) *citing DeYoung v. Cenex Ltd.*, 100 Wn.App. 885, 892, 1 P.3d 587 (2000).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

motion for reconsideration or appealed the decision. She did neither. As a result, her claim against WGH has been forever extinguished.

Having determined that the dismissal of Ms. Simpson's lawsuit against Dr. Gipson's employer is a final judgment on the merits, the next step is to determine whether the necessary concurrence of identity exists sufficient to warrant the application of the doctrine to this case. The reasoning in *Ensley v. Pitcher*[23] is determinative. In *Ensley*, the plaintiff, Nicholas Ensley, suffered serious injuries when, after an evening of drinking, a female driver crashed her car into two parked cars after departing from several drinking establishments. Plaintiff Ensley ("Ensley") first brought suit against the owner of the Red Onion Tavern ("Red Onion") and others. Ensley, however, did not sue the Red Onion's bartender in the initial suit. Ensley claimed that the Red Onion negligently over-served the female driver who crashed into a parked car in which he was a passenger. After Red Onion successfully dismissed the case on summary judgment, Ensley filed a lawsuit against Red Onion's bartender, interestingly named, "Pitcher," alleging that he had negligently over-served alcohol to the female driver which resulted in the car accident in which plaintiff was injured.[24] Pitcher successfully argued that the doctrine of *res judicata* barred Ensley's lawsuit against an employee like him when identical claims were asserted in a previous lawsuit against his employer.[25]

First, it is a well-established principle in determining the application of *res judicata* that different defendants in separate suits are the same party for *res judicata*

---

[23] 152 Wn.App. 891, 222 P.3d 99 (Div. 1 2009)
[24] *Id.* at 895.
[25] *Id.* at 906-907.



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

purposes as long as they are in privity.[26] When determining whether privity exists between an employee and an employer, the *Ensley* court stated:

> Pitcher and Red Onion are clearly in privity. Ensley could have sought to establish Pitcher's personal liability in the first suit. The fact that Ensley did not name Pitcher as a defendant does not defeat the identity of the parties where the employer's liability turns solely on vicarious liability.[27]

Since *Ensley*, courts have uniformly recognized that the employer/employee relationship is sufficient to establish privity for purpose of *res judicata*. It is undisputed that Dr. Gipson was a WGH employee on May 13, 2014, and that she still is. In fact, she is part of the management team, as its Chief Nursing Officer. Moreover, it is further indisputable that Ms. Simpson's claims against WGH turned vicarious liability for the alleged acts of Dr. Gipson. Therefore, privity of identity exists between WGH and Dr. Gipson.

When determining whether the two lawsuits constitute the same cause of action four factors are considered: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.[28] These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim.[29] The *Ensley* court employed

---

[26] *Kuhlman v. Thomas*, 78 Wn.App. 115, 120, 121, 897 P.2d 365 (1995).
[27] *Id.* at 903.
[28] *Pederson v. Potter*, 103 Wn.App. 62, 72, 11 P.3d 833 (2000).
[29] *Kuhlman*, 78 Wn.App. at 122 ("there is no specific test for determining identity of causes of action"); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L.REV.. 805, 816 (1984).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

the following analysis when determining whether the lawsuit against an employer was the same cause of action as a subsequently filed lawsuit against an employee:

> The two suits arise out of the same transactional nucleus of facts. Examination of the complaints filed in each of the two suits reveals that Ensley told the same story: that Humphries was apparently intoxicated at the Red Onion, but that Pitcher served her nevertheless. The claim against Red Onion in the first suit is based solely on vicarious liability for the alleged overservice of Humphries by Pitcher. Red Onion's rights and interests established in the prior summary judgment order—that it was not liable for overserving Humphries—could be destroyed by prosecution of the second action. Lastly, the suits involved infringement of the same right: the right to be protected from bars providing alcohol to persons apparently under the influence.
>
> The identical nature of the claims, including the facts alleged in the complaints and the theories of the case argued, leave only one conclusion: that Ensley's negligent overservice claim against Pitcher is the same cause of action as Ensley's negligent overservice claim against Red Onion.[30]

Like the complaints in *Ensley*, an examination of the two complaints filed by Ms. Simpson can lead to but one conclusion: they are based on identical facts. Second, like two lawsuits filed in *Ensley*, the first lawsuit against WGH was based solely on WIPHD's vicarious liability for alleged actions by the employee sued in the second lawsuit. Third, like the employer in *Ensley*, WGH's rights established in the first case – that it was not liable for any of the claims asserted against it – could be destroyed by prosecution of the second action. Finally, the two Simpson lawsuits involve infringement of the same right: the right to be protected against alleged bad behavior by a hospital employee. Like *Ensely*, the identical nature of the claims (including the facts alleged in the complaints and the identical nature of the causes of action asserted in the two complaints) leads to but one conclusion: Ms. Simpson's assault, battery, outrage/intentional infliction of

[30] *Ensley* at 904.



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

emotional distress and negligent infliction of emotional distress claims asserted against Dr. Gipson are the same cause of actions as those same claims asserted by Ms. Simpson against WGH.

With regard to the third element of *res judicata*, there is no doubt that subject matter of both Mr. Simpson's lawsuit against WGH and Dr. Gipson are the same. Both lawsuits involve claims brought for the alleged acts of Dr. Gipson that occurred on a single day, May 13, 2014, and involved the assertion of Ms. Simpson's right to seek compensation for alleged wrongs.[31]

Having found a concurrence of identity regarding the first three *res judicata* elements, the fourth factor simply requires a determination of which parties in the second suit are bound by the judgment in the first suit.[32] Dr. Gipson and WGH are in privity. Ms. Simpson's lawsuits against WGH and Dr. Gipson are identical causes of action and the subject matter of the two lawsuits are identical. Therefore, as a matter of law by the authority of the legal principles in *Ensley*, Ms. Simpson is bound by the judgment in the first lawsuit and, her lawsuit against Dr. Gipson is barred by the doctrine of *res judicata*.

The reasoning and result that the defendant in this case is asking the court to adopt has been followed, many, many, many times by courts in this country and in England.

---

[31] *See, e.g., Kuhlman,* 78 Wn.App. at 124, 897 P.2d 365 (finding the same subject matter even where the claims were different, because the basis of the claims was the plaintiff's alleged deprivation of a constitutional right and tortious harm resulting from false allegations).

[32] *Ensley at* 905 *citing* 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.27, at 464 (1st ed. 2007) (explaining that the "identity and quality of parties" requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

*W. G. Platts, Inc. v. Wendt*[33], is another Washington case in which *res judicata* was the basis for granting summary judgment dismissing with prejudice a second lawsuit against the agent who had not been named as a defendant in the previous unsuccessful lawsuit against the principal. These two Washington decisions are in accord with overwhelming weight of authority from other jurisdictions.

There are several ALR annotations that collect and comment upon pertinent cases. The following are found in *Annot.*, Judgment in action growing out of accident as *res judicata*, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action, 23 A.L.R.2d 710 (originally published 1952)(accessed online 1-14-16).

> In cases involving the derivative responsibility of the present defendant, who was not a party to the earlier action, the view has been taken that where the present defendant is liable only derivatively, a judgment in the former action in favor of the person primarily liable is *res judicata*, or conclusive, of the issue of negligence in a subsequent action by the same plaintiff arising out of the same accident. A similar view has been taken where the opposite sequence of events has occurred, the original action being against the party responsible only derivatively, the party primarily responsible being entitled to plead *res judicata* where such former judgment was favorable to the party derivatively responsible.
>
> * * *
>
> The most frequent application of the principle of derivative responsibility so as to avoid the otherwise general rule that only actual parties to a former judgment are concluded in a subsequent action between the same parties and arising out of the same accident is found in cases where the relationship of master and servant, and principal and agent are involved.

*Id.* 2 Summary and Comment.

> **§ 13. Responsibility, either primary or derivative, of present defendant, not a party to earlier action, as affecting *res judicata*; judgment for defendant in earlier action**

[33] 70 Wn.2d 561, 424 P.2d 629 (1967).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

[Supplementing 133 A.L.R. 192.]

There have been some expressions of approval of the rule stated in the original annotation to the effect that a judgment in favor of a defendant primarily liable for negligence resulting in an accident is *res judicata*, or conclusive, as to the issue of negligence in a subsequent action by the same plaintiff, arising out of the same accident and brought against the party liable only because of derivative responsibility.

* * *

Similarly, where the opposite factual situation is present and the suit is originated against the party only derivatively responsible, an adjudication favorable to the latter has been held *res judicata*, or conclusive, as to the issue of negligence or contributory negligence in a subsequent action brought against the party primarily liable.

Thus, in Canin v. Kesse (1942) 20 NJ Misc 371, 28 A2d 68, where the driver and the owner of a car which had been in a collision with a bus sought to recover from the bus operator for injuries and damages arising out of such collision, but it appeared that the two plaintiffs had already unsuccessfully sued the bus company in prior actions, it was held that the judgments in the former actions were *res judicata* in the present actions, since where the liability was entirely derivative, the rule regarding *res judicata* that the parties were not in privy was inapplicable, and the negligence of the servant, having already been tried in the action against the employer, could not again be retried against the employee.

And, in Thirty Pines, Inc. v. Bersaw (1942) 92 NH 69, 24 A2d 500, an action against an employee to recover damages allegedly caused when the latter drove his employer's truck so negligently as to cause it to collide with plaintiff's building, it was held that the present action was barred because the plaintiff had already sued the employer for the same cause of action, a judgment for the employer having been returned in that case. The court pointed out that it had been admitted in the original action that the employee was acting within the scope of his authority, and plaintiff, having elected to sue the employer in the first place, could not now maintain a second suit for the same cause of action against the employee, since the matter in issue, that is, the negligence of the employee, having been fully tried in the original case, could not now be retried.

So, in Jones v. Valisi (1941) 111 Vt 481, 18 A2d 179, where a passenger in an automobile which collided with a truck sought to recover from the driver in an action for negligence in the operation of such truck resulting in injuries sustained, a judgment in a prior action brought by the present plaintiff against the owner of the truck, who was the present defendant's employer, was held conclusive of the issues of the negligence of the present defendant in the instant case, the court pointing out in accord with the language of the leading case of Emery v. Fowler (1855) 39 Me 326, 63 Am Dec 627, that to permit the present



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

plaintiff to commence an action against the principal, and, upon his failing to recover upon the merits, subsequently to commence an action against the servant, would necessitate proof in reliance upon the same acts, and would allow two trials for the same cause of action, to be proved by the same testimony; that in such cases, the technical rule that a judgment can only be admitted between the parties to the record or their privies, was inapplicable. The court rejected the contention of the defendant that the rules of evidence would be different in an action against the servant, since the servant's admission of negligence, although inadmissible against the master, would be admissible in evidence against the servant, pointing out that such rules were rules of procedure only and were not of a substantive nature, having no effect upon the proposition that the question of the servant's negligence had already been determined.

In Spitz v. BeMac Transport Co. (1948) 334 Ill App 508, 79 NE2d 859, an action to recover for the death of plaintiff's intestate and for property damage, alleged to have resulted from an accident involving a car driven by plaintiff's decedent and two trucks owned by the BeMac Transport Company, one driven by an alleged agent named Palermo and the other driven by the present defendant Bristow, where it appeared that in a former action brought against the abovenamed parties by the plaintiff, each of whom was charged with wilful and wanton misconduct or negligence, in which the answer denied the substantial averments but admitted the allegations to the effect that the individual defendants were acting as agents of the principal and in the scope of their authority, a stay had been granted to the present defendant, Bristow, under the provisions of the Soldiers' and Sailors' Civil Relief Act, and the trial against the remaining defendants had resulted in a directed verdict of not guilty, it was held that such prior judgment in favor of the principal BeMac Transport Company operated as *res judicata* of the action against the present defendant, the court pointing out that the issues in the present case had been litigated and decided adversely to the plaintiff in the former suit, a judgment in favor of the principal being a bar to a subsequent action against the agent and making it unnecessary, as the court observed, to indulge in a metaphysical search for meaning of such words as "privity."

And in Barrabee v. Crescenta Mut. Water Co. (1948) 88 Cal App2d 192, 198 P2d 558, judgment in favor of an independent contractor was held conclusive on the issues of negligence and contributory negligence in a subsequent suit against the person who had hired the latter, upon the principle that since the present defendant's liability was predicated upon the culpability of another who was the immediate actor, the exoneration of the latter served in turn to exonerate the person liable only derivatively, at most.

To like effect, see Hawley v. Davenport, R. I. & N. W. R. Co. (1951) — Iowa —, 45 NW2d 513, applying the rule to a similar situation involving an indemnitor-indemnitee relationship.

In Silva v. Brown (1946) 319 Mass 466, 66 NE2d 349, an action by an injured seaman under the Jones Act to recover damages for personal injuries to his hand when it became caught in the door of a dragnet that was being hauled into the



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

vessel, because of the alleged negligence of the captain, it was held that a judgment in a prior action in which the present plaintiff had sued the shipowner on separate counts for maintenance and cure and for damages for personal injuries, recovering on the former count but failing on the latter, was *res judicata* in the present action on the issues of the negligence of the present defendant, since there was no contention in the prior action that the captain was not an employee of the defendant corporation, but on the contrary, the liability asserted against the corporation was because of the negligence of the captain as its servant or employee and the verdict for the defendant in that action must therefore have been based not on the ground that the captain was not an employee of the defendant corporation but on the ground that he was not negligent. The court stated: "The conduct of the captain, Brown, which in the present action is alleged to be negligent is the same conduct as that which in the previous action was found not to be negligent. What the plaintiff is seeking is a second opportunity to prove the negligence of the captain after he has had his day in court and failed to prove such negligence. He is not entitled to relitigate that issue in the present action against the captain. The principle is well established that; where a plaintiff seeks damages against a master for injuries alleged to be due to the negligence of his servant and fails to prove such negligence and then brings an action against the servant for the same injuries, the servant may assert the defense of *res judicata* on the ground that it has already been adjudicated in the earlier action that he was not negligent."

While the facts in Adriaanse v. United States (1950, CA2d NY) 184 F2d 968, cert den 340 US 932, 95 L ed 673, 71 S Ct 495, did not indicate whether the injuries sustained by the plaintiff in the present case, a seaman, were the result of an accident such as would bring the case within the scope of the present annotation, attention is called to that case as discussing the principles involved herein, where it appeared that the seaman sought to recover damages against the United States, as owner of a vessel, for injuries sustained while employed thereon, through the alleged negligence of the defendant. In a former action by the same plaintiff to recover for the same injuries under the Jones Act, 46 USCA § 688, against the steamship company as the general agent of the owner of the vessel, based on the claim that the injuries had been suffered as the result of the negligence of the steamship company, or its employees, judgment was had in favor of the agent to the effect that such agent was not negligent. In holding that the decision in the prior case was *res judicata* of the issues of such negligence, the court pointed out that while the general rule was that for an estoppel by judgment to be effective it must appear that the estoppel is mutual, an apparent exception to such rule exists where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts when sued by the same plaintiff. The court observed that the unilateral character of the estoppel of an adjudication in such case was justified by the injustice which would result in allowing a recovery against a defendant for conduct of another when that other has been exonerated in a direct suit.

In action for injuries from fall of carnival booth, judgment for defendant corporation which conducted carnival and its agent was *res judicata* in action against member of board of trustees of corporation who was chairman of booth



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

committee at carnival. Templeton v. Scudder, 16 N.J. Super. 576, 85 A.2d 292 (App. Div. 1951).

*Id.* §13.

More cases are collected at *Annot.*, Judgment for or against master in action for servant's tort as bar to action against servant 31 A.L.R. 194 (originally published 1924)(accessed online 1-15-16)

> When injured plaintiff sues either a master or his servant for the latter negligence and when it is conceded that servant was acting in scope of his employment and there is no basis except for respondeat superior for master liability, if plaintiff loses his first suit against either the master or the servant he cannot maintain a second suit against the other. Bounds v. Travelers Ins. Co., 242 Ark. 787, 416 S.W.2d 298 (1967).
>
> Where master is sued under doctrine of respondeat superior for actions of servant within scope of servant authority, and there are no defenses available to master which are not available to servant, the action adjudicating master liability is *res judicata* and bars subsequent action against servant. Brinson v. First American Bank of Georgia, 200 Ga. App. 552, 409 S.E.2d 50 (1991).
>
> Under Illinois law, when respondeat superior is the sole asserted basis of liability against a master for the tort of his servant, an adjudication on the merits in favor of either the master or servant precludes suit against the other. Muhammad v. Oliver, 547 F.3d 874 (7th Cir. 2008) (applying Illinois law).
>
> Dismissal with prejudice of master as discovery sanction is adjudication on the merits as to servant; similar result generally obtains where master or servant is dismissed with prejudice due to failure to exercise due diligence in service of process. Sup.Ct.Rules, Rules 103(b), 273. Walters v. Yellow Cab Co., 273 Ill. App. 3d 729, 210 Ill. Dec. 590, 653 N.E.2d 785 (1st Dist. 1995)
>
> In Chicago & R. I. R. Co. v. Hutchins (1863) 34 Ill. 108, where the plaintiff sued the railroad company for damages for killing horses, the court, in holding that the refusal to permit the engineer to testify as to whether the bell was rung at the road crossing where the animals were found was not error, said: "It does not matter that the owner may elect to sue either the driver or company, because, when a jury have found in an action against the company that there was no negligence, it is a bar to a recovery against the agent."
>
> So, in Anderson v. West Chicago Street R. Co. (1902) 200 Ill. 329, 65 N.E. 717, affirming (1902) 102 Ill. App. 310, a judgment in favor of the lessor of a street railway, in an action for an injury caused by the negligence of the lessee, was held to be a bar to a subsequent suit for the injury against the lessee, the court saying:



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

"In the case of a leasing of a railroad by one company to another company, the negligence or tort of the lessee company in operating its road is, by the law of this state, imputed to the lessor company, because it cannot absolve itself from the responsibility imposed by law upon it to operate its road so as to do no unnecessary damage to the person or property of others. Ellett's Case (1890) 132 Ill. 654, 24 N.E. 559. The relation between them, so far as it has reference to such damage, is not that of landlord and tenant, but that of principal and agent, or master and servant. Both being liable to the party injured, such party could sue them both in the same action or sue each one separately, but if one was not guilty of the tort, the other one could not be. It is not a case where the allegation is that two different parties have committed a tort to the person or property of the plaintiff, and thus each one of them would be individually liable, and where it might turn out on the trial that one of the parties was innocent of any actionable wrong. Such could never be the case where the negligence complained of is the negligence of the company operating the road. Its negligence is conclusively presumed to be the negligence of the owner. There is no question of fact to be tried whether the owner company is liable for the negligence of the lessee,—it is so liable under the law. It must follow, then, that if, in a suit brought against the lessor in which the tort complained of is in fact the tort of the lessee, a verdict of not guilty is rendered,—that is, that there was no actionable wrong committed against the plaintiff by the lessor,—no actionable wrong could have been committed against him by the lessee in the premises, for it is the lessee's wrong that in these cases constitutes the basis of the action against the lessor."

In Emery v. Fowler (1855) 39 Me. 326, 63 Am. Dec. 627, referred to in the reported case (McNamara v. Chapman, ante, 188) as the leading case on the subject, the plaintiff obtained a verdict in an action of trespass quare clausum against the defendant; on the trial the defendant offered to prove that the same act of trespass was testified to and relied upon by plaintiff in an action of trespass in a suit against the father of the defendant, and that in that suit it was testified that the act of the defendant was done by the express direction of his said father, this testimony was excluded in the action against the son. In the action against the father, judgment was rendered in his favor, and this defendant at the time of the act complained of was his minor son. In the action against the son, the verdict was set aside on exceptions, the court holding that "if, upon the testimony, the jury should have been satisfied that the same acts of alleged trespass had been directly put in issue, and that a decision upon them had been made in the former suit on trial of the merits, that decision exhibited by the record of the judgment should have been held to be conclusive." The court also said, inter alia: "This case requires that a single point only should be considered,—whether one who acts as the servant of another, in doing an act alleged to have been a trespass, is to be considered as so connected with his principal, who commanded the act to be done, that what will operate as a bar to the further prosecution of the principal will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another who commanded the act, and was justified in the commission of it, or who, if the act were unlawful, had made compensation for it, either before or after judgment; and his defense would be complete. It is not perceived why he may not, upon the same principles be



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERIC@FREISE-FERGUSON.COM

permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them, and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest, and would be known to the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided, and judgment rendered between parties responsible for the acts of others."

Where a plaintiff seeks damages against a master for injuries alleged to be due to negligence of servant and fails to prove such negligence and then brings an action against servant for same injuries, servant may assert defense of *res judicata* on the ground that it has already been adjudicated in earlier action that he was not negligent. Silva v. Brown, 319 Mass. 466, 66 N.E.2d 349 (1946).

If judgment for defendant in action against truck owner for damages sustained in collision necessarily decided that at time of collision the operator of truck was not negligent, judgment would be a bar to a subsequent action against truck driver by same plaintiff for same cause of action. Tighe v. Skillings, 297 Mass. 504, 9 N.E.2d 532 (1937).

A judgment for employer, in an action to recover damages allegedly caused when employee drove truck so as to cause it to collide with plaintiff building, was *res judicata* in a subsequent action against the employee for same cause of action, where it was admitted in original suit against employer that employee was an employee and was acting within scope of his employment notwithstanding that the same evidence might not be admissible in both cases. Thirty Pines v. Bersaw, 92 N.H. 69, 24 A.2d 500 (1942).

A prior action against a master is a bar to prosecution of a subsequent action against servant implicating essentially the same subject matter, where former action was entirely dependent upon application of doctrine of respondeat superior. Templeton v. Scudder, 16 N.J. Super. 576, 85 A.2d 292 (App. Div. 1951).

A master and servant are not in privity as used when dealing with estoppel of a judgment, but where the relationship is undisputed and the action is purely derivative and dependent entirely upon the doctrine of respondeat superior, it constitutes an exception to the general rule that a prior judgment is a bar to subsequent litigation of the same matters between the same parties or their privies and lack of mutuality does not affect the exception. Canin v. Kesse, 20 N.J. Misc. 371, 28 A.2d 68 (Dist. Ct. 1942).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

A judgment in favor either of operator or of owner of automobile in negligence action is *res judicata* as to liability of the other in a subsequent action by same plaintiff against such other, on theory that since both parties to such a relationship, like that of principal and agent, master and servant, or indemnitor and indemnitee, are liable, one derivatively, for same tort, it would be unjust to allow recovery against one where other has been exonerated in a direct action. Bisnoff v. Herrmann, 260 A.D. 663, 23 N.Y.S.2d 719 (2d Dep't 1940).

A plaintiff who first brings action against the master for negligent act of servant and fails on merits cannot bring a second action against servant for same negligent act. Jones v. Young, 257 A.D. 563, 14 N.Y.S.2d 84 (3d Dep't 1939).

In Jepson v. International R. Co. (1913) 80 Misc. 247, 140 N.Y. Supp. 941, affirmed in (1914) 163 App. Div. 933, 147 N.Y. Supp. 1118, which in turn was affirmed in (1917) 220 N.Y. 731, 116 N.E. 1053, the court said, arguendo: "If the principal is exonerated from liability for the negligent acts of the agent, done for him, by reason of the contributory negligence of the injured person, it would seem that the agent must also be relieved from liability for the same act. Featherston v. Newburgh & C. Turnp. Road (N.Y.) supra."

Where the relation between two parties is analogous to that of master and servant, a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against plaintiff right of action against the other. Whitehurst v. Elks, 212 N.C. 97, 192 S.E. 850 (1937).

Where conduct of manager of furnace company within scope of his employment constituted sole claim of liability of company in prior action by customer, judgment for company in that action constituted a bar to second action against manager based upon the identical conduct. Melchion v. Burkart, 54 Ohio L. Abs. 287, 87 N.E.2d 373 (Ct. App. 1st Dist. Hamilton County 1948).

In Jenkins v. Atlantic Coast Line R. Co. (1911) 89 S.C. 408, 71 S.E. 1010, it was held that a judgment in favor of a lessor railroad against the plaintiff in an action for injuries caused by the lessee railroad was a bar to an action against the lessee railroad for the same injuries. The court said: "As the liability of the C. N. & L. is predicated upon that of the defendant, and as it would be liable for anything for which the defendant is liable, in respect to the matter complained of, the logical conclusion necessarily is that if the C. N. & L. is not liable, the defendant is not."

Where no issue was raised as to agency or scope of employment of servant in suits against owner of truck and servant for injuries sustained in accident involving truck driven by servant and any liability of owner was predicated solely on negligence of servant, any facts with reference to accident which would render servant liable would render owner liable also and hence Supreme Court decision affirming judgment entered on verdict in favor of owner was a conclusive adjudication of non-liability of servant, though certiorari to review decision of



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

> Court of Appeals ordering a new trial was not sought on behalf of servant. Caldwell v. Kelly, 202 Tenn. 104, 302 S.W.2d 815 (1957).
>
> It may be noted that in Bailey v. Sundberg (1892) 1 C. C. A. 387, 1 U.S. App. 101, 49 Fed. 583, it was held that while the master of a vessel is not in privity with the owner, within the rule that binds privies as well as parties to the estoppel of a judgment, yet that where he participated in the defense of a libel in rem for a collision, the decree dismissing the libel on the merits was *res judicata* in a libel in personam against him for the same loss.
>
> Judgment in negligence case in favor of master or principal on one hand, or servant or agent on other, sued alone, is *res judicata* and conclusive as to such negligence in subsequent action against other party. Mooney v. Central Motor Lines, 222 F.2d 572 (6th Cir. 1955).

*Id.*

Because Ms. Simpson's lawsuit against Dr. Gipson is barred as a matter of law, this Court should grant summary judgment in her favor on all of the claims in the complaint filed by Ms. Simpson on January 7, 2016.

**2. This Court should grant summary judgment in favor of Dr. Gipson on all claims asserted by Ms. Simpson in her complaint filed January 7, 2016, because a jury has already reached a verdict that she used lawful force when restraining Ms. Simpson on March 31, 2013.**

Dr. Gipson defensively asserts the doctrine of collateral estoppel against Ms. Simpson's claims that Dr. Gipson's restraint of her, during the Code Gray on May 13, 2104, was unlawful.

As an initial matter, Dr. Gipson assertion of collateral estoppel is not barred by the fact that the State has appealed some aspects of the criminal case. An appeal does not destroy the finality of a judgment. If a judgment is appealed, the *res judicata* and collateral estoppel effects will not be suspended or denied during the pendency of the appeal.[34] In

[34] *Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998) *citing Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 621, 358 P.2d 975 (1961); *Lejeune v. Clallam County*, 64 Wn.App. 257, 265-66, 823 P.2d 1144 (1992) (a judgment or administrative order



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

fact, if a party appeals only part of a judgment, and only part of the judgment is reversed, the part that is not appealed normally retains its *res judicata* effect.[35] Here, the jury rendered a special verdict determining, by a preponderance of the evidence standard, that Dr. Gipson used lawful force when restraining Ms. Simpson during the Code Gray on March 13, 2014. The State did not appeal that special verdict. Therefore, Dr. Gipson can properly assert collateral estoppel as a bar to the re-litigation of this issue determined by the jury through the special verdict.

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.[36]

After a nine-day trial during which 27 witnesses testified[37], the jury in the criminal case determined that Dr. Gipson was not guilty. The jury further rendered a special verdict and determined that Dr. Gipson had, by a preponderance of evidence standard, used lawful force. Unquestionably, the criminal case was a judgment on the merits. In fact, it is the

---

becomes final for *res judicata* purposes at the beginning, not the end, of the appellate process, although *res judicata* can still be defeated by later rulings on appeal).

[35] *State ex rel. Carriger v. Campbell Food Markets, Inc.*, 65 Wn.2d 600, 398 P.2d 1016 (1965) (Part of original judgment not appealed from continued in effect regardless of reversal of other parts of the judgment).

[36] *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *Hanson v. City of Snohomish*, 121 Wn.2d 552, 562, 852 P.2d 295 (1993); *McDaniels v. Carlson*, 108 Wn.2d at 303, 108 Wn.2d 299, 303, 738 P.2d 254 (1987); *Chau v. City of Seattle*, 60 Wn.App. 115, 119, 802 P.2d 822 (1991).

[37] Declaration of Eric Friese at 2: 4-5 and Exhibit 4 at 23 -24 (List of Witnesses for Defense and State).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERIC@FREISE-FERGUSON.COM

clearest instance of a judgment on the merits where a judgment is entered after a full trial on the issues, both parties having presented evidence and made argument.[38]

The issue adjudicated in the criminal case, the lawfulness of Dr. Gipson's restraint of Ms. Simpson, is identical to the subject matter of this case. Both the criminal case and this civil action involve the identical set of facts surrounding Dr. Gipson's restraint of Ms. Simpson during the Code Gray on May 14, 2014.

Here, admittedly, the party against whom the doctrine is being asserted, Ms. Simpson, has not traditionally been found to be in privity with the party in the first case, in the State of Washington, because she is not an agent of the State. However, in this instance, she should be found in "virtual privity" with the State because the State championed her version of the facts. The State with its substantial resources stepped into Ms. Simpson's shoes and pursued a criminal conviction against Dr. Gipson. The case was vigorously asserted and vigorously defended as indicated by the 27 witnesses who testified in the case.[39] The Court should take judicial notice that the State asserted a vigorous case against Dr. Gipson in an effort to convict her under the higher, beyond a reasonable doubt standard required for a criminal conviction.

Finally, application of the doctrine does not work an injustice in this case. The requirement that collateral estoppel should not work an injustice rests primarily on whether the prior suit afforded the party a full and fair hearing.[40] As noted above, there is every

---

[38] 14A Wash. Prac., Civil Procedure § 35:23 (2d ed.) *citing Carlson v. Department of Labor and Industries*, 200 Wn. 533, 94 P.2d 191 (1939).

[39] Declaration of Eric Friese at 2: 4-5 and Exhibit 4 at 23 -24 (List of Witnesses for Defense and State).

[40] *Barr v. Day*, 69 Wn.App. 833, 854 P.2d 642 (Div. 3 1993), aff'd in part, rev'd in part,124 Wn.2d 318, 879 P.2d 912 (1994).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

indication that there was full and complete adjudication of the issue of whether Dr. Gipson's restraint of Ms. Simpson was lawful during the Code Gray on May 13, 2014, during the criminal trial.[41] The State's vigorous assertion of its case assured that the determinant issue in this case was fully adjudicated, as required when applying the doctrine of collateral estoppel.

Washington Courts typically apply the doctrine of virtual representation, when collateral estoppel is being asserted against a non-party to the first suit who is in privity with a party in the prior lawsuit. The doctrine is applied only when the nonparty participated in the former adjudication, for instance as a witness, and when there is evidence that the subsequent action was the product of some manipulation or tactical maneuvering.[42]

Admittedly, there is no indication that this third legal proceeding is a product of tactical or improper manipulation. However, this rule should not be applied rigidly in this case because Ms. Simpson was afforded the greatest of protections, the vast resources and competency of the State, when the issue of Dr. Gipson's lawful use of force was adjudicated the first time. Other than Judge Hancock's recent ruling, this is a case of first impression where a non-party does not fit cleanly under either the traditional privity analysis or the virtual representation analysis, yet her rights were protected in the first legal

---

[41] By analogy, *see e.g., Kyreacos v. Smith,* 89 Wn.2d 425, 429, 572 P.2d 723 (1977), where the Supreme Court held that an earlier murder conviction estopped retrying the issue of premeditation in a subsequent action for wrongful death. Two other cases also have held that the doctrine of offensive collateral estoppel is applicable where defendants in civil cases have been previously convicted of criminal charges after trial. *See, e.g., Maicke v. RDH, Inc.,* 37 Wn.App. 750, 683 P.2d 227, *review denied,* 102 Wn.2d 1014 (1984); *Seattle-First Nat'l Bank v. Cannon,* 26 Wn.App. 922, 615 P.2d 1316 (1980).

[42] *Stevens County v. Futurewise*, 146 Wn.App. 493, 192 P.3d 1 (Div. 3 2008), *rev. denied,* 165 Wn.2d 1038, 205 P.3d 132 (2009).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

proceeding by the resources of the State. Dr. Gipson directs the Court to the purpose of collateral estoppel and not the black letter application of the rule.

Collateral estoppel "has the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[43] Here, collateral estoppel should be applied because, otherwise, the litigants would unjustly be required to re-litigate the same facts underlying the same issue on which a final determination has been made. Moreover, a re-litigation of the same facts and issues could lead to incongruent verdicts, which would be an unfair and unjust result and undercut the credibility of our legal system by allowing a second bite at the apple.

Because collateral estoppel bars re-litigation of whether Dr. Gipson's restraint of Ms. Simpson was lawful, and because the criminal jury's determination that Dr. Gipson's restraint of Ms. Simpson was lawful, this Court should grant summary judgment in favor of Dr. Gipson on all of Ms. Simpson's claims asserted in her complaint filed on January 7, 2016 because the alleged act underlying of these claims has been found lawful by a preponderance of the evidence in the criminal case.

## VI. Conclusion

For the above reasons, this Court should grant summary judgment in favor of Dr. Gipson on all claims asserted by Ms. Simpson in her complaint filed on January 7, 2016.

[43] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L.Ed.2d 552 (1979); *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 731, 254 P.3d 818 (2011).



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

DATED: January 22, 2016

FREISE & FERGUSON PLLC

By _____
Eric L. Freise
WSBA #7126
Of Attorneys for Defendant



FREISE & FERGUSON PLLC
ATTORNEYS AT LAW
MAIL TO: P.O. BOX 4567 SEATTLE, WA 98194
108 S. WASHINGTON ST., SUITE 400
SEATTLE, WA • 206-587-6570
ERICF@FREISE-FERGUSON.COM

P5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ISLAND

JESSICA SIMPSON, an individual, ) No. 16-2-00012-1
)
Plaintiff, )
)
v. )
)
LINDA GIPSON, et al. )
)
Defendant. )
)
---------x

---

VERBATIM REPORT OF PROCEEDINGS

(Motion to Continue, Motion for Summary Judgment)

---

BE IT REMEMBERED that on Monday, February 22, 2016 at 9:30 o'clock, a.m., the above-named and numbered cause came on for a Motion to Continue and a Motion for Summary Judgment hearing on the Law & Motions Calendar before the HONORABLE VICKIE I. CHURCHILL, sitting as judge in the above-entitled Court, at the Island County Courthouse, in the Town of Coupeville, State of Washington.

Victor Ro, Attorney at Law, appeared on behalf of the Plaintiff, Jessica Simpson.

Eric L. Freise, Attorney at Law, appeared on behalf of the Defendant, Linda Gipson.

Whereupon, the following proceedings were had:

THE COURT: Jessica Simpson versus Linda Gipson, 16-2-00012-1. Is Jessica Simpson --

MR. RO: Counsel present, Your Honor.

THE COURT: Counsel. Okay. Thank you.

MR. RO: She is here, but I had her wait outside for a second.

THE COURT: Okay. Thank you.

MR. RO: Good morning.

THE COURT: Okay. Just one moment.

We have a Local Court Rule that you have to provide courtesy copies to the judge that's going to be hearing this.

So... Okay. Go ahead.

MR. RO: This is Victor Ro for the Plaintiff, Ms. Jessica Simpson.

I don't know if Your Honor would like to hear --

THE COURT: I'd like to hear your response.

MR. RO: Sure. No problem. Victor Ro for Ms. Jessica Simpson. We - we just --

This is a Motion to Continue. I don't-- Generally, on motions to continues I would not say that Your - Your Honor will grant it today. Normally grant that. Just so that my clients can have an opportunity to advocate the case.

We're asking for this motions for continuance. I just got on this case. I don't know anything about this case whatsoever.

I just met Mr. Freise today for the first time. It seems like this is a-- I'm glad to be here in this venue.

We're just asking for a Motion to Continue. I don't see any-- There's - there's no undue prejudice we believe to our - to Ms. Simpson. No prejudice that's going to be confronted by Mr. Freise or his client, as well.

We-- Most importantly, we think in the interest of justice, most importantly we think-- I'm requesting a 90-day continuance. I'm not sure what the trial - docket says for trial date right now.

Is it 2017? Or --

MR. FREISE: There's no trial date right now.

MR. RO: No trial date set?

THE COURT: No. This is a Motion for Summary Judgment.

MR. RO: These are, as you know, large motions for us to oppose.

Once again, I need-- My - my office just got the file. We just need some time to look at it. We - we just want to be able to advocate for Ms. Simpson.

I think that it's-- There's a long history of

something that's been going on. And I'm-- I'm a private attorney and --

THE COURT: Mm-hmm.

MR. RO: To say the least, I'm a private attorney. I'm trying to help her out also and advocate for her to the best my ability. I'm glad that she has finally decided to hire counsel on this matter, as well.

Also, for the record, Sixth Amendment right to counsel. Fifth Amendment due process.

We just think it would be most-- Just for a continuance. We understand that they're merits to the summary judgment motion that must been adjudicated by this Court.

But it's a basic procedural request. We really-- We really would plea to Your Honor to just grant this, perhaps a 90-day continuance, so we can at least have a position and a foot to stand on to advocate for Ms. Simpson.

THE COURT: Okay.

MR. RO: Thank you.

THE COURT: Thank you.

MR. FREISE: Good morning, Your Honor. I'm Eric Freise. I'm here representing Linda Gipson.

Did - did you get our opposition to the motion?

THE COURT: I did.

MR. FREISE: Okay.

THE COURT: I got that.

MR. FREISE: All right. Hmm.

I'll - I'll do my best to be brief. I'm sure you've heard that from lawyers millions of times.

THE COURT: Do your best.

MR. FREISE: Okay. Justice does not require a continuance of our summary judgment motion.

The facts that-- This Court is very able to render a just decision.

The facts that our motion are - is or are based on are indisputable. They're undisputed.

They are Ms. Simpson's Complaint, an Amended Complaint in the action that was dismissed by Judge Hancock. Her-- And-- Her Complaint in this action and Judge Hancock's Order of Dismissal.

There is nothing to be gained by - by continuing this motion. The law-- It - it's purely a question of law.

They're not going to be able to come up with any other facts. And they have not even attempted to do so.

In our brief we provided the Court with three cases that expressly discuss the requirements to get a continuance on a motion for summary judgment under Rule 56(f).

The - the party requesting the continuance must

inform the Court of what evidence they expect to produce. They must inform the Court of what efforts they have made to get that evidence, why they haven't got the evidence, and that that evidence will be material.

There's nothing in this case that they're going to produce that, in my opinion -- The Court, of course, will make her own - make its own decision -- is going to force - is going to cause the Court not to grant our summary judgment motion.

It's purely a matter of law. And the law is so well established it's been followed in this state, almost every other state in the united kingdom.

So Linda Gipson has lived with this miserable, trumped-up situation for a long time now. The Plaintiff got the Prosecutor to prosecu - to try to prosecute her. They lost that. She filed her own lawsuit with the lawyer. The lawyer withdrew. And they got another lawyer. The - the-- Judge Hancock dismissed it.

She filed another lawsuit, this time pro se. As we all know, if a person wants to be a pro se, they're expected to follow the same rules as a lawyer does.

Now, after-hours Thursday night Mr. Ro sends me his Motion for a Continuance.

They don't tell us any reason why. And, in fact, Mr. Ro told me this morning that if he's read it, our

motion, he's barely skimmed it.

Well, the motion is not that long. You could read it on the ferry coming over here. So I--

Justice requires that this case be ended today.

Thank you, Your Honor.

MR. RO: Quick rebuttal.

I appreciate Mr. Freise's response on that.

Just for the record, I don't think he's arguing the sub - substantive value of the - of the summary judgment motion.

We're still on the Motion to Continue; correct, Your Honor?

THE COURT: Right.

MR. RO: Okay. Just - just on that, I had-- I don't disagree with Mr. Freise's issues on the law. I - I one hundred percent agree with him.

But on the issue of a continuance, it's - to me it's - to us it's simply basic adjudication that your - that this Court could - could make so at least I could respond most zealously and vehemently to Mr. Freise's position on this matter.

It would be more in the interest of justice for this Court. It would be a waste of judicial resources. To put it to-- Hypothetically, in the event -- And this is in - this is with great respect for the Court, as well -- in

the event that this Motion to Continue is denied, what will probably happen is we will file an appeal.

Probably not a Motion to Reconsider. I don't think you would probably do that anyway.

File an appeal, if we have to file an Amended Complaint. And if this goes through a circus of - of multiple processes, it certainly won't been advantageous to any of us. It may be advantageous to Mr. Freise's client in terms of billable work that he might be doing.

But certainly Ms.-- My understanding is our client, she is-- She's-- I - I-- May be destitute, to say the least. And we are doing the best we can to - to give her justice.

The allegation that I know is that she was choked by a nurse and that, to me, is something atrocious. In a Court of Law we think justice should - should - should prevail. I know I'm speaking a little bit more subjectively right now.

And I-- I believe there was a criminal case that - that - that had preceded. And the AG's Office, more importantly right now, is appealing that - I believe is appealing that case.

And just in the very least, all we're asking for is a Motion to Continue so that Ms. Simpson's lawyer can prepare for this case and perhaps either amend the

Complaint or whatever is necessary to respond to the summary judgment motion.

At least just go through the processes of - of the Court so that she can use the courts that - that she's entitled to.

Thank you very much.

THE COURT: Thank you.

I - I understand that your position that this would have to go up on appeal.

The first case-- You have no-- You've given me no reason for continuing this case other than there may be something somewhere somehow.

I'm denying the Motion to Continue.

Now, the Court, in looking at this, went through the first case and the second case; exact word-for-word except for the claim against the corporate entity, Whidbey General Hospital. Or it's now called Whidbey - something or other. Not Whidbey General.

MR. FREISE: Whidbey - Whidbey General Hospital and Clinics. That - that seems to be the fashion these days among hospitals, Your Honor.

THE COURT: I know. But they changed their name recently. So...

MR. FREISE: Oh, did they?

THE COURT: Yes. So you're behind the times.

MR. FREISE: I guess I better get up to --

THE COURT: You're behind the times.

But that - that case was not appealed. And it was dismissed on summary judgment.

So there is res judicata. And I am dismissing-- I'm granting the Motion for Summary Judgment.

Okay.

MR. RO: Would it-- Even - even a five-day continuance?

THE COURT: Sir, may I hear from you?

Five-day continuance.

MR. FREISE: Your Honor, we really want this case over. This-- It's not going to make any difference. The - the law is overwhelming. The facts are indisputable. It's a waste of everybody's time and - and more torture for poor Dr. Gipson.

THE COURT: "Doctor"? I thought she was a nurse.

MR. FREISE: Well, Ph.D.

THE COURT: Oh, I see.

MR. FREISE: She's a nurse. But she has number of advanced degrees.

THE COURT: I'm - I'm granting the Motion for Summary Judgment. Thank you. No continuance.

MR. FREISE: Thank you, Your Honor.

We have an order. May I hand it up, Your Honor?

THE COURT: You may.

MR. FREISE: (Proffers order to Court for review and signature.)

MR. FREISE: Thank you, Judge, for the Court's time.

THE COURT: Thank you.

(Hearing concluded.)

--oo0oo--

C E R T I F I C A T E

I, Karen P. Shipley, do hereby certify that the foregoing Verbatim Report of Proceedings was taken by me to the best of my ability and completed on Monday, February 22, 2016, and thereafter transcribed by me by means of computer-aided transcription;

That I am not a relative, employee, attorney or counsel of any such party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof.

That I am herewith affixing my seal this 26th day of February, 2016.

_____

Karen P. Shipley, CSR No. 2051

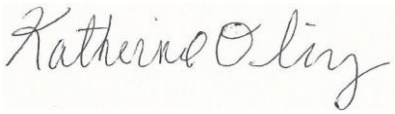
## CERTIFICATE

I declare that on the 12th day of July, 2016, I sent a copy of BRIEF OF APPELLANT to other parties of record in the manner described below: **VIA Electronic Mail**

**DEFENDANT: LINDA GIPSON**
ERIC FREISE
19109 – 36TH AVENUE, WEST, SUITE 204
LYNNWOOD, WA 98036
ericf@freise-furguson.com
annf@freise-furguson.com

I hereby certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

EXECUTED this July 12th, 2016, at Kirkland, WA.



Katherine Olivarez, Legal Secretary
**THE RO FIRM, P.S.C.**



**THE RO FIRM, P.S.C.**
**5400 Carillon Point**
**Bldg. 5000, 4th Floor**
**Kirkland, WA 98033**
**Tel: (206) 319-7072**
**Fax: (206) 319-4470**