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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GLENDA NISSEN, Appellant/Cross Respondent, v. PIERCE COUNTY, a public agency, PIERCE COUNTY PROSECUTOR'S OFFICE, a public entity, Respondents/Cross Appellants.	No. 45039-9-II UNPUBLISHED OPINION

SUTTON, J. — Glenda Nissen appeals the trial court's order dismissing her 2013 complaint and denying her request for sanctions and attorney's fees and costs against Pierce County for allegedly failing to produce responsive records under the Public Records Act (PRA).[1] The trial court previously dismissed Nissen's 2011 PRA complaint because it concluded that the records Nissen requested were not public records under the PRA and also dismissed her 2013 complaint because it raised the same issue. Pierce County cross appeals the trial court's denial of its motion for CR 11 sanctions and attorney's fees against Nissen and her counsel for filing a frivolous lawsuit and on appeal requests sanctions under RAP 10.3(a)(5) and attorney's fees under RAP 18.9.

[1] Ch. 42.56 RCW.

After the trial court dismissed the 2013 complaint at issue and after the parties submitted their briefs in this case, our Supreme Court held that the trial court improperly dismissed Nissen's 2011 complaint. *Nissen v. Pierce County*, 183 Wn.2d 863, 869, 357 P.3d 45, (2015) (*Nissen*). The Supreme Court expressly held that text messages on work-related matters from a public employee's personal cell phone may be public records under the PRA.[2] *Nissen*, 183 Wn.2d at 869. Following *Nissen*, we hold that Nissen's 2013 complaint is not precluded by the trial court's dismissal of her 2011 complaint and that the trial court properly denied Pierce County's request for CR 11 sanctions and attorney's fees. The issue of whether Pierce County has complied with *Nissen* or whether PRA penalties are appropriate in *Nissen* is not before us. We decline to penalize Pierce County in the present case because there is no basis under the PRA for doing so prior to it having a reasonable opportunity to comply with *Nissen*. Therefore, we reverse the trial court's dismissal of Nissen's 2013 complaint on issue preclusion grounds and remand for proceedings consistent with our Supreme Court's instructions in *Nissen*. We also deny Pierce County's request under RAP 18.9 for sanctions under RAP 10.3(a)(5) and attorney's fees on appeal.

FACTS

Nissen's first PRA request to Pierce County stated as follows:

> Please produce any and all of Mark Lindquist's cellular telephone records for number 253-861-[redacted] or any other cellular telephone he uses to conduct his business including text messages from August 2, 2011.

Clerk's Papers (CP) at 334. When Pierce County denied that request, Nissen filed suit against Pierce County on October 26, 2011 for violating the PRA, and Lindquist intervened as a party.

[2] The Amici brief, filed before the Supreme Court's *Nissen* decision, argues against the interpretation of the PRA adopted by the Supreme Court. Thus, we do not address it further.

Pierce County moved to dismiss the complaint and the trial court granted that motion. The trial court ruled that, as a matter of law, a public employee's personal cell phone records were not public records under the definitions of the PRA. The trial court denied Nissen's motion for reconsideration, and she appealed. This court reversed the trial court's ruling, and our Supreme Court accepted review. *Nissen v. Pierce County*, 183 Wn. App. 581, 597, 333 P.3d 577 (2014), *aff'd* by *Nissen*, 183 Wn.2d. 863.

Before the trial court dismissed her 2011 complaint, Nissen submitted a second request for records to Pierce County:

> Please produce for public inspection the text content on Verizon Wireless # 253-861-XXXX from July 29, 2011 to August 4, 2011 that relate to the conduct of government or the performance of any governmental or proprietary function. This request relates to the cell phone used by Mark Lindquist.

CP at 28. Pierce County denied this request following the trial court's dismissal of Nissen's 2011 complaint, explaining that the text messages requested were not a public record and, if they were, they would be exempt from production. Nissen filed a second public records request complaint against Pierce County on February 8, 2013.

Pierce County moved to dismiss Nissen's 2013 complaint under CR 12(b)(6), arguing that it was barred by issue preclusion and claim preclusion. The trial court granted Pierce County's motion and ruled that Nissen's 2013 complaint was barred by issue preclusion because the trial court had already ruled that a public employee's private cell phone records were not records subject to the PRA and her 2013 complaint presented identical issues as her 2011 complaint. The trial court denied Nissen's motion for reconsideration.

Pierce County moved for CR 11 sanctions and attorney's fees under RCW 4.84.185 against Nissen and her counsel for filing a frivolous lawsuit that was pursued for an improper purpose. The trial court denied Pierce County's motion for CR 11 sanctions and attorney's fees. Nissen appeals the trial court's dismissal of her 2013 complaint. Pierce County cross appeals the trial court's denial of sanctions and attorney's fees. After the parties submitted their briefs in this appeal, our Supreme Court reversed the trial court's dismissal of Nissen's 2011 complaint, holding that a public employee's work-related text messages sent and received on a private cell phone may be public records subject to disclosure under the PRA. *Nissen*, 183 Wn.2d at 869.

ANALYSIS

I. STANDARDS OF REVIEW ON CR 12(b)(6) & CR 11 SANCTIONS

CR 12(b)(6) permits a trial court to dismiss a complaint when it fails to "state a claim upon which relief can be granted." We review a trial court's 12(b)(6) dismissal de novo. *Nissen*, 183 Wn.2d at 872. Appellate review of a PRA case is also de novo. *Nissen*, 183 Wn.2d at 872.

Dismissal under CR 12(b)(6) is appropriate only if the trial court concludes beyond a reasonable doubt that, on the face of the plaintiff's complaint, he or she cannot prove any set of facts that would justify recovery. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). The trial court is to take all facts alleged in the complaint as true and may consider hypothetical facts that support the plaintiff's claims. *FutureSelect*, 180 Wn.2d at 962. If a plaintiff's claim remains legally insufficient even under hypothetical facts, dismissal under CR 12(b)(6) is appropriate. *FutureSelect*, 180 Wn.2d at 963.

We review a trial court's denial of a request for CR 11 sanctions for abuse of discretion. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 218, 304 P.3d 914 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Protect the Peninsula's Future*, 175 Wn. App. at 218.

II. SUPREME COURT RULING IN *NISSEN*

In *Nissen*, our Supreme Court answered the core issue of the underlying PRA complaint, whether a public employee's text messages on work-related matters sent and received from a private cell phone may be public records. "Records that an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment can be 'public records' of the agency under RCW 42.56.010(3)." *Nissen*, 183 Wn.2d at 888. In the context of the dispute between Pierce County and Nissen, the *Nissen* court held that "text messages sent or received by Lindquist in his official capacity can be public records of [Pierce] County, regardless of the public or private nature of the device used to create them." *Nissen*, 183 Wn.2d at 873. As to Nissen's 2011 complaint under the PRA, the Supreme Court held that her complaint sufficiently alleged that "at least some" of the text messages sent from Lindquist's private cell phone may be public records. *Nissen*, 183 Wn.2d at 888.

However, the Supreme Court could not determine whether or not the text messages at issue were, in fact, public records because Pierce County and Lindquist had not yet produced the text

messages Nissen requested. *Nissen*, 183 Wn.2d at 888. The Court directed the parties as follows:

> Lindquist must obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with our opinion. The County must then review those messages—just as it would any other public record—and apply any applicable exemptions, redact information if necessary, and produce the records and any exemption log to Nissen. As to text messages that Lindquist in good faith determines are not public records, he must submit an affidavit to the County attesting to the personal character of those messages. The County must also produce that affidavit to Nissen.

Nissen, 183 Wn.2d at 888.

III. ISSUE PRECLUSION

Nissen argues that the trial court improperly dismissed her 2013 complaint on issue preclusion (collateral estoppel) grounds because issue preclusion does not apply to bar this case.[3] We agree.

The purpose of issue preclusion is to encourage respect for judicial decisions and thus ensure finality of judgments. *In re Dependency of H.S.*, 188 Wn. App. 654, 660, 356 P.3d 202 (2015). The ultimate issue in issue preclusion is whether the party to be estopped has had "a full and fair opportunity to litigate the issue" in the first proceeding. *H.S.*, 188 Wn. App. at 660 (internal quotation marks omitted) (quoting *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App.

[3] Although the trial court did not dismiss Nissen's 2013 complaint on claim preclusion grounds, Pierce County argues that this court may affirm the trial court under the doctrine of claim preclusion because the record supports it. Because the Supreme Court has reversed the trial court's dismissal in *Nissen*, there is no longer a final judgment on the merits. Thus, claim preclusion does not bar Nissen's 2013 complaint. *Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 523, 262 P.3d 81 (2011) (requiring a final judgment on the merits as a threshold for claim preclusion) (quoting *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004)).

299, 304, 57 P.3d 300 (2002)). For a case to be properly barred by issue preclusion, four elements must be met:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom [issue preclusion] is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 108, 297 P.3d 677 (2013) (internal quotation marks omitted) (quoting *Hadley v. Maxwell*, 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001)). If any of these four elements are not met, issue preclusion may not bar the claim. *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 722, 346 P.3d 771 (2015). Following the Supreme Court's reversal in *Nissen*, Nissen's first cause of action no longer presents a final judgment on the merits.

For the purposes of issue preclusion, a final judgment "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." RESTATEMENT (SECOND) OF JUDGMENTS § 13, at 132 (Am. Law Inst. 1982). A trial court's CR 12(b)(6) dismissal of a case constitutes a final judgment on the merits. *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 175 n.6, 963 P.2d 911 (1998). The *possibility* of appeal does not impact finality for issue or claim preclusion purposes. *Metcalf*, 92 Wn. App. at 175 n.6 (emphasis added). Although absolute finality is not required before a judgment may collaterally estop a subsequent case, finality is conclusively established when the judgment is affirmed on appeal. *Chau v. City of Seattle*, 60 Wn. App. 115, 120, 802 P.2d 822 (1991).

There is no longer a final judgment on the merits in this case. We reversed the trial court's dismissal of Nissen's 2011 complaint and the Supreme Court affirmed that reversal. *Nissen*, 183 Wn.2d at 888. Thus, the trial court's order in *Nissen* has no preclusive effect on Nissen's 2013 complaint. Thus, we reverse the trial court's order dismissing Nissen's 2013 complaint under CR 12(b)(6).[4]

IV. PRA PENALTIES, ATTORNEY'S FEES, & COSTS

Nissen argues that she is entitled to penalties, fees, and costs at trial and on appeal for Pierce County's failure to comply with the PRA. Following the Supreme Court's reasoning, we disagree.

In *Nissen*, the Supreme Court presumed that Pierce County acted pursuant to a good-faith interpretation of the PRA when it denied Nissen's first request, and Pierce County had not yet had an opportunity to comply with the opinion. *Nissen*, 183 Wn.2d at 888. Thus, the Supreme Court declined to impose PRA penalties, fees, and costs against Pierce County in favor of Nissen. *Nissen*, 183 Wn.2d at 888. Nissen's factual assertions that Pierce County has deliberately failed to comply in *Nissen* are not before us. The present case, rather, deals with whether Nissen's 2013 complaint is precluded by the trial court's dismissal of her 2011 complaint. Having agreed with Nissen that her 2013 complaint is not precluded, the PRA does not provide a statutory basis in the

[4] Before oral argument at this court, Nissen moved for a motion on the merits, arguing that this case was resolved by *Nissen*. We denied that motion. Nissen again moved for a motion on the merits at oral argument. We deny Nissen's second motion because, as explained, Pierce County has not yet had an opportunity to comply with the Supreme Court's instructions in *Nissen* as applied to Nissen's second PRA request.

present case to warrant penalizing Pierce County. Therefore, we decline at this time to penalize Pierce County or award Nissen her attorney's fees or costs at trial court or on appeal.

V. CR 11 SANCTIONS

On cross appeal, Pierce County argues that the trial court improperly denied its motion for CR 11 sanctions and attorney's fees under RCW 4.84.185 against Nissen and her counsel because her 2011 complaint (*Nissen)* was unwarranted by existing law and was brought to harass Lindquist. Pierce County also requests attorney's fees and costs on appeal under RAP 18.9, arguing that Nissen's appeal is frivolous and brought for an improper purpose.[5] We deny Pierce County's requests.

CR 11 provides that a trial court may sanction an attorney for a claim that is not warranted by existing law or a good faith argument for a change in the law or for a claim brought for an improper purpose, such as harassment or undue delay. RCW 4.84.185 allows a court to require a party who brings a frivolous claim to pay the prevailing party's attorney fees and costs incurred in opposing the frivolous action. Likewise, RAP 18.9(a) allows this court to sanction a party who files a frivolous appeal. An appeal is frivolous when, considering the entire record and resolving all doubts in favor of the appellant, it does not present any debatable issues about which reasonable minds might differ and "is so devoid of merit that there is no possibility of reversal." *Advocates*

[5] Pierce County also asks that we sanction Nissen and her counsel for an improper brief under RAP 10.3. Pierce County is correct that Appellant's opening brief at page 28 includes factual assertions that are not followed by citations to the record. But these facts are not pertinent to resolution of Nissen's appeal or Pierce County's cross appeal. Nissen provides citations to the record throughout her statement of facts and relevant facts in her analysis. Therefore, we deny Pierce County's request for sanctions for failure to comply with RAP 10.3(a)(5).

for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

Nissen's appeal is not frivolous, as demonstrated by our holding that issue preclusion does not bar her 2013 complaint and by the Supreme Court's *Nissen* holding that a public employee's work-related text messages sent or received on a private cell phone may be public records subject to disclosure. In addition, Nissen's two PRA requests were not identical because the first request asked for "telephone records . . . including text messages," while the second PRA requested asked for only text messages and encompassed several more days than her first request. CP at 334. Thus, Nissen's 2013 complaint and subsequent appeal were not brought for an improper purpose.

Pierce County also requests sanctions against Nissen and her counsel because it asserts that Nissen's counsel lied to the trial court and used defamatory language against Lindquist. Pierce County cites multiple places in the record wherein it alleges that Nissen told the trial court that her first PRA request did not encompass text messages and that she improperly stated on the record that Lindquist had acted in retaliation against her. We disagree with Pierce County's assertions.

Pierce County is incorrect that Nissen lied to the trial court regarding what she sought in her first PRA request as compared to the second. Nissen did not state that text messages were not part of her first PRA request. She explained to the trial court that the second request was different because "[i]t contains a request for text messages of Prosecutor Lindquist that we do believe supports and documents his retaliatory animus towards Detective Nissen." CP at 1141. Nissen then explained that the timeframe of the second request was purposefully broader and that she expected that the second case would be stayed pending resolution of *Nissen* on appeal.

During a hearing on a different motion, the trial court asked Nissen, "But you don't agree that these are the same—these are text messages. Were the other ones telephone?" CP at 1169. Nissen's counsel replied, "Telephone records, and they pertain to a much narrower point in time. It's August 3rd. We're dealing with a broader scope of information and specifically text content as opposed to phone records." CP at 1169. Similarly, Pierce County asserts that Nissen "repeated this falsehood" in her motion for reconsideration of the trial court's dismissal. Br. of Resp't at 7. In that motion, Nissen stated that "[t]he [second] request is for text content, not phone records." CP at 887. This statement mirrors the precise language in the two PRA requests. Nissen did not state that the first request was for *only* phone records.[6]

Pierce County is correct that Nissen's 2013 complaint alleged that the records she sought would demonstrate that "Lindquist has retaliated against her" and that she alleged that his withholding of the texts constituted "a class B felony." CP at 7, 479-80. Nissen's explanation for seeking certain public records cannot be the basis of CR 11 sanctions because the reason for seeking the records will become relevant to whether particular text messages should be produced as a public record on remand. The trial court, in denying Nissen's motion for contempt against Pierce County, acknowledged that "there will be some argument about retaliation potentially as it relates to if I get to the substance of whether or not they're public records." Verbatim Report of Proceedings (VRP) (March 1, 2013) at 54.

[6] Pierce County further argues that Nissen's counsel misrepresented the number of days that her first PRA request encompassed, stating that it was only a single day. Nissen's first request *was* for a single day's worth of records.

Thus, the trial court did not abuse its discretion in denying CR 11 sanctions against Nissen and her counsel. Furthermore, Nissen's appeal is not frivolous and we therefore deny Pierce County's request for attorney's fees and costs on appeal.

CONCLUSION

Following *Nissen*, we hold that Nissen's 2013 complaint is not precluded by the trial court's dismissal of her 2011 complaint and that the trial court properly denied Pierce County's motion for CR 11 sanctions and attorney's fees. The issue of whether Pierce County has complied with *Nissen* or whether PRA penalties are appropriate in *Nissen* is not before us. We decline to penalize Pierce County in the present case because there is no basis under the PRA for doing so prior to it having an opportunity to comply with *Nissen*. Therefore, we reverse the trial court's

dismissal of Nissen's 2013 complaint on issue preclusion grounds and remand for proceedings consistent with our Supreme Court's instructions in *Nissen*.[7] We deny Pierce County's request under RAP 18.9 for sanctions under RAP 10.3(a)(5) and attorney's fees and costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

BJORGEN, A.C.J.

MELNICK, J.

[7] The Court directed the parties as follows:

> Lindquist must obtain a transcript of the content of all the text messages at issue, review them, and produce to the County any that are public records consistent with our opinion. The County must then review those messages—just as it would any other public record—and apply any applicable exemptions, redact information if necessary, and produce the records and any exemption log to Nissen. As to text messages that Lindquist in good faith determines are not public records, he must submit an affidavit to the County attesting to the personal character of those messages. The County must also produce that affidavit to Nissen.

Nissen, 183 Wn.2d at 888.