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NO. 65369-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KIRK ALAN THOMPSON,

Appellant,

v.

KING COUNTY

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. STATEMENT OF ISSUES

1. Where a party, who prepared and approved a voluntary dismissal pursuant to Federal Rule of Civil Procedure 41 (a)(1)(A), with prejudice, should be entitled to engage in claim-splitting by maintaining a separate lawsuit in state court for the same event?
2. Whether it was appropriate for the trial court to grant summary judgment on *res judicata* grounds when all of the requirements of the doctrine had been satisfied?

B. STATEMENT OF THE CASE

Plaintiff Kirk Alan Thompson filed five separate Complaints in three different lawsuits in federal and state courts alleging he was sexually assaulted by Mario Dione Clark and Ronnie K. Williams on February 19, 2007, while housed as an inmate in the King County Correctional Facility ("KCCF") in Seattle, Washington.¹

Thompson's First Amended Complaint was filed in U.S. District Court, Western District of Washington at Seattle on October 16, 2008. (CP 23-28) ("*Thompson I*"). Thompson alleged claims under 42 U.S.C. § 1983, cruel and unusual punishment under the 8th

¹ Mr. Thompson's original Complaint in federal court contained deficiencies cited by the Court in an Order Granting Leave to Amend, resulting in Thompson's First Amended Complaint, *Kirk Alan Thompson v. Brian McMillan C/O and Sgt. Weirich*, U.S. District Court, Western District of Washington, C08-1206-TSZ/JPD. (CP 23-28).

Amendment, intentional torts of assault and battery and common law negligence. (CP 23-28). Thompson originally named former King County corrections officer Brian McMillen and King County "watch commander" Sgt. David Weirich as defendants. (CP 23-28).

Thompson's negligence claim was premised upon their alleged failure to take action after Thompson reported sexual harassment, prior to the sexual assault.² (CP 25). Defendants McMillen and Weirich timely filed an Answer admitting "they were acting within the course and scope of their employment for King County" during the relevant times in question and further denying Thompson's claims. (CP 30-34).

Defendants McMillen and Weirich subsequently filed a motion for summary judgment dismissal of all of Thompson's claims, including his negligence claims against them. (CP 36-70). Among the uncontroverted evidence presented in support of their summary judgment motion, defendant Brian McMillen established that he had not been working in Thompson's housing area in the KCCF when

² The alleged sexual assault on Thompson was investigated by Seattle Police Department (SPD) Detective Roger Ishimitsu (Thompson first reported the incident on April 6, 2007, approximately 7 weeks after it allegedly occurred) after a referral from Sgt. David Weirich. Detective Ishimitsu interviewed Thompson, prepared a photo montage for his review, interviewed the alleged suspects and other inmates and referred his case report to the King County Prosecuting Attorney's Office for review. No criminal charges were filed against anyone. (CP 57-58); (CP 68-70).

Thompson alleged he reported to him sexual harassment by other inmates. (CP 59-67).

Sgt. Weirich submitted undisputed evidence, that upon hearing Thompson's allegations, he immediately interviewed Thompson, sent him to Harborview Medical Center for a rape examination and referred the matter to the SPD Sexual Assault Unit for further investigation. (CP 68-70). Thompson filed no response in opposition to defendants' summary judgment motion and in their Reply, defendants noted there was no "factual issue that McMillen or Weirich's actions were negligent." (CP 72-75).

Thompson subsequently sent defendants' counsel a letter, dated March 4, 2009, in which he characterized his probability of prevailing on the claims as "slim" and requested the defendants stipulate to his request for a voluntary dismissal pursuant to FRCP 41(a)(1)(A). (CP 70). Thompson prepared the Stipulation for Voluntary Dismissal FRCP 41 (a)(1)(A), specifically asking that the matter be dismissed **with prejudice**. (CP 70).

After Thompson filed his federal lawsuit involving the February 19, 2007 incident, he then filed a separate lawsuit in King County Superior Court, involving the very same February 19, 2007 incident. (CP 81-88) ("*Thompson II*"). In Thompson's state court lawsuit, he

again alleged negligence claims, this time listing "Reed Holgeerts, Director of the King County Correctional Facility" as one of the party defendants.³ (CP 81-88). Thompson alleged Holtgeerts was negligent in "mis-management and failure to properly supervise his staff to protect inmates from inmate assaults and rape at the facility." (CP 81-88).

Defendant Reed Holgeerts filed a timely Answer, admitting that he was the King County Department of Adult and Juvenile Detention ("DAJD") Director at the time in question. (CP 90-94). Director Holtgeerts further admitted that all of his actions were performed "within his course and scope of employment" with King County. (CP 91).

Thompson subsequently sought leave to amend his Complaint under CR 15(a) with the Court to dismiss Reed Holgeerts from his lawsuit and name Brian McMillen as a party defendant. Defendant Reed Holtgeerts did not oppose Thompson's request to dismiss him from the lawsuit but did point out to the Court in his Response that McMillen had previously been dismissed, with prejudice, from

³ In this lawsuit, Thompson also named inmates Ronnie K. Williams and Mario D. Clark as party defendants under claims of assault and battery.

Thompson's federal court lawsuit involving the same incident. (CP 96-104).

The Court dismissed Reed Holgeerts from the lawsuit but allowed Thompson to file a First Amended Complaint. (CP 106-112). Thompson's First Amended Complaint repeated his negligence theory against McMillen, first raised in his federal court case, alleging McMillen failed to protect him from assault.⁴ (CP 106-112).

Defendant Brian McMillen was again forced to file an Answer, again admitting that he was working as a corrections officer for King County on the date of the alleged sexual assault. (CP 114-118).

Thompson failed to properly perfect service of process on McMillen in his state court lawsuit so McMillen sought relief seeking his dismissal from this lawsuit. (CP 120-125).

On October 13, 2, 2009, the Honorable Michael C. Hayden granted McMillen's Motion for Dismissal.⁵ (CP 127-128).

⁴ Thompson also named John Does 1-3 in his First Amended Complaint, alleging John Doe 2 was a KCCF corrections officer whose actions constituted malicious and/or sexual harassment and John Doe 3, also identified as a KCCF corrections officer, who allegedly made a derogatory remark to Thompson, which he alleges constituted negligence. No Notices of Appearance were made on behalf of these unidentified John Does and no service was ever perfected upon them or King County.

⁵ Thompson's lawsuit against defendants Mario D. Clarke and Ronnie K. Williams remains open - *Kirk Alan Thompson v. Mario Dione Clark; Ronnie K. Williams; John Does 1-3; and the marital communities severally thereof*, King County Superior Court, Cause No. 08-2-38989-8 SEA.

Undeterred by the fact that he stipulated to a voluntary dismissal of his federal court lawsuit (with prejudice) or the dismissal of former King County corrections officer Brian McMillen (for the second time) in his state court lawsuit, Thompson filed this third lawsuit on February 15, 2010 alleging negligence against King County, arising out of this alleged sexual assault on February 19, 2007. (CP 130-132) ("*Thompson III*").

On February 25, 2010 King County filed a motion to dismiss Thompson's latest lawsuit on *res judicata* grounds. (CP 4-132). After review of the pleadings and oral argument from the parties on April 12, 2010, the Honorable Jim Rogers granted King County's motion to dismiss. (CP 167-169).

Thompson did not file any motion for reconsideration with the trial court and on May 10, 2010, filed this appeal. (CP 170-172).

C. ARGUMENT

1. Standard of review

A trial court's grant of summary judgment is reviewed *de novo*, thus this Court will engage in the same inquiry as the trial court. *Walker v. King County Metro*, 126 Wn.App. 904, 907, 109 P.3d 836 (2005).

Summary judgment is appropriate if the pleadings, admissions, answers to interrogatories and affidavits, if any, "show that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). See *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). In response to a motion for summary judgment, the nonmoving party may not rely solely on his pleadings but must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). Additionally, the facts submitted and all reasonable inferences there from must be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249, 850 P.2d 1298. The motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Scott v. Blanchet High School*, 50 Wn. App. 37, 41, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1988). A summary judgment motion should not be denied on the basis of an unreasonable inference. *Scott*, 50 Wn. App. at 47, 747 P.2d 1124. There are no genuine issues of material fact in this case and as discussed below, King County is entitled to judgment as a matter of law.

2. The Trial Court Properly Adhered to all of the CR 56 Requirements in Granting King County's Motion to Dismiss.

Thompson's argument that the trial court failed to undertake the correct analysis in granting King County's motion is without merit. While King County titled its motion as pursuant to CR 12 (b)(6), its introduction of evidence outside the pleadings converted it to a motion for summary judgment. King County recognized that, citing *Hope v. Larry's Market*, 108 Wn.App. 185, 29 P.3d 1268 (2001). (CP 4, footnote 1).

The trial court not only considered all the evidence presented by King County but (over the County's objection; (CP 144-146) also considered Thompson's untimely declaration. (CP 169). The trial court correctly concluded that there were no genuine issues of material fact that precluded dismissing Thompson's state court action on *res judicata* grounds.

3. Thompson's Voluntary Dismissal under FRCP 41 (a)(1)(A) with prejudice Operated as a Final Adjudication on the Merits and invoked Application of the Res Judicata Doctrine.

Thompson's argument that the federal court never entered a judgment on his state claims thereby preserving them in state court ignores the ramifications of FRCP 41 and the elements of *res judicata*.

Thompson prepared the pleading entitled Stipulation for Voluntary Dismissal - FRCP 41 (a)(1)(A). (CP 79). He included the language that the action was to be dismissed "with prejudice." (CP 29). This was not a case of a party taking unfair advantage over an unsophisticated litigant. Thompson accurately characterized his chances of prevailing in his federal action as "slim." (CP 77). By requesting King County's cooperation in engaging in a FRCP 41 (a)(1)(A) dismissal, Thompson avoided the necessity of filing an unwinnable Response and theoretically the risk of costs.

It wasn't necessary that the federal court enter an order of dismissal in this case. A voluntary dismissal "with prejudice" operates as adjudication on the merits. See *Schwarzer, Tashima & Wagstaffe*; RUTTER GROUP PRAC. GUIDE: FED CIV. PRO. BEFORE TRIAL 16-145, (The Rutter Group 2002). It is entitled to the same *res judicata* effect as a judgment after trial. See *Semtek Int'l Inc. Lockheed Martin Corp.*, 531 U.S. 497, 505, 121 S.Ct. 1021, 1026 (2001) - "with prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits'"; *Larken v. Wray*, 189 F.3d 729, 732 (8th Cir. 1999). This is consistent with the language in FRCP 41(a)(1)(B) which states, the Stipulation of Dismissal with prejudice "operates as adjudication on the merits."

Thompson concedes that the threshold requirement of *res judicata* is the preexistence of a valid and final judgment. That occurred in this case. Summary judgment was warranted as the elements of *res judicata* were met.

4. The Requirements of Res Judicata were established thereby providing the Trial Court with the Basis to Grant Summary Judgment.

The purpose of *res judicata* is to ensure the finality of judgments and eliminate duplicative litigation. Dismissal on those grounds is warranted when the subsequent action is identical with a prior action in four respects:

(1) Persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.

Landry v. Luscher, 95 Wash. App. 779, 780, 976 P.2d 1274 (1999).

a. Subject Matter

Thompson does not dispute that his lawsuits in federal and state courts both arose out of this alleged February 19, 2007 incident. The subject matter requirement was satisfied.

b. Causes of Action

Thompson cannot question that his federal and state lawsuits arose from the same causes of action. In *Kuhlman v.*

Thomas, 78 Wash. App. 115, 897 P.2d 365 (1995), the court listed the criteria to be considered in determining identity of causes of action under *res judicata*:

(1) [w]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 122.

The criterion was again satisfied. *Thompson I, II and III* arose out of the same transactional nucleus of facts. The basis of Thompson's negligence claim was King County employees' alleged failure to take action to protect him from an alleged sexual assault. The evidence needed to support Thompson's negligence claim is the same as reflected in his multiple Complaints. (CP 23-28; 81-88; 1-3). *Thompson I, II and III*, allege infringement of the same rights; the right to be adequately protected from assault while housed as an inmate.

The rights in *Thompson I* would have been impaired by judgment in *Thompson III*. The dismissal in *Thompson I* established that Thompson could not prove negligence on McMillen or Weirich's part as King County employees. To allow *Thompson III* to proceed

would undercut that established fact. The cause of action requirement has been met in this case.

c. Person and Parties.

Thompson's claim that the requisite privity of parties between his federal and state actions is missing as King County was not named in the state action ignores the holdings in *Kuhlman v. Thomas*, 78 Wash. App. 115, 897 P.2d 365 (1995) and *Ensley v. Pitcher*, 152 Wash. App. 891, 222 P.3d 99 (2009).

In *Kuhlman*, the plaintiff, a former Seattle Housing Authority (SHA) employee, filed two lawsuits following his demotion after allegedly harassing female co-workers. In the first lawsuit, Kuhlman named his employer as the sole defendant. In his second lawsuit, Kuhlman named various SHA employees as defendants.⁶ Both lawsuits encompassed similar causes of action of due process violation, defamation and wrongful interference. Ultimately, Kuhlman's first lawsuit was dismissed on summary judgment and his second lawsuit (although named Kuhlman III) was also dismissed on summary judgment on *res judicata* grounds.

⁶ The reverse occurred in this case. Thompson named individual King County employees as defendants in his first two lawsuits and in his present case identified their employer, King County, as a defendant. The order in which the parties were named in the different suits is immaterial to the *res judicata* analysis. *See Kuhlman at 119.*

In upholding the trial court's summary judgment dismissal on *res judicata* grounds, the Court of Appeals rejected Kuhlman's argument that *res judicata* did not apply as he had named different defendants in the lawsuits. The Court reiterated that different defendants in separate suits are the same party for *res judicata* purposes as long as they are in privity. *Id.* at 121. The employer/employee relationship is sufficient to establish privity. *Id.* at 121-122. In *Kuhlman*, the liability of SHA turned on the actions of the SHA employees. They were in privity.

Thompson's negligence claims against Brian McMillen and David Weirich were asserted in their capacity as King County employees. In their Answer, they both admitted they were working within the course and scope of their employment with King County at the relevant times in question. (CP 30-34). Thompson's negligence theory against King County turned on the actions of the King County employees. The parties must be viewed as the same, if not identical.

In *Ensley v. Pitcher*, 152 Wash. App. 891, 222 P.3d 99 (2009), the plaintiff filed a lawsuit against a tavern after being injured in a car accident involving an intoxicated driver who had been served there before the accident. The tavern was later dismissed on summary judgment. The plaintiff subsequently filed another lawsuit against the

tavern's bartender individually claiming his negligence in over serving the driver. The trial court denied the bartender's motion to dismiss on *res judicata* grounds only to have the Court of Appeals remand the case for dismissal on that basis. The Court held that the tavern and the bartender were in privity. The bartender's actions were deemed the actions of the tavern under vicarious liability. The plaintiff's failure to name the bartender in the initial suit did not afford her a second bite of the apple and preclude *res judicata*.

McMillen and Weirichs' alleged negligence is the negligence of King County under vicarious liability. The dismissal of the King County employees serves as the final dismissal of "same party" King County from the same transactional lawsuit. The "persons and parties" element of *res judicata* was met.

d. Quality of persons for or against whom the claim is made.

Thompson cannot establish that the fourth element of *res judicata* is subject to dispute. The "quality of persons for or against whom the claim was made" turns on a determination of which parties in the subsequent suit are bound by the judgment in the first suit. *Ensley* at 900, referencing *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).

There is no doubt that McMillen and Weirich were in privity with their employer King County and that vicarious liability attaches to their actions. In *Ensley*, the Court, relying on *Restatement (Second) of Judgments: Parties and Other Persons Affected By Judgments § 51 (1982)* set out the preclusive effect of a judgment against a party where that party and another party have a relationship such that one of them is vicariously liable:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that **could not** have been asserted against the defendant in the first action;
or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

Id. at 906.

Thompson cannot reassert a negligence claim against King County after he stipulated to final dismissal of negligence claims against defendants with whom King County maintained a vicarious relationship. There is simply no basis for Thompson to argue to the court that he was precluded from asserting a negligence claim against King County in *Thompson I*. Under the doctrine of *res judicata*, a plaintiff is barred from litigating claims that either were, **or should have been**, litigated in a former action. *Schoeman v. New York Life Ins. Co.*, 106 Wash.2d 855, 859, 726 P.2d 1 (1986). Thompson is unable to offer any explanation for his failure to name all the potential King County personnel to whom he sought to attribute negligence.

Thompson's attempt to prolong an already extinguished cause of action against King County is best summarized by the *Kuhlman* court:

Where a plaintiff has sued parties in serial litigation over the same transaction; where plaintiff chose the original forum

and had the opportunity to raise all its claims relating to the disputed transaction in the first action; where there was a "special relationship" between the defendants in each action, if not complete identity of parties; and where although the prior action was concluded, the plaintiff's later suit continued to seek essentially similar relief- the courts have denied the plaintiff a second bite at the apple.

78 Wash. App. at 121.

Thompson's serial litigation arising out of an alleged assault on February 19, 2007 was originally initiated by his federal lawsuit. He was afforded the opportunity to raise all his claims related to this incident in that lawsuit and failed to do so. The claims Thompson asserted in his federal lawsuit were forever closed with its dismissal. Given the "special relationship" existing between defendants McMillen, Weirich and King County, Thompson is precluded under *res judicata* from attempting to resurrect his extinguished claims - he is not entitled to what amounts to a third bite of the apple against King County.

5. The Leniency Afforded a Pro Se Party Should Not Trump Application of the Res Judicata Doctrine.

Thompson makes no effort to hide the fact that he engaged in claim-splitting. Instead, he argues that he should be treated with

greater leniency than parties who are represented by counsel.

Thompson was given leniency by both the federal and state courts. He was afforded additional time by the federal court to correct the deficiencies in his original Complaint and later additional time to conduct discovery. (CP 153 -154; CP 5, footnote 2). He did nothing. In addition, the state court considered his untimely declaration in his opposition to King County's motion to dismiss. (CP 155-156).

Thompson was represented by counsel in responding to King County's motion to dismiss. The only injustice here is the fact that King County officials were repeatedly targeted as party defendants for an incident for which no viable negligence theory against them can be established.

The purpose of *res judicata* is to produce certainty as to individual rights and finality to judicial proceedings. *Marino Prop. Co. v. Port Commissioners*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982). Thompson's serial litigation directed at King County was appropriately brought to a halt by the trial court's order on summary judgment.

D. CONCLUSION

Based on the foregoing, King County respectfully requests that the trial court's grant of summary judgment to King County be

affirmed.

DATED this 15th day of November, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I hereby served a copy of Brief of Respondent to be filed with the Washington Court of Appeals, Division I, by legal messenger, at the following address:

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And, that I arranged for a copy of Brief of Respondent to be served on counsel for Appellant at the address below, by legal messenger:

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DATED this 16th day of November, 2010.


KARON THOMPSON
Legal Secretary