

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
NO. 287262

Rod Ullery, et ux

Respondents,

v.

Billy L. Fulleton, et ux, et al

Appellants

BRIEF OF APPELLANTS

James A. Perkins, WSBA #13330
LARSON BERG & PERKINS PLLC
P. O. Box 550
Yakima, WA 98907
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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The court erred in dismissing respondents' lawsuit claims by summary judgment order.
2. The court erred by refusing to reconsider the court's summary judgment dismissal order.
3. The court erred in issuing judgment in Ullery's favor.

Issues Pertaining to Assignments of Error

1. If a case is decided on procedural grounds, is that decision "on the merits" for *res judicata* or collateral estoppel purposes?
2. Were Pat Fulleton (Pat) or Fulleton-Pacific Corp. (FPC) in "privity" with Billy Fulleton (Billy) for *res judicata* or collateral estoppel purposes?
3. Are Rod Ullery and Dianne Ullery (Ullery) judicially estopped from claiming Billy was in privity or had standing to assert Pat or FPC's contract rights in the 2005 litigation?
4. Were all legal tests required to establish collateral estoppel or *res judicata* met?

B. CASE STATEMENT.

On August 25, 1997, Ullery received by Statutory Warranty Deed, an interest in two patented mine claims commonly known as the “Discovery” and “Black Jack” mining claims located in Kittitas County, Washington. (Def. 1/12/10 Trial Ex. 1, Tab 1). Subsequently in December 1997, Ullery received by Quit Claim Deed, an interest in three unpatented mining claims in Kittitas County, one of which was known as the “Last Chance” claim. (*Id.*, Tab 1). With the transfer of these claims came reclamation responsibilities. (*Id.*, Tab 2). In August 2000, the Department of Natural Resources (DNR) told Ullery that its estimated reclamation costs for the mining claims was approximately \$97,000.00, but it could be more. (*Id.*, Tab 11).

In 2000, Pat owned FPC, a construction company, which had the equipment needed to accomplish reclamation work. Pat’s brother, Billy (now deceased) lived adjacent to Ullery’s “Discovery” mining claim. Billy was personally capable of performing the reclamation work. Because Ullery knew Billy and Pat, in June 2001, Ullery asked Pat/FPC to submit a bid to perform the state desired reclamation work. Pat/FPC did so. The estimated cost for the work was \$248,300.00. (*Id.*, Tab 12). Rather than pay this sum to do the reclamation work, approximately one year later on June 30, 2002,

Ullery instead contracted with FPC and Pat (Ullery Contract) to have the reclamation work performed in return for certain non-monetary consideration. (*Id.*, Tab 15).

Specifically, for performing the reclamation work, Ullery agreed to transfer certain existing mining equipment, as well as immediate possession of the “Black Jack” and “Last Chance” patented and unpatented mining claims, to Pat and FPC. Actual title to the two claims was to be subsequently transferred upon work completion. The parties agreed the work would be completed on or before September 30, 2002. (*Id.*, Tab 15).

After the Ullery Contract was signed, Pat and Billy reached a separate agreement under which FPC and Pat would provide the equipment, and Billy would physically do the reclamation work required by the Ullery Contract. (*Id.*, Tab 16). Because there was no actual reclamation plan on record with the DNR (these mining claims were too old) Pat’s substantive agreement with Ullery was, that when DNR and the Washington State Department of Fish and Wildlife (DFW) approved the work as being complete, it would then be deemed contractually complete by the parties. (*Id.*, Tab 16). Upon work completion, Billy and Pat agreed a separate accounting as between Pat, FPC and Billy would occur, at the conclusion of which the Ullery Contract

property transferred by Ullery to Pat and FPC would, in turn, be transferred and become Billy's property. (*Id.*, Tab 16).

Prior to November 21, 2002, all reclamation work under the Ullery Contract was completed. (*Id.*, Tab 18). Work completion to the DNR's satisfaction was confirmed by a letter dated November 25, 2002. (*Id.*, Tab 19). Although DFW had no official reclamation authority over the site, by the first week of November 2002, it too had approved the work as complete, and its approval was confirmed by a subsequent December 5, 2002 letter copied to Ullery. (*Id.*, Tab 20).

Despite work completion, Ullery did not act to transfer either the patented or unpatented claims to Pat or FPC. Further, either intentionally or by inadvertence, Ullery had also failed to take those minimum acts required to keep the "Last Chance" unpatented claim in force. Therefore, by 2003, to appellants' knowledge, the "Last Chance" portion of contract consideration could not have been transferred by Ullery as the contract required.

After several verbal requests that Ullery perform his contract obligations were ignored, in August 2003, appellants eventually hired legal counsel, and a letter was sent to Ullery asking that contract performance occur. (*Id.*, Tab 22). Ullery responded through legal counsel that he considered the reclamation agreement to be "unperformed," because certain

mining equipment had not been removed and the area under it returned to grade. Ullery gave appellants 30 days to perform this work. (*Id.*, Tab 25). Appellants did so, and Ullery acknowledged appellants had timely performed this work by later letter dated October 14, 2003. (*Id.*, Tab 30).

In that letter, Ullery confirmed he was willing to issue Quit Claim Deeds for the contract mining claims, but he asserted the obligation to keep the “Last Chance” claim in force had purportedly resided with Pat and FPC, and therefore, if there was any problem with title, it was their, not his, responsibility. (*Id.*, Tab 30). Despite yet another later written request that the promised transfer be made (*Id.*, Tab 31), the mining claims were again not subsequently transferred by Ullery.

A few months thereafter, in January 2004, Billy and Pat executed an agreement by which their many personal business interests were to be separated. (*Id.*, Tab 32). Under that agreement, Pat agreed to furnish Billy, as soon as possible, with the “Black Jack” property Ullery was to convey, as well as title to the “Last Chance” claim. Pat also agreed to “assign any liens, agreements, acquired interests or settlements to Billy.”

After this agreement was signed, in 2005, Billy filed suit against Ullery for contract breach damages and for specific performance (2005

Lawsuit). (CP 669-676). Pat and FPC were not made parties to that litigation.

Billy asserted in the 2005 Lawsuit, that prior to the complaint, Pat had conveyed all of his rights, claims and causes of action under the Ullery Contract to Billy. (CP 671). Responding to Billy's claims, Ullery asserted as affirmative 2005 Lawsuit defenses, that Billy "lacked standing" and was not the "real party in interest" able to enforce the Ullery Contract. Ullery also asserted that Billy had "failed to join an indispensable party" (*i.e.*, Pat/FPC). (CP 683).

Despite these defense assertions, no action was ever taken by Ullery or by Billy to interplead Pat or FPC into the 2005 litigation. Further, Pat did not participate as a witness or otherwise in the litigation, he had virtually no contact with Billy or Billy's lawyer regarding the 2005 Lawsuit and he was not deposed.

At trial, Ullery again asserted that Billy was not a proper plaintiff and that the two "assignment" contracts with Pat, which Billy referred to, were not sufficient to accomplish an actual assignment of Ullery Contract claims to Billy. (CP 779-780).

At trial conclusion, the court issued a Memorandum Decision holding that the two written agreements between Pat and Billy dated September 6,

2002 (Def. 1/12/10 Trial Ex. 1, Tab 16) and January 26, 2004 (*Id.*, Tab 32) were not legally sufficient to actually assign Ullery Contract rights. (CP 792). Therefore, the court said it would dismiss Billy's complaint claims based upon a lack of standing.

Before a final judgment issued, Billy moved to reopen the 2005 case to address the evidentiary deficiencies identified by the court. Specifically, in an effort to cure the lack of standing, Billy had prepared and he presented the court with a post-trial written July 2007 "Assignment" of Pat and FPC's Ullery Contract rights to Billy. (CP 801-802).

Addressing the court's second procedural concern, an added July 2007 letter from DFW was also supplied to the court by Billy to dispositively confirm that all reclamation work under the Ullery Contract had been acceptably performed. (CP 803-804).

The court however, denied the motion to reopen, and instead, a judgment upon the grounds stated in the Memorandum Decision was filed. (CP 809-816).

Told post-trial that Ullery was paying nothing for the approximate quarter million dollars worth of reclamation work performed (because the court had concluded the proper party had not sued Ullery) in late-2007, the appellants jointly filed a new suit against Ullery (2007 Lawsuit).

Concurrently, Ullery filed a separate proceeding for “Ejectment,” etc., against Billy and Alice Fulleton (Alice) (CP 1-10) designed to terminate these appellants’ continuing possession of a portion of the mining claim property which Ullery was to have transferred.

Notwithstanding that Pat and FPC had not been parties to the 2005 Lawsuit and notwithstanding that the post-trial July 2007 “assignment” of contract rights to Billy had changed Billy’s legal status with regard to Ullery Contract rights enforcement, in answer to the appellants’ new suit, Ullery claimed the legal principles of “*res judicata*” and “collateral estoppel” barred any further attempts at Ullery Contract enforcement by anyone. (CP 49-50).

Consistent with these assertions, Ullery subsequently moved the court to dismiss all 2007 Lawsuit claims. (CP 59-100). Appellants opposed that motion asserting that neither doctrine was factually or legally applicable. (CP 101-113; 141-155).

By written order dated November 16, 2007 (CP 229-235), the court denied Ullery’s motion stating in part:

More importantly, since the court’s focus in the previous case was squarely on Billy Fulleton’s legal status and the completion of the reclamation work, the court never adjudicated whether the Ullerys were required upon receipt of evidence that the reclamation contract was satisfactorily completed, to tender their full performance, or what the particulars of that full performance would be, or what

remedies would be available if the Ullerys did not provide full performance.

For the purposes of this motion, the court is confident from the evidence considered that the reclamation work has been fully and satisfactorily completed as contemplated by the reclamation contract, and that the Ullerys have not as of yet performed as required by said contract. The court therefore determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third-party plaintiffs from asserting the theories underlying their respective cases.

(CP 235). [Emphasis added].

After the court ruled that *res judicata* and collateral estoppel did not bar appellants' claims, in January 2009, appellants moved for partial summary judgment, asking the court to rule the contract had been breached by Ullery, because confirming state correspondence did show that all reclamation work had been satisfactorily completed. (CP 824-896; 969-983). Ullery responded to this motion by again claiming that collateral estoppel/*res judicata* barred appellants' claims. (CP 897-908).

Although the court denied appellants' partial summary judgment request, it did order that the case filed by Ullery, Cause No. 07-2-00589-0, and the case filed by appellants against Ullery, Cause No. 07-2-00678-1, be consolidated for trial, and a trial date was set. (CP 238-239).

A few months later, Ullery next filed a motion for summary judgment arguing yet a third time that collateral estoppel and *res judicata* doctrines required a dismissal of all appellants' lawsuit claims. (CP 240-259). Astonishingly, ignoring its prior rulings and the reasons given for them, the trial court granted this motion, dismissing appellants' claims against Ullery. (CP 476-478). Appellants moved the court to reconsider this decision. (CP 480-544). The court declined to do so. (CP 548).

Thereafter, a brief trial was held to address the unresolved issue of Billy and Alice Fulleton's continued property possession rights, in light of the court's dismissal of all claims seeking Ullery Contract enforcement. The court found against the appellants on the issue of possession. The court's disposition of the remaining trial issues is well set forth in the filed Findings of Fact (CP 608-617) and Judgment (CP 619-629) which were subsequently entered. This appeal was then filed. (CP 633-668).

C. ARGUMENT.

1. Case Facts Do Not Establish The Four Tests Required For Collateral Estoppel.

Washington courts have developed a four-part test to determine whether collateral estoppel applies. For collateral estoppel to apply, there must be:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea 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.

Hadley v. Maxwell, 144 Wn.2d 306, 311, 27 P.3d 600 (2001).

The person relying upon the doctrines of *res judicata* or collateral estoppel has the burden of proving the existence of all elements. *Bradley v. State*, 73 Wn.2d 914, 442 P.2d 1009 (1968); *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955).

In order for collateral estoppel to apply, all four tests must be met, not just one, two or three. *George v. Farmers Ins. Co. of Wa.*, 106 Wn. App. 430, 443, 23 P.3d 552 (2001); *Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245 (2004).

Here, in granting summary judgment, it appears the court focused solely upon whether arguably, there was “privity” between Pat, FPC and Billy in the 2005 Lawsuit. Although appellants believe that legal privity did not exist under Washington law, even assuming this one collateral estoppel test was met, if any of the other three tests were not met, then collateral estoppel would not apply.

Taking each required test in turn, 2005 Lawsuit and 2007 Lawsuit issues are not identical. Specifically, the issue of Billy’s standing in 2005 to

enforce the Ullery Contract versus his standing in 2007 to enforce the Ullery Contract, involve different facts (*i.e.*, a new post-trial 2007 written Assignment) making case issues different. Pat and FPC's rights to enforce the Ullery Contract were also not before the court in the 2005 Lawsuit. They were before the court in the 2007 Lawsuit.

Similarly, even if some identical issues were presented by the two proceedings, collateral estoppel does not apply, unless the specific issues in dispute are actually tried and determined in the prior proceeding. In this case, as the trial court made clear, the issues of contract performance and contract enforceability were not decided in the 2005 Lawsuit, even though the issues were raised.

In the previous case, the court concluded that Billy Fulleton did not have the right to compel the Ullerys to fulfill their obligations under the reclamation contract, and that Billy Fulleton had not established that the conditions precedent (which would trigger the Ullerys to perform) had been performed. The court did not find that Billy Fulleton, Patrick Fulleton, or FPC had not fulfilled their obligations under the contract, or that Patrick Fulleton or FPC could not establish performance under the contract.

For the purposes of this motion, the court is confident from the evidence considered that the reclamation work has been fully and satisfactorily completed as contemplated by the reclamation contract, and that the Ullerys have not as of yet performed as required by said contract. The court therefore

determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third party plaintiffs from asserting the theories underlying their respective cases.

(CP 234-235). [Emphasis added].

As the court confirmed in *Mead v. Park Place Properties*, 37 Wn. App. 403, 681 P.2d 256 (1984):

Collateral estoppel requires a prior determination of an issue on its merits. The doctrine will preclude relitigating only those issues which have actually been tried and determined. If there is ambiguity or indefiniteness in a verdict or judgment, collateral estoppel will not be applied as to that issue.

Id., at 406. [Emphasis added]. See also, *Bradley v. State*, 73 Wn.2d 914, 442 P.2d 1009 (1968); *Davis v. Nielson*, 9 Wn. App. 864, 515 P.2d 995 (1973); *Roper v. Mabry*, 15 Wn. App. 819, 551 P.2d 1381 (1976).

Here, the record before this court makes clear, only the issue of Billy's standing was resolved on the merits by the court in the 2005 litigation. It follows that every other issue presented by that proceeding which was not resolved "on the merits" is not precluded by the doctrine of collateral estoppel from being again presented in the subsequent 2007 Lawsuit. *State Farm Mut. Auto. Ins. Co. v. Amirpanhi*, 50 Wn. App. 869, 751 P.2d 329 (1988), n.2; *In Re Bigelow*, 271 B.R. 178, 185 (9th Cir. BAP Wash. 2001); *Alishio v. Dept. of Social & Health Svcs.*, 122 Wn. App. 1, 91 P.3d 893

(2004); *Estate of Sly v. Linville*, 75 Wn. App. 431, 435, 878 P.2d 1241 (1994).

If an issue is merely raised in the pleadings in the earlier proceeding but not actually litigated or decided by the court, collateral estoppel does not bar litigation of the issue in a later proceeding.

Alishio, 122 Wn. App. at 5-6. [Emphasis added].

Turning to the third collateral estoppel test, facially, neither Pat nor FPC were parties to the 2005 Lawsuit. As will later be addressed, they were also not in “privity” with Billy as Washington law defines privity. Indeed logically, if Billy had the legal authority (privity) to enforce Ullery Contract terms, then the trial court could not have held that Billy lacked standing to substantively prosecute those claims in the 2005 Lawsuit, as the eventual judgment confirmed.

Finally, even if the first three tests could be met, the application of collateral estoppel to bar 2007 Lawsuit claims would “work an injustice,” because it would be unjust for Ullery to now pay nothing for the expensive reclamation work provably performed (which the facts show was properly done) solely because a party without standing sought to prematurely enforce Ullery Contract rights.

With regard to this fourth test, to determine whether application of collateral estoppel will work an injustice on the party against whom the

doctrine is asserted, Washington courts have long held this test depends primarily on whether the parties to the earlier proceeding received a full and fair hearing on the issue in question. *Baines*, 150 Wn.2d at 913; *Thompson v. Dep't. of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601 (1999).

Here, as the court made clear in its Memorandum Decision, the substantive issues of contract breach damages, etc., were not decided on the merits by the court in the 2005 Lawsuit. (CP 235). Instead, the action was decided solely on the issue of Billy's standing. (CP 235). It accordingly follows that there was no full and fair hearing on all issues presented, and since the fourth required test was not met, the doctrine of collateral estoppel simply does not apply to preclude appellants' substantive 2007 Lawsuit claims.

The fact all necessary collateral estoppel tests were not met, was correctly noted by the trial court in its original order denying judgment on the pleadings. (CP 229-235).

Addressing the first "identical issues" test, the court said:

Common sense and logic dictate that before a party can be estopped from "re-litigating" an issue, that issue must first be litigated in some previous proceeding.

Identical is defined as “similar or alike in every way... being the very same; self same... agreeing exactly.
(CP 234).

Ignoring its prior order conclusions however, when granting Ullery’s motion for summary judgment two years later, the trial court failed to identify how the issues presented by the 2005 Lawsuit and the 2007 Lawsuit had subsequently changed, such that the “identical issues” test it correctly said was required for collateral estoppel to apply, had been met.

If, as the record clearly shows, the issues had not changed (and they had not), then it necessarily follows this required collateral estoppel test was not met, and the court’s summary judgment order was in error.

The court also initially and correctly concluded that the 2005 Lawsuit was not resolved “on the merits.”

More importantly, since the court’s focus in the previous case was squarely on Billy Fulleton’s legal status and the completion of the reclamation work, the court never adjudicated whether the Ullerys were required upon receipt of evidence that the reclamation contract was satisfactorily completed, to tender their full performance or what the particulars of that full performance would be, or what remedies would be available if the Ullerys did not provide full performance.
(CP 235). [Emphasis added].

In this regard, Washington courts have long recognized that a court may dispose of a case on procedural grounds without reaching the merits.

When a case is decided on procedural grounds, Washington courts have continually held that collateral estoppel and *res judicata* just do not apply.

Since we are dismissing on procedural grounds, petitioner's claim to withdraw his guilty pleas to 2^o and 3^o rape, we did not consider it on the merits. *Stoudmire*, 141 Wn.2d 350-51, 5 P.3d 1240. Thus, this PRP is not barred as a successive petition. [Emphasis added.]

In Re Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001).

As a threshold matter, Goldstar alleges that this challenge is barred under principles of collateral estoppel or *res judicata* by our decision in *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, in which, according to Goldstar, we upheld the county's designation of Whatcom County's transportation quarters. Goldstar misreads *Wells*. Our decision was entirely procedural, addressing issues of the burden of persuasion, standing and service. We remanded to the board with directions to apply certain procedures in reviewing substantive challenges to the Whatcom County comprehensive plan. We explicitly refrained from reviewing the "substantive portions" of the board's decision.

Gold Star Resorts v. Futurewise, 140 Wn. App. 378, 386, 166 P.3d 748 (2007). [Emphasis added].

This is precisely what happened in the 2005 Lawsuit. The court expressly dismissed 2005 Lawsuit claims, because it concluded Billy lacked standing, not because it actually decided on the merits whether the Ullery Contract work had been fully performed, or whether as a consequence, Ullery owed someone besides Billy the contract consideration bargained for.

Addressing finally the issue of “privity” and how that applies or does not apply to those who are not lawsuit parties, Washington has adopted and applies the “virtual representation doctrine.” To apply that doctrine however, courts must find that a number of factors have all been met, so that a non-party is not wrongfully deprived of the right to have their day in court.

Addressing the necessary factors, the court in *Garcia v. Wilson*, 63 Wn. App. 516, 820 P.2d 964 (1991) stated:

The primary factor to be considered is whether the nonparty in some way participated in the former adjudication, for instance as a witness. The issue must have been fully and fairly litigated at the former adjudication. That the evidence and testimony will be identical to that presented in the former adjudication is another important factor. Finally, there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so.

Id. at 521. [Emphasis added].

Here, Pat was not a witness in the 2005 Lawsuit. Although he knew Billy had sued Ullery, it is undisputed he never saw the suit papers Billy filed, he never helped Billy in any way to prepare the lawsuit papers, he never provided Billy any advice or information, nor did he fund 2005 Lawsuit prosecution. (Pat Fulleton dep. p. 31).

Pat, in fact, never talked to Billy about the lawsuit at all. The only contact which Pat had with the lawsuit was one conversation with Billy’s

lawyer, Mr. Tabler, who asked Pat if he would agree to testify in the 2005 Lawsuit. As to this one conversation, Pat said:

Mr. Tabler asked if I would come and testify. One time he called me, not Bill. There was no communication with Bill whatsoever. And I says: No, I don't need to. I said, I think it's pretty cut and dried. I said, I did a contract and didn't get paid for it, and, I said, so it should be pretty simple. And he said okay.

So I was off running around the world, or whatever, and so never heard any more. Never heard any more until after the court hearing.

(Pat Fulleton dep. p. 33).

These facts clearly show that the two 2005 and 2007 Lawsuits were not the product of some "manipulation or tactical maneuvering" by Pat or Billy. Billy did not make Pat a lawsuit party and Pat did not seek to become a lawsuit party, because both wrongly believed that the January 26, 2004 business separation contract which they had signed, had been effective to assign Pat and FPC's Ullery Contract rights to Billy. Had that been the case, Pat would have had no legal basis for intervening in or being made a party to the 2005 Lawsuit. It follows that Pat's absence from the 2005 Lawsuit was not the result of bad faith manipulation. It was instead the result of multiple parties' good faith mistakes regarding the assumed efficacy of Pat and Billy's prior contract agreements (Billy's attorney Rex Tabler included).

Importantly, under Washington law, the fact Pat was aware, but had no other contact with the 2005 Lawsuit, is not sufficient to place a person “in privity” with a party to a prior proceeding.

Privity is established in cases where a person is in actual control of the litigation, or substantially participates in it even though not in actual control. Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding.

Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 898 (1995). [Emphasis added]. See also, *State ex rel. Lidral v. Superior Court for King County*, 198 Wash. 610, 618, 89 P.2d 501 (1939); *Stevens County v. Futurewise*, 146 Wn. App. 493, 504, 192 P.3d 1 (2008).

Since the record facts show that beyond mere knowledge of 2005 Lawsuit existence, Pat had no other direct contact with the 2005 Lawsuit, “privity” for collateral estoppel or *res judicata* purposes simply did not exist and the court erred in wrongly concluding that either doctrine applied.

2. Appellants’ Claims Are Not Barred By The Doctrine Of Res Judicata.

Under Washington law, to support a *res judicata* defense, the party asserting the doctrine must establish: “a concurrence of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.”

To determine whether causes of action are identical, courts must consider: (1) whether rights or interests established in the prior judgment will

be destroyed or impaired by prosecution of the second lawsuit; (2) whether substantially the same evidence is presented in the two suits; (3) whether the two suits involve infringement of the same rights; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410-11, 54 P.3d 687 (2002) *rev. granted*, 149 Wn. 2d 1017, 72 P.3d 761 (2003).

Washington courts have long held that *res judicata* should not be applied in a manner so that a party is deprived of his or her property rights without having his or her day in court. *Meder v. CCME Corp.*, 7 Wn. App. 801, 804, 502 P.2d 1252 (1972) *rev. denied*, 81 Wn.2d 1011 (1973).

Like collateral estoppel, while a party does not have to be identical in both suits, there must at least be privity between a party to the first suit and the party to the second suit. *Kuhlman v. Thomas*, 78 Wn. App. 115, 121, 897 P.2d 365 (1995).

Privity for *res judicata* purposes is based on a mutual or successive relationship to the same right, property, or subject matter of the litigation. *Loveridge*, 125 Wn.2d at 764.

Here, the facts show that because Billy did not receive by assignment, any interest in the Ullery Contract until after the 2005 Lawsuit was completed. It follows that there was no “successive relationship” to the same

right, property or subject matter (*i.e.*, Ullery Contract) which existed in 2005. That is indeed precisely why the court decided the 2005 litigation on the procedural issue of standing.

Further addressing this issue, Washington case law also confirms that if a cause of action did not exist at the time an initial suit was brought and if different proof is later required to prevail on that claim, then again there is no *res judicata* bar. *Meder*, 7 Wn. App. at 806.

Applying law to fact, here Billy lacked standing to enforce the Ullery Contract in the 2005 Lawsuit. That procedural deficiency was subsequently cured by the written 2007 assignment of Ullery Contract rights finally made by Pat and FPC to Billy. Those changed facts were not before the court in the 2005 Lawsuit. Because those changed facts no longer made Billy's claims premature, both different facts and a different claim were substantively before the court in the 2007 Lawsuit. It follows that the necessary tests to apply *res judicata* are not factually supported, and the trial court's issuance of a summary judgment dismissal order was in error.

Because Billy did not have an existing mutual interest in the Ullery Contract or a legally effective assigned right, there also was no "privity." Absent privity, the doctrine of *res judicata* does not apply, whether or not any of the other *res judicata* tests could be otherwise met.

Further, just as with collateral estoppel, Washington courts have been clear in stating that mere awareness of legal proceedings is not sufficient to place persons in privity for *res judicata* purposes.

Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property.

Privity is established in cases where a person is in actual control of the litigation, or substantially participates in it even though not in actual control. Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding.

Loveridge, 125 Wn.2d at 900. [Emphasis added].

Here, the facts show Pat and FPC were not parties to the prior litigation. It is uncontested they did not participate, nor fund, nor control the 2005 litigation in any respect. It follows that applying relevant Washington case law, the requisite “privity” did not exist between the parties to the 2005 Lawsuit and 2007 Lawsuit, such that the *res judicata* doctrine would bar 2007 Lawsuit claims.

However, where a party to a second suit was not a party to the judgment entered in the first suit, *res judicata* does not apply. *Owens v. Kuro*, 56 Wn.2d 564, 354 P.2d 696 (1960). *Nielson*, 9 Wn. App. at 872.

Finally, as with collateral estoppel, the doctrine of *res judicata* does not apply unless a final judgment on the merits of the claims placed at issue was entered.

The threshold requirement of *res judicata* is a final judgment on the merits in the prior suit. Once that threshold is met, *res judicata* requires sameness of subject matter, cause of action, people and parties, and “the quality of the persons for or against whom the claim is made.” *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

Here, there was no final judgment on the merits. In fact, closely on point with present case facts, in the case *State ex rel. Hamilton v. Cohn*, 1 Wn.2d 54, 62-63, 95 P.2d 38 (1939), the court initially dismissed a plaintiff’s lawsuit claims as being premature. When subsequently the facts changed so that the case was no longer premature and a second suit was filed, the court held that the prior dismissal was not “*res judicata*” and that new lawsuit was not barred. *Edwards v. Tremper*, 49 Wn.2d 677, 305 P.2d 1062 (1957).

3. **Ullery’s Failure To Join Pat Or FPC To The Prior Litigation Precluded The Court From Issuing A Res Judicata Order Binding Upon Them.**

In the case *Junkin v. Anderson*, 12 Wn.2d 58, 120 P.2d 548 (1941), a judgment creditor sued a widow over an interest in an automobile. The widow disclaimed any interest in the automobile and testified the automobile

instead belonged to a son-in-law. The creditor made no attempt to subject the son-in-law to the jurisdiction of the court or to vest the court with jurisdiction to bind the son-in-law by any order concerning title to the automobile which the son-in-law then personally possessed. After obtaining a favorable judgment, the creditor nevertheless sought to make the son-in-law subject to the court judgment. The court declined to find the judgment binding on the son-in-law, finding:

No attempt was made to subject appellant to the jurisdiction of the court, nor was any attempt made to vest the court with jurisdiction to bind appellant by any order concerning the title to the automobile. It must, therefore, be held that, in the supplemental proceeding, the court was without jurisdiction to make any order affecting the title to the automobile.

Junkin, 12 Wn.2d at 72.

Here, at inception of the 2005 Lawsuit, Ullery argued that Billy lacked standing to enforce the Ullery Contract. Nevertheless, Ullery took no action to join Pat or FPC to the proceeding so that any order entered would be binding as against these other claimed “indispensable parties.”

Having identified these non-parties as indispensable, but then not including them, Ullery cannot now claim that sufficient privity existed between Pat/FPC and Billy as a matter of law, so as to make the court’s 2005 judgment binding upon them.

4. **Ullery Is Barred By Judicial Estoppel From Claiming That Pat Or FPC Were In “Privity” With Billy.**

Under Washington law, the doctrine of standing prohibits a party from asserting another person’s legal rights. *Timberlane Homeowners Ass’n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995); *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987). In the 2005 Lawsuit, Ullery raised the standing issue for the court, claiming in effect that no binding judgment could issue from the court with regard to the Ullery Contract because a proper party had not sued (*i.e.*, those parties entitled to sue were not jurisdictionally before the court). Ultimately, the court agreed with Ullery, and on that basis, Billy’s 2005 Lawsuit claims against Ullery were dismissed.

Pertinent to these facts, Washington law recognizes the doctrine of “judicial estoppel.” *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001). Judicial estoppel precludes a party from taking a position in a second case, inconsistent with the position that the party previously took in prior litigation. *Id.* at 903.

Washington courts have confirmed that judicial estoppel applies if a litigant’s prior inconsistent position benefitted the litigant or was accepted by the court. Either of these two results permits the application of judicial

estoppel. Both are not required. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005).

Applying law to fact, in the 2005 Lawsuit, Ullery benefitted by taking the legal position that Billy lacked standing to enforce the Ullery Contract because no valid contract rights assignment had issued. Having advocated that legal position which the court accepted, Washington judicial estoppel law now precludes Ullery from inconsistently claiming in the subsequent 2007 Lawsuit, that some sort of “privity” did exist between Billy and Pat and/or FPC, such that Billy had the legal authority to validly prosecute Pat or FPC’s contract claims. In short, asserting these plainly inconsistent positions in separate legal proceedings is just not allowed by Washington judicial estoppel law.

Accordingly, the court should have found that Ullery was legally precluded from claiming that collateral estoppel or *res judicata* barred appellants’ 2007 Lawsuit claims.

5. Because Pat And FPC Were Indispensable Parties To The 2005 Lawsuit, The Court-Issued Judgment Was Not “On The Merits” For Either Collateral Estoppel Or Res Judicata Purposes.

The facts of this case are not materially different from those considered by the court in the recent case *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008). In that case, the plaintiff brought suit against the

State regarding a State-Tribe compact, but failed to join the Tribe (as one contracting party) to that proceeding.

Because the Tribe (an indispensable party) was not joined, eventually, as in the 2005 Lawsuit here, the court dismissed the lawsuit because no judgment on the merits could be rendered in the necessary party's absence.

Here, contracting parties Pat and FPC were not brought before the court in the 2005 Lawsuit. Just as in *Mudarri*, since Billy was not a contracting party and because no effective contract rights assignment had occurred, Billy lacked standing to ask the court to substantively decide Ullery Contract breach issues in the absence of indispensable parties Pat and FPC.

Since the court lacked the authority under Washington law to make any substantive Ullery Contract decisions, there simply was no “on the merits” adjudication of Pat or FPC contract rights, sufficient to support the application of *res judicata* or collateral estoppel doctrines to the subsequent 2007 Lawsuit proceeding.

The failure to serve indispensable parties to a lawsuit, although not jurisdictional, results in the inability of the trial court to render a judgment that affords all interested persons their rights to due process of law.

It would therefore appear that once the trial court determines that indispensable persons are not parties to the lawsuit it must dismiss the case without making any further rulings.

Lakemoor Community Club, Inc. v. Swanson, 24 Wn. App. 10, 17, 600 P.2d 1022 (1979). [Emphasis added].

As properly noted by the court in the case *Veradale Valley Citizens' Planning Comm. v. Bd. of Co. Comm'rs*, 22 Wn. App. 229, 588 P.2d 750 (1978), Civil Rule 19(a)(2)(A) requires joinder “when a person claims an interest in the subject matter of the action and is so situated that the disposition of the action in his absence may impede his ability to protect that interest.” *Veradale*, at 234-35.

Here, the court provably ruled that Pat and FPC were the only parties who had a right to seek Ullery Contract performance and given that ruling, it necessarily follows that Pat/FPC were so situated, that the substantive disposition of the 2005 Lawsuit in their absence would impede their ability to protect their interests. It was for this reason the court eventually dismissed Billy's claims on procedural grounds rather than issuing a decision on the merits. Since for this reason the record shows no “merits” decision issued, the trial court did commit legal error by later issuing a summary judgment dismissing appellants' claims.

6. **Because The Judgment Order Dismissing Appellants' Claims Was In Error, The Judgment In Ullery's Favor Must Also Be Similarly Reversed As Error.**

The judgment for attorney's fees and costs entered by the court specifically says the court's judgment is based upon the court previously determining that the doctrine of collateral estoppel barred the claims and defenses of the appellants. (CP 593.)

It necessarily follows that if the court erred in dismissing all 2007 Lawsuit claims and defenses based on collateral estoppel, then the subsequently entered judgment is in error and must be reversed, as well as the judgment awarding attorney's fees to Ullery as the purportedly "prevailing party."

7. **If Appellants Are Prevailing Parties On Appeal, They Have A Right To Be Awarded Attorney's Fees.**

The Ullery Contract provides that if any litigation is required to enforce contract terms, the party prevailing is entitled to receive an award of reasonable attorney's fees and costs. (CP 518).

Where a contract contains a prevailing party attorney's fees clause, that clause is deemed to be bilaterally applicable as between the parties. Washington courts have held that a contractual provision for an award of attorney's fees at trial supports an award of attorney's fees on appeal. *Reeves*

v. *McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989); *Quality Food Centers v. Mary Jewell T, L.L.C.*, 134 Wn. App. 814, 142 P.3d 206 (2006).

Applying this rule, if appellants prevail on appeal, they should be awarded their attorney's fees and costs. Alternatively, if the court believes an award of attorney's fees is not yet warranted, because it can't yet be determined who the prevailing party will be below if the case is remanded, then at minimum, appellants should at least be awarded their costs under RAP 14.2, as being the substantially prevailing party on the appeal. *See, NW Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 986, 640 P.2d 710 (1982); *Satomi Owners Ass'n. v. Satomi LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009).

D. CONCLUSION.

As the court's original orders and Memorandum Decision statements well evidence, the doctrine of collateral estoppel does not apply, because the only issue resolved in the 2005 Lawsuit was the issue of Billy's standing. The 2007 Lawsuit, in contrast, presents the court with a host of otherwise unresolved lawsuit issues. Because there was also no decision "on the merits" in the 2005 Lawsuit, neither collateral estoppel nor *res judicata* apply. Similarly, Pat and FPC were not parties to the 2005 Lawsuit. They

were also not in “privity” with Billy for lawsuit purposes, applying those factual tests required by Washington law. Finally, it would be unjust to apply either doctrine to preclude 2007 Lawsuit claims, as this would give Ullery a factually undeserved approximately \$250,000 windfall, to the ultimate detriment of Billy’s widow, Alice Fulleton.

The same deficiencies exist with regard to the legal doctrine of *res judicata*. Specifically, the “issues” presented by the 2005 litigation were not substantively determined by the court. Because Pat and FPC were indispensable parties, in order to be bound by any court decision, it was legally necessary that Pat and FPC be joined to that litigation. Since they were not, and because the court ultimately dismissed Billy’s claims on procedural and not substantive grounds, the doctrine of *res judicata* just does not apply.¹

It is further true that the 2007 Lawsuit involved different facts (*i.e.*, the newly signed 2007 assignment agreement) which substantively made Billy’s claims legally different than those he presented in the 2005 Lawsuit. For this reason as well, the *res judicata* doctrine does not apply.

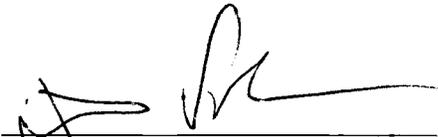
¹It should also be noted that in the final attorney’s fees judgment entered, from which appellants have appealed, the court set forth that its basis for the summary judgment dismissal was solely “collateral estoppel,” the separate doctrine of “*res judicata*” is not mentioned. (CP 593).

Finally, Washington judicial estoppel law does and should apply to bar Ullery's persistent attempts to inconsistently claim 1) Billy lacked standing to substantively enforce Ullery Contract claims in the 2005 Lawsuit, but 2) somehow Billy was sufficiently authorized to represent to Pat or FPC in that 2005 proceeding, such that the court's judgment in that case should be considered binding as against non-parties Pat and FPC.

For these and all other reasons set forth, the summary judgment order and final judgments issued by the lower court should be reversed, and the case should be remanded back for a trial on the merits.

RESPECTFULLY SUBMITTED this 7th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2010, I caused to be served by forwarding via Federal Express Standard Overnight service, a true and correct copy of the Brief of Appellants to:

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