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STATE OF WASHINGTON
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No. 94452-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC, and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Petitioner

PETITIONER'S STATEMENT OF ADDITIONAL AUTHORITIES

Mark R. Johnsen, WSBA No. 11080
Steven D. Robinson, WSBA No. 12999
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104-7055
Telephone: (206) 223-13-13
Facsimile: (206) 682-7100

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48467
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Petitioner

Petitioner Thurston County submits the following additional authorities under RAP 10.8.

1. On the issue of whether the Legislature's adoption of LUPA was an adverse reaction to this Court's collateral-estoppel ruling in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746 (1992), and was designed to separate land-use disputes from damages actions (raised in the Supplemental Brief of Respondent Port of Tacoma at 7-9), Thurston County submits the following additional authorities on the intended meaning of "claim" in RCW 36.70C.030(1)(c):

- *Eubanks v. Brown*, 180 Wn.2d 590, 597, 327 P.3d 635 (2014) ("If the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law." (quoting *N.Y. Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975));
- *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 75-6, 50 P. 586 (1897) ("[W]e think that the word 'claim,' used in the statute, was intended to mean, and should be given the same meaning as the term or phrase 'cause of action.' ... The word 'claim' has been variously defined. 'In a statute authorizing the courts to order a bill of particulars of the 'claim' of either party, 'claim' is co–extensive with 'case,' and embraces all causes of action and all grounds of defense.' Black, Law Dict., under word 'Claim.' And in *Minick v. City of Troy*, 83 N. Y. 514, it was construed as synonymous with 'cause of action.' In *Prigg v.*

Pennsylvania, 16 Pet. 615, the United States Supreme Court (Story, J.) says: 'What is a claim? It is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing, as a matter of duty.'"); and

- *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004) (distinguishing issue preclusion (collateral estoppel) from claim preclusion (res judicata): "Claim preclusion...'is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial or one or more of the crucial issues or determinative facts determined in previous litigation.'") (quoting *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967)).

2. On the issue of whether giving preclusive effect to a land-use decision, adverse to a damage claimant's theory of the case in a follow-on damages action against a local government, would impinge on Washington State's right to trial by jury in civil-damages actions (raised in the Supplemental Brief of Respondent Port of Tacoma at 10), Thurston County submits the following additional authority:

- *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 308 n.4, 96 P.3d 957 (2004) ("[T]here is no state constitutional right to a jury trial on a factual issue that was already resolved in a

prior proceeding.") (citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-69, 956 P.2d 312 (1998)).

Copies of these authorities are attached for this Court's convenience.

Respectfully submitted this 24th day of January, 2018.

KARR TUTTLE CAMPBELL

By _____
Mark R. Johnsen, WSBA No. 11080
Steven D. Robinson, WSBA No. 12999

CARNEY BADLEY SPELLMAN, P.S.

By _____
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647

Attorneys for Petitioner Thurston County

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record via Email and first-class United States mail, postage prepaid, to the following:

Patrick John Schneider Steven J. Gillespie Foster Pepper PLLC 1111 3rd Ave Ste 3400 Seattle WA 98101-3264 Pat.schneider@foster.com Steve.gillespie@foster.com	Elizabeth Petrich Thurston County Prosecuting Attorney's Office 2000 Lakeridge Dr SW Bldg 2 Olympia WA 98502-6001 petrice@co.thurston.wa.us
Donald C. Bauermeister James A. Hertz Friedman Rubin 1126 Highland Ave Bremerton WA 98337-1828 don@friedmanrubin.com jhertz@friendmanrubin.com	John E.D. Powell Jed Powell & Associates PLLC 7525 Pioneer Way, Suite 101 Gig Harbor, WA 98335-1165 jed@jedpowell.com
Carolyn A. Lake Goodstein Law Group, PLLC 501 S G St Tacoma WA 98405-4715 clake@goodsteinlaw.com	Mark R. Johnsen Karr Tuttle Campbell 701 Fifth Ave., Ste. 3300 Seattle, WA 98104 mjohnsen@karrtuttle.com
Josh Weiss Washington State Association of Counties 206 Tenth Ave SE Olympia, WA 98501 jweiss@wsac.org	Daniel G. Lloyd Assistant City Attorney P.O. Box 1995 Vancouver, WA 98668-1995 Dan.lloyd@cityofvancouver.us

Daniel B. Heid City Attorney, City of Auburn 25 W. Main Street Auburn, WA 98001-4998 dheid@auburnwa.gov	

DATED this 24th day of January, 2018.

Patti Saiden

Patti Saiden, Legal Assistant

180 Wash.2d 590
Supreme Court of Washington,
En Banc.

Robin EUBANKS and Erin Gray, Respondents,
v.
David BROWN, individually and on behalf of his marital community, Petitioner,
and
Klickitat County, Klickitat County Prosecuting Attorney's Office, Defendants.

No. 88021–2.
|
June 19, 2014.

Synopsis
Background: Administrative assistants for county deputy prosecuting attorney filed suit against county and prosecuting attorney for sexual harassment, negligent infliction of emotional distress and negligence. Prosecuting attorney filed motion for change of venue. The Superior Court, Clark County, Robert A. Lewis, J., denied motion. Prosecuting attorney appealed. The Court of Appeals, Quinn-Brintnall, J., 170 Wash.App. 768, 285 P.3d 901, affirmed. Prosecuting attorney moved for discretionary review, which was granted.

[Holding:] The Supreme Court, en banc, Fairhurst, J., held that prosecuting attorney's alleged acts were not done in virtue of his public office.

Affirmed.

Madsen, C.J., filed dissenting opinion.

West Headnotes (16)

[1] **Venue**
Place in which action may be brought or tried in general

Initial choice of venue belongs to plaintiff.

Cases that cite this headnote

[2] **Venue**
Objections and exceptions, estoppel, and waiver

Venue
Action not brought in proper county or district

If initial venue is not proper as to defendant, defendant may either waive objection to erroneous venue by failing to object or move to transfer case to where venue is proper.

2 Cases that cite this headnote

[3] **Venue**
Action not brought in proper county or district

If initial venue is not proper as to defendant and defendant objects, case must be transferred to court with proper venue.

1 Cases that cite this headnote

[4] **Venue**
Constitutional and statutory provisions

Proper venue is governed by statute.

2 Cases that cite this headnote

[5] **Venue**
Actions against public officers and others for official acts

If statute governing venue for certain types of suits against public officials applies, venue is mandatory in county where cause arose. West's RCWA 4.12.020(2).

Cases that cite this headnote

[6] **Venue**
Objections and exceptions, estoppel, and waiver

To determine venue, court assumes allegations in complaint are true.

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1 Cases that cite this headnote

[7] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo questions of statutory meaning to discern and implement legislature's intent.

1 Cases that cite this headnote

[8] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

When interpreting statute, courts begin by looking at statute's plain language and ordinary meaning.

1 Cases that cite this headnote

[9] **Statutes**
Plain language;plain, ordinary, common, or literal meaning

Where language of a statute is unambiguous, courts must give effect to that plain meaning as expression of legislative intent.

1 Cases that cite this headnote

[10] **Statutes**
Common or civil law

If legislature uses term well known to common law in statute, it is presumed that legislature intended it to mean what it was understood to mean at common law.

Cases that cite this headnote

[11] **Public Employment**
Authority and Powers

Common law defines "acts done virtute officii," or acts done in virtue of a public office, as acts public official is authorized to perform as part of his or her position, even if improperly or wrongfully performed.

Cases that cite this headnote

[12] **Venue**
Actions against public officers and others for official acts

Alleged acts underlying administrative assistants' claims against county deputy prosecuting attorney for sexual harassment, negligent infliction of emotional distress, and negligence were not done in virtue of attorney's public office, such that attorney was not entitled to venue in county in which cause arose; even though alleged acts occurred at workplace, attorney did not have authority to harass, inflict emotional distress on, or create hostile working environment for other people in his office. West's RCWA 4.12.020(2).

Cases that cite this headnote

[13] **Public Employment**
Authority and Powers

When considering whether act is in virtue of one's position, courts focus on underlying claims in complaint and whether, if all allegations comprising claims in complaint are true, that act would be beyond authority granted to public officer.

Cases that cite this headnote

[14] **Judgment**
Nature and requisites of former adjudication as ground of estoppel in general

Issue preclusion requires: (1) identical issues; (2) final judgment on the merits; (3) party estopped must be either party in prior proceeding or in privity with party; and (4) that applying doctrine will not work injustice on party to whom preclusion will be applied.

Cases that cite this headnote

[15] **Judgment**
What constitutes diversity of issues

Venue determination under statute governing venue for certain types of suits against public officials would not have precluded argument about appropriateness of vicarious liability

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in sexual harassment suit against county and deputy prosecuting attorney, since act occurring in virtue of public office, as required for statute to apply, was different from act occurring in course and scope of employment. West's RCWA 4.12.020(2).

Cases that cite this headnote

[16] Public Employment
Authority and Powers

Public officer acts in course and scope of employment if he or she acts to serve purposes of his or her employer, which is the public.

1 Cases that cite this headnote

Attorneys and Law Firms

****636** Michael Early Mcfarland Jr., Attorney at Law, Spokane, WA, for Petitioner.

Francis Stanley Floyd, Floyd Pflueger & Ringer PS, Seattle, WA, for Defendant.

Philip Albert Talmadge Talmadge/Fitzpatrick, Emmelyn Hart, Lewis Brisbois Bisgaard & Smith, Seattle, WA, Thomas Stephenson Boothe, Attorney at Law, Portland, OR, for Respondent.

Opinion

FAIRHURST, J.

***593** ¶ 1 Petitioner David Brown seeks review of a Court of Appeals published opinion holding that venue for this sexual harassment suit was proper in Clark County. Brown argues that RCW 4.12.020(2) requires that suits against public officers for acts done "in virtue of his or her office" proceed in the county where the acts occurred. In this case, Brown claims the suit brought against him must proceed in Klickitat County. We affirm venue is proper in Clark County because we hold that the acts alleged in this complaint were not "in virtue of" Brown's public office under RCW 4.14.020(2).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶ 2 Respondents Robin Eubanks and Erin Gray allege Brown engaged in sexual harassment against them. From September 2007 to July 2010 Brown was a deputy prosecuting attorney in the Klickitat County Prosecuting Attorney's Office (Prosecutor's Office) where he supervised administrative assistants Eubanks and Gray.

¶ 3 The complaint alleges that Brown engaged in the following inappropriate actions toward Eubanks:

> (1) [S]itting in their shared office with his pants unzipped and legs spread open upon his desk on a regular basis; (2) staring at Ms. Eubanks for unusually long periods of time while Ms. Eubanks was attempting to work; (3) licking his lips constantly while he was talking to Ms. Eubanks; (4) following her around the office; (5) positioning himself so that Ms. Eubanks would need to rub against his body as she left their office; (6) closing the door on the office when they were in the small office space together; and (7) giving gifts to Ms. Eubanks, even though she made it clear she did not want to accept them.

Clark County Clerk's Papers (CCP) at 10. Further, the complaint alleges that Brown engaged in the following inappropriate actions toward Gray:

> (1) [S]taring at Ms. Gray's breasts during the conversations with her several times ****637** daily; (2) staring at Ms. Gray for ***594** unusually long periods of time while Ms. Gray was trying to work at her desk in her office; (3) licking his lips constantly while he was talking to her, as well as following her around the office; (4) positioning himself so that Ms. Gray, who was pregnant at the time, would need to

> rub against [his] body as she left the front door to the office; (5) hanging around outside Ms. Gray's office for unusually long periods of time doing nothing other than breathing heavily.

CCP at 12.

¶ 4 Eubanks and Gray (hereinafter Eubanks) filed this suit against Brown in his individual capacity, the Prosecutor's Office, and Klickitat County in Benton County Superior Court. Eubanks mistakenly believed that RCW 36.01.050, which governs venue for suits against a county, allowed for venue in any neighboring county, rather than the two nearest judicial districts. Upon realizing it was only the two nearest judicial districts, Eubanks moved to transfer venue to an appropriate county, Clark County Superior Court. Brown responded, claiming that under RCW 4.12.020(2), only Klickitat County Superior Court was an appropriate venue for the claims against him. However, his response did not request a change of venue to Klickitat County Superior Court or ask the Benton County Superior Court to deny the transfer of venue to Clark County Superior Court. Benton County Superior Court granted the motion to transfer venue to Clark County Superior Court.

¶ 5 After the change of venue to Clark County Superior Court, Brown moved for a dismissal or a change of venue to Klickitat County Superior Court based on RCW 4.12.025(1) and RCW 4.12.020(2). He argued that venue was proper in Klickitat County Superior Court because he resided there and, alternatively, because the alleged tortious acts occurred in virtue of his public office and took place there. Clark County Superior Court denied Brown's motion to dismiss or motion to change venue on both grounds. The Court of Appeals affirmed. Brown moved for discretionary review, which we granted. *Eubanks v. Brown,* 176 Wash.2d 1026, 301 P.3d 1047 (2013).

***595** II. ISSUE PRESENTED

¶ 6 Do Eubanks' claims against Brown involve acts done in virtue of his public office under RCW 4.12.020(2), thus requiring venue in Klickitat County?

III. ANALYSIS

A. Venue depends on whether RCW 4.12.020(2) applies to this case

[1] **[2]** **[3]** ¶ 7 The initial choice of venue belongs to the plaintiff. *Hatley v. Saberhagen Holdings, Inc.,* 118 Wash.App. 485, 488–89, 76 P.3d 255 (2003) (noting this concept is a "well-established principle"). If initial venue is not proper as to the defendant, the defendant may either waive their objection to the erroneous venue by failing to object or move to transfer the case to where venue is proper. *See, e.g., Youker v. Douglas County,* 162 Wash.App. 448, 459–60, 258 P.3d 60 (2011). If the defendant objects, the case must be transferred to a court with proper venue. *See, e.g., Roy v. City of Everett,* 48 Wash.App. 369, 372, 738 P.2d 1090 (1987). Venue in Benton County Superior Court was not proper as to Brown, and he objected. After the case was transferred to Clark County Superior Court, Brown again objected and moved to change venue. Because Brown objected, the court must make the determination where venue is proper.

[4] **[5]** ¶ 8 Proper venue is governed by statute in Washington. *Parker v. Wyman,* 176 Wash.2d 212, 222, 289 P.3d 628 (2012). There are two venue statutes that might apply to this case, RCW 4.12.020(2) and RCW 36.01.050. RCW 4.12.020(2) applies to certain types of suits against public officials. It provides, in relevant part:

> Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:
>
> ....
>
> (2) Against a public officer, or person specially appointed to execute his or her duties, for an act done by him or her in virtue ***596** of his or her office, or against a person who, by his or her command or in ****638** his or her aid, shall do anything touching the duties of such officer.

RCW 4.12.020. If this statute applies, venue is mandatory in the county where the cause arose. [1]

1 The use of the word "shall" in RCW 4.12.020(2) emphasizes the mandatory nature of this provision. *Ballasiotes v. Gardner,* 97 Wash.2d 191, 195, 642 P.2d 397 (1982) (citing *Wash. State Liquor Control Bd. v.*

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Wash. State Pers. Bd., 88 Wash.2d 368, 377, 561 P.2d 195 (1977)).

¶ 9 The other statute involved, RCW 36.01.050, is applicable to all cases in which a county is a defendant. It authorizes proper venue over a county defendant in "the superior court of such county, or in the superior court of either of the two nearest judicial districts." RCW 36.01.050(1). If venue is not mandatory in the county where the cause arose based on RCW 4.12.020(2), then it is proper in the defendant county or either of the two nearest judicial districts.

[6] ¶ 10 Consequently, this court must first determine whether RCW 4.12.020(2) applies. If it does, venue must be in Klickitat County. To determine venue, the court assumes the allegations in the complaint are true. *Greenius v. Am. Sur. Co. of N.Y.,* 92 Wash. 401, 403, 159 P. 384 (1916) (look at claim of trespass in complaint to determine venue); *Roy,* 48 Wash.App. at 370, 738 P.2d 1090 (look at claims of negligence, failure to perform duties under the domestic violence act, denial of equal protection, denial of federal civil rights, and assault in the complaint to determine venue). The applicability of RCW 4.12.020(2) and venue for this action turn on the statutory interpretation of the phrase "an act done ... in virtue of his or her office."

B. An act in virtue of his or her public office is an act exercising or failing to exercise the authority of the office

[7] **[8]** **[9]** ¶ 11 We must interpret the meaning of "in virtue of" in RCW 4.12.020(2). We review de novo questions of statutory ***597** meaning to discern and implement the legislature's intent. *Manary v. Anderson,* 176 Wash.2d 342, 350–51, 292 P.3d 96 (2013); *State v. J.P.,* 149 Wash.2d 444, 450, 69 P.3d 318 (2003). We begin by looking at the " 'statute's plain language and ordinary meaning.' " *J.P.,* 149 Wash.2d at 450, 69 P.3d 318 (quoting *Nat'l Elec. Contractors Ass'n v. Riveland,* 138 Wash.2d 9, 19, 978 P.2d 481 (1999)). Where the language of a statute is unambiguous, we "must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002).

[10] ¶ 12 "If the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law." *N.Y. Life Ins. Co. v. Jones,* 86 Wash.2d 44, 47, 541 P.2d 989 (1975). RCW 4.12.020(2) has remained essentially unchanged since territorial days. *See* LAWS OF 1854, § 14, at 133.

[11] ¶ 13 The common law defines acts done virtute officii (in virtue of a public office) as acts a public official is authorized to perform as part of his or her position, even if improperly or wrongfully performed. *See, e.g., Greenius,* 92 Wash. at 403–04, 159 P. 384 ("That is to say, if his office gives him authority to act, he is acting in virtue of his office, although, in the performance of a specific duty, he improperly exercises his authority."); *Feller v. Gates,* 40 Or. 543, 546, 67 P. 416 (1902) (" 'Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him.' " (quoting *People ex rel. Kellogg v. Schuyler,* 4 N.Y. 173, 187 (1850) (Pratt, J. dissenting))); *Gerber v. Ackley,* 37 Wis. 43, 44 (1875) ("It is an official act, a failure to perform an official duty, or performing it in an improper manner."). This term was historically contrasted with acts done colore officii (under color of office), which were acts beyond the scope of authority given by one's office. *Greenius,* 92 Wash. at 405, 159 P. 384; *Haffner v. U.S. Fid. & Guar. Co.,* 35 Idaho 517, 520, 207 P. 716 (1922) ("[A]cts ***598** done *'colore offici'* are those which are entirely outside or beyond the authority conferred by the office."), *overruled* ****639** *in part by Helgeson v. Powell,* 54 Idaho 667, 34 P.2d 957 (1934). [2]

2 Many of the cases discussing an act done in virtue of a public office discuss the issue in the context of insurer liability for the actions of law enforcement officers. *See, e.g., Greenius,* 92 Wash. at 401, 159 P. 384. Insurers were liable for acts done in virtue of a public office, but not for acts done under color of office. *Id.* at 403–04, 159 P. 384. The later decisions, like our decision in *Greenius* and the Idaho Supreme Court's opinion in *Helgeson,* abolished the distinction for purposes of insurer liability on the theory that if an officer did wrong, the fact that his or her office authorized the act should not preclude a plaintiff from recovering from the officer's insurer. *Id.* at 407–08, 159 P. 384; *Helgeson,* 34 P.2d at 965–66. As Justice Givens observed in his concurrence in *Helgeson,* this policy decision should have no effect on the meaning of an act done in virtue of a public office in the context of venue. 34 P.2d at 966 (Givens, J. concurring).

¶ 14 This distinction between the two concepts in early common law is illustrated in *Haffner,* an Idaho case, in the

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context of a nearly identical venue statute. 35 Idaho at 520, 207 P. 716. [3] Haffner sued the Power County sheriff under two causes of action: (1) false arrest and imprisonment and (2) conversion. *Id.* In regard to the false arrest, the court held that the sheriff acted in virtue of his public office because he had the authority as part of his office to make arrests and even his wrongful use of that official authority was done in virtue of his public office. *Id.* at 521, 207 P. 716. The sheriff's motivations were irrelevant; all that mattered was whether his action was an authorized act. *See id.* In regard to the conversion claim, the sheriff took Haffner's property without any writ or any process authorizing him to do so and thus this act was not done in virtue of his public office. *Id.* This was not "the improper exercise of an authority conferred upon him by law, but an arbitrary, wholly unauthorized act on his part." *Id.* Since one cause of action ***599** was done in virtue of his public office, the venue statute applied to the whole case and venue was proper only where the cause of action arose.

3 *Helgeson* overruled *Haffner* in regard to when an insurer of police conduct can be held liable. *Id.* at 965–66. After *Helgeson,* surety liability was no longer dependent on what authority the officer had or purported to have. *Id.* Instead, surety liability was thereafter dependent on whether an officer would have taken the action he took if he had not been an officer. *Id.* While this change affected the rule from *Haffner,* it did not overrule what was said about the terminology or how the acts would have been characterized in *Haffner,* which is what we examine above. *Id.* at 966 ("Therefore, *in so far as* [*the rules in Haffner*] *are contrary to the rule herein announced,* they are hereby expressly overruled." (emphasis added)).

¶ 15 While the distinction between and use of the terms has been abandoned, Washington courts have followed this early common law meaning of "an act done in virtue of a public office" when determining the proper venue under RCW 4.12.020(2). In *State ex rel. McWhorter v. Superior Court,* 112 Wash. 574, 574–78, 192 P. 903 (1920), we held that McWhorter had acted in virtue of his public office as an agent of the state humane bureau when he charged Charles D. Davis with animal cruelty in King County, and so the suit had to proceed in the county where the cause of action arose. In doing so, this court implicitly applied the common law definition of "in virtue of a public office" by agreeing that an agent of the state humane bureau is authorized to take legal action against animal cruelty as part of his job and even if he does so wrongly or with improper motivations, the act itself is authorized.

¶ 16 Many years later, the Court of Appeals applied this common law meaning of "an act done in virtue of a public office" in *Roy*. Roy alleged various theories of negligence related to a pattern of the police failing to protect her and her daughter from her daughter's abusive boyfriend. 48 Wash.App. at 370, 738 P.2d 1090. Applying RCW 4.12.020(2), the Court of Appeals held that the police officers had a right to venue in the county where the cause of action arose because it derived from acts done in virtue of a public office. *Id.* at 371–72, 738 P.2d 1090. The police officers' job authorized them to stop the boyfriend's harassment of Roy and her daughter by arresting Roy. Roy's claim that the officers failed to use their valid authority to protect her and her daughter involved acts done in virtue of ***600** their public ****640** office and, so venue was proper where the acts occurred, Snohomish County. [4]

4 The court went on to point out that there might still be policy arguments regarding why venue should be changed in the interest of justice. However, those arguments must be postponed and made in front of the court that is determined to have proper venue; they are inapplicable and should not be considered when determining where statutorily dictated venue resides. *Roy v. City of Everett,* 118 Wash.2d 352, 372, 823 P.2d 1084 (1992). Thus, the many policy arguments made by Eubanks are irrelevant at this juncture and should wait to be presented to the court that is determined to have the proper venue.

¶ 17 Recently, the court again recognized this definition in *Youker,* which involved a suit against a county and two of its police officers for alleged false arrest, false imprisonment, and malicious prosecution. 162 Wash.App. at 453, 258 P.3d 60. The Court of Appeals affirmed the trial court and held that RCW 4.12.020(2) required the suit against the officers to proceed in Douglas County where the arrest that was the subject of the suit occurred. *Id.* at 458, 258 P.3d 60. By doing so, the Court of Appeals implicitly recognized that the officers had acted in virtue of their public office when they arrested and imprisoned Youker because they were acting within their authority as police officers.

[12] ¶ 18 From the clear definitional parameters of this precedent, we hold that an act done by a public

officer in virtue of his or her public office is an act exercising or failing to exercise the authority of the office or performing the authority in an improper manner. The officer's motivations are irrelevant; an officer may act in virtue of his or her public office in a negligent or intentional manner so long as he or she acts with the authority of the office. This definition encompasses suits alleging that an officer has exercised the powers of his or her office for proper or improper motives, as in *Youker* and *Haffner,* and suits where the officer fails to exercise the powers of his or her office, negligently or otherwise, as in *Roy.*

[13] ¶ 19 Under this definition, Brown's acts did not occur in virtue of his public office. When considering whether an act is in virtue of one's position, courts focus on ***601** the underlying claims in the complaint and whether, if all allegations comprising the claims in the complaint are true, that act would be beyond the authority granted to the public officer. *McWhorter,* 112 Wash. at 575, 192 P. 903 (claim of malicious prosecution was within the authority of a state humane bureau officer); *Youker,* 162 Wash.App. at 453, 258 P.3d 60 (claims of false arrest and false imprisonment were within the authority of the police deputies); *Roy,* 48 Wash.App. at 370, 738 P.2d 1090 (claims of negligence, failure to perform duties under the domestic violence act, denial of equal protection, denial of federal civil rights, and assault were within the authority of the police officers). Eubanks' claims against Brown are for sexual harassment, negligent or intentional infliction of emotional distress, and negligence. As a deputy prosecuting attorney, Brown has the authority to take all actions to prosecute citizens who have broken the law. He does not have the authority to harass, inflict emotional distress on, or create a hostile working environment for the other people in his office.

[14] **[15]** ¶ 20 Brown argues that because his actions occurred in the workplace, they were automatically done in virtue of his public office. This is not true. He frames this basic argument three ways: (1) because the actions occurred during his employment, they occurred in virtue of his public office; (2) because his actions were taken as part of his supervisory capacity, they were taken in virtue of his public office; and (3) acts that are within the course and scope of employment must also be in virtue of one's public office. [5] We reject this ***602** contention that ****641** acts occurring in a workplace are necessarily done in virtue of one's public office.

5 Brown argues a venue determination under RCW 4.12.020(2) could preclude a determination regarding whether the official acted in the course and scope of employment. Issue preclusion requires (1) identical issues, (2) a final judgment on the merits, (3) the party estopped must be either a party in the prior proceeding or in privity with a party, and (4) that applying the doctrine will not work an injustice on the party to whom the preclusion will be applied. *Schroeder v. Excelsior Mgmt. Grp., LLC,* 177 Wash.2d 94, 297 P.3d 677 (2013). An act occurring in virtue of a public office is related to but different than an act occurring in the course and scope of employment. Because the different types of acts do not involve identical issues, a venue determination under RCW 4.12.020(2) would not preclude argument about the appropriateness of vicarious liability.

[16] ¶ 21 Employment alone is not sufficient to make an act in virtue of a public office. Brown needed to have acted with authority granted to him from his position not just his employment. The same is true for his supervisory role. A supervisory position does not make all of the supervisor's acts automatically in virtue of his public office. Further, acts within the course and scope of employment are not all done in virtue of one's public office. An officer acts in the course and scope of employment if he or she *acts to serve the purposes of his or her employer*—the public. *Robel v. Roundup Corp.,* 148 Wash.2d 35, 53–54, 59 P.3d 611 (2002). An officer acts in virtue of his public office when *acting with authority granted to him because of that position,* regardless of underlying motivations. *Greenius,* 92 Wash. at 403–04, 159 P. 384.

¶ 22 Brown was a deputy prosecuting attorney. His public office gave him the authority to prosecute. His public office did not give him the authority to harass, inflict emotional distress upon, or create a hostile work environment for his coworkers. This is not a case where a public officer used valid authority for an improper motive. This is a case where a public officer is trying to use his office to justify acts outside his designated authority. Such acts are not "in virtue of", his public office, and thus, RCW 4.12.020(2) does not control venue in this case.

IV. CONCLUSION

¶ 23 We hold that because the alleged claims of sexual harassment, negligent or intentional infliction of emotional distress, and negligence were not done in virtue of his public office, RCW 4.12.020(2) does not entitle Brown to venue in Klickitat County. He does not renew before us his argument that venue is proper in Klickitat County by virtue of his residence. Nor has he at any point argued that venue is proper in Klickitat County because Eubanks' ***603** injury occurred there. Consequently, we affirm the trial court and the Court of Appeals. Venue is proper in Clark County Superior Court, and the action should proceed there.

WE CONCUR: JAMES M. JOHNSON, J.P.T., CHARLES W. JOHNSON, SUSAN OWENS, DEBRA L. STEPHENS, CHARLES K. WIGGINS, STEVEN C. GONZALEZ, and SHERYL GORDON McCLOUD, Justices.

Mary I. Yu, J., not participating.

MADSEN, C.J. (dissenting).

¶ 24 Under RCW 4.12.020(2), a cause of action against a public officer shall be tried in the county where the cause arose if the acts occurred in virtue of his or her office. The issue here is whether venue is proper in Klickitat County where the defendant, Davis Brown, was working as a deputy attorney at the time the alleged acts of sexual harassment and related claims occurred. Brown contends venue is proper in Klickitat County under the statute because the acts in question occurred in virtue of his office. I agree.

Discussion

¶ 25 The majority makes two analytical mistakes on the way to its conclusion that Mr. Brown's acts did not occur in virtue of his office. The majority distinguishes between acts done "virtute officii," in virtue of office, and those done "colore officii," under color of office.[1] But this distinction ignores our cases to the contrary, and it is inconsistent ****642** with the vast body of authority from other jurisdictions, which explicitly reject this distinction in determining whether an officer's acts were in virtue of his or her office.

1 "Virtute officii" is defined as "[b]y virtue of one's office; by the authority vested in one as the incumbent of a particular office. [ ] An officer acts *virtute officii* when carrying out some official authority as the incumbent of an office." BLACK'S LAW DICTIONARY 1706 (9th ed.2009). Early common law distinguished between acts done virtute officii and acts done colore officii. Acts done virtute officii were "those within the authority of the officer, but done in an improper exercise of his authority *or in abuse of the law,*" while acts done colore officii were "of such nature the office gives him no authority to do them." *See* 2 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 1263–64 (1904) (emphasis added).

***604** ¶ 26 The second mistake the majority makes is relying on outdated Idaho case law to conclude that the distinction remains critical in venue determinations. The majority seems to recognize our cases have rejected the distinction. However, it finds compelling *Haffner v. United States Fidelity & Guaranty Co.,* 35 Idaho 517, 520, 207 P. 716 (1922), which addressed similar statutory language. Unfortunately for the majority, *Haffner* was overruled in relevant part and now the sole Idaho support in favor of continuing the distinction in the venue context is the concurring opinion in the overruling case. *Helgeson v. Powell,* 54 Idaho 667, 34 P.2d 957 (1934) (overruling *Haffner* in part); *id.* at 966 (Givens, J., concurring).

¶ 27 RCW 4.12.020(2) has remained essentially unchanged since territorial days. We have a significant line of cases interpreting this statute that reject a distinction between "virtute officii" and "colore officii." But rather than adhere to the "clear definitional parameters of this precedent," the majority reintroduces a distinction long abandoned in modern jurisprudence. Majority at 640. This is not in line with either the cases or the principle of upholding settled law where it is neither harmful nor incorrect. *See, e.g., State v. Barber,* 170 Wash.2d 854, 863, 248 P.3d 494 (2011) ("[t]hese considerations have led us to require 'a clear showing that an established rule is incorrect and harmful before it is abandoned' " (quoting *In re Rights to Waters of Stranger Creek,* 77 Wash.2d 649, 653, 466 P.2d 508 (1970))).

¶ 28 When determining venue, we do not reach the merits of the case; rather, we look to the allegations in the complaint only insofar as it is necessary to determine proper venue within the meaning of the statute. *See State ex rel. Hand v. Superior Court,* 191 Wash. 98, 108, 71 P.2d

24 (1937). If a statute includes a term of art, we strive to give it the technical meaning. *Swinomish Indian Tribal Cmty. v. Dep't of Ecology,* 178 Wash.2d 571, 581, 311 P.3d 6 (2013). We also consider relevant Washington case law illuminating ***605** the meaning of a statute. *Jongeward v. BNSF Ry.,* 174 Wash.2d 586, 594, 278 P.3d 157 (2012).

¶ 29 Here, we do not write on a clean slate. The court has expressly rejected the early common law distinction. *See Greenius v. Am. Surety Co. of N.Y.,* 92 Wash. 401, 405, 159 P. 384 (1916). In *Greenius,* a constable, acting without reasonable grounds, unlawfully arrested the plaintiffs and, in the process, shot and severely injured one. In determining whether the constable acted in virtue of his office, the court recognized that "[m]uch mental energy had been expended in drawing distinctions" between acts done virtute officii and colore officii. *Id.* at 403, 159 P. 384. The court reasoned the best argument for rejecting this distinction was the hopeless and interminable confusion of the cases. *Id.* at 404, 159 P. 384. The court also concluded that it makes no difference whether the officer acted with or without process or warrant: "[h]e is an officer just the same, and his acts, *whether right or wrong,* are in *virtute officii.*" *Id.* at 407, 159 P. 384 (emphasis added).

¶ 30 In defining the meaning of "in virtue of his office," the court committed to the "later and better rule" in line with the "preponderating authority," which held that an act in virtue of one's office includes acts that occur either virtute officii or colore officii. *Id.* at 405, 159 P. 384 (citing *Lammon v. Feusier,* 111 U.S. 17, 17–21, 4 S.Ct. 286, 28 L.Ed. 337 (1884)). Where an officer engaged in acts "outside of the performance of *any duty* imposed by law," the surety would not be liable. *Id.* at 407, 159 P. 384 (emphasis added). However, the court explained if the officer had the authority to make an arrest and was officially engaged, his acts, whether right or wrong, lawful or not, were in virtue of his office. *Id.*

¶ 31 In *Jahns v. Clark,* 138 Wash. 288, 244 P. 729 (1926), *Greenius* was reinforced. In *Jahns,* we recognized courts that long before had ceased to view the distinction with much tolerance and again noted that the distinction yields a rule that is neither workable nor sensible. *See Jahns,* 138 Wash. at 294–95, 244 P. 729. *Jahns* involved a deputy sheriff who wrongfully shot the plaintiff, a minor. ****643** The deputy was at the location in search of ***606** bootleggers. When the plaintiff's car neared the officer's location, without any cause to believe the occupants guilty of the crime and without any signal to stop them, the deputy fired a sawed-off shotgun into the car, wounding the plaintiff. The defendants argued that because the act was wrongful, it was "not an official one." *Id.* at 294, 244 P. 729. This court rejected the argument and held "[w]hether the act was one done ... by virtue of his office or under color of his office, is of no importance, and the court was correct in assuming that the act was an official act." *Id.* at 298, 244 P. 729.

¶ 32 In another case we held the wrongful acts of military police officers, acting under the guise of authority as Grays Harbor police officers, were not official acts because the military officers had no authority or legal right to act as civilian police officers. *Hand,* 191 Wash. at 103–04, 71 P.2d 24. Whether the acts were lawful or not is not the critical inquiry, however. Rather, the question is whether the officers had the authority to act. Because the military police officers had no legal authority to act as civilian police officers, their acts were not official acts. *Id.*

¶ 33 Officers acting unlawfully while engaged in the performance of official duties have long been characterized as committing acts in virtue of their office. *See, e.g., State ex rel. McWhorter v. Superior Court,* 112 Wash. 574, 577, 192 P. 903 (1920) (the defendant's acts of malicious prosecution were performed while acting as an agent of the state humane society); *see also Hand,* 191 Wash. at 104, 71 P.2d 24 (noting *McWhorter* was acting under color of and in virtue of his office as a public official); *Roy v. City of Everett,* 48 Wash.App. 369, 738 P.2d 1090 (1987) (implicitly recognizing proposition that regardless of whether the officer's acts were lawful or unlawful, if the officer was engaged in the performance of his official duties the acts, as official acts, and venue are proper in the county where the acts occurred; plaintiffs sued the officers, among others, on theories of negligence, equal protection and civil rights violations, and assault).

***607** ¶ 34 This is in line with the vast body of authority rejecting the distinction. *See Greenius,* 92 Wash. at 405, 159 P. 384 (" '[t]he almost uniform current of the later cases, however, regards wrongful acts of a public officer *colore officii* as official acts' " (quoting *Lee v. Charmley,* 20 N.D. 570, 129 N.W. 448, 449 (1910))); *Jahns,* 138 Wash. at 295, 244 P. 729 (holding "in so far as [*Marquis*] expresses an opinion that the distinction referred to should exist, the case is now finally expressly overruled" (overruling *Marquis v. Willard,* 12 Wash. 528, 41 P. 889 (1895)));

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Helgeson, 34 P.2d at 965 ("we believe that the great weight of authority and the more modern decisions state the better rule—that it is immaterial whether the officer was acting by virtue of his office or under color of office, the surety is bound for his acts" (citing *Jahns,* 138 Wash. at 296–97, 244 P. 729)); *see also Lammon,* 111 U.S. 17, 4 S.Ct. 286, 28 L.Ed. 337 (recognizing and affirming the authorities rejecting the distinction).

¶ 35 Here, it is that undisputed Mr. Brown worked as a supervising deputy attorney. In this position he had the authority to supervise the plaintiffs. Whether he used his authority properly—or improperly, wrongfully, or unlawfully—his actions were within the ambit of his "supervisory" authority. Under our clear precedent Mr. Brown's actions were in virtue of his office.

¶ 36 But rather than adhere to this well-established and widely supported principle, the majority concludes that Mr. Brown "has the authority to take *all actions* to prosecute citizens who have broken the law. He does not have the authority to harass, inflict emotional distress on, or create a hostile working environment for the other people in his office." Majority at 640 (emphasis added). [2]

2 Contrary to the majority's assertion that Mr. Brown lacks authority, when addressing the issue of supervisor authority and sexual harassment in the related context of vicarious liability and agency principles, the United States Supreme Court stated, "[i]n the usual case, a supervisor's harassment involves *misuse of actual power,* not the false impression of its existence." *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 759, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (emphasis added). It follows that because Mr. Brown's actions stemmed from his "actual power" or authority *as a supervisor,* his actions clearly occurred in virtue of his public office.

****644** ***608** ¶ 37 But this reasoning does not accord with our precedent. In cases discussed above, it was plain that a police officer has the authority to take all actions to protect and serve but he does not have the right to unlawfully arrest or shoot someone without cause. *Greenius,* 92 Wash. at 402–03, 159 P. 384; *Jahns,* 138 Wash. at 289, 244 P. 729. A police officer may not lawfully assault or violate the civil rights of citizens. *Roy,* 48 Wash.App. at 370, 738 P.2d 1090. An attorney, as the agent of the state, has the authority to take all actions to prosecute citizens for violations of the law, but he or she has no legal right to engage in malicious prosecution. *McWhorter,* 112 Wash. at 574, 192 P. 903. But each of these cases would have been wrongly decided under the majority's rule defining "official acts" to exclude those done colore officii. Each of the acts at issue, which this court consistently held to be "official," could no longer be so because they do not fall within the majority's constrained definition of acts done in virtue of one's office.

¶ 38 It is hard to understand why the majority rejects this court's sound precedent, only to breathe new life into a doctrine that will once again lead to "interminable confusion" and absurd results. It is necessary only to read the cases to understand why the old rule was unworkable. *See Greenius,* 92 Wash. at 407, 159 P. 384 (noting 100 years of arguments attempting to fix an arbitrary line of demarcation between acts done virtute officii and colore officii left the cases in disarray). Yet, a century of fanciful arguments, litigation, and confusion has not dissuaded the majority from returning to the old rule and reviving the distinction.

Conclusion

¶ 39 The majority's holding disregards precedent and reinstates an antiquated distinction between acts done virtute officii and colore officii—a test that was unworkable and senseless at common law and remains so today. I would ***609** uphold this court's well-reasoned precedent and conclude that Mr. Brown's acts were official acts. Because he was a supervising deputy attorney, he necessarily had the authority and the power to exercise his supervisory duties, whether he did so improperly or unlawfully. Under RCW 4.12.020(2), venue should be proper in Klickitat County.

¶ 40 I dissent.

All Citations

180 Wash.2d 590, 327 P.3d 635

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Superseded by Statute as Stated in ZDI Gaming Inc. v. State ex rel. Washington State Gambling Com'n, Wash., January 12, 2012

42 L.R.A. 33
Supreme Court of Washington.

NORTHWESTERN & PACIFIC HYPOTHEEK BANK
v.
STATE.

Oct. 28, 1897.

Synopsis
Appeal from superior court, Thurston county; Charles H. Ayer, Judge.

Action by the Northwestern & Pacific Hypotheek Bank (Northwestern & Pacific Mortgage Company) against the state. From a judgment for defendant, plaintiff appeals. Reversed.

West Headnotes (1)

[1] **States**
Construction of grant of consent

Laws 1895, p. 188, § 1, providing that "any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county," was enacted pursuant to Const. art. 2, § 26, providing that the legislature shall direct in what manner and in what courts "suits against the state shall be brought"; and the word "claim," as used in said act includes all causes of action.

19 Cases that cite this headnote

Attorneys and Law Firms

****586** ***74** O. G. Ellis and A. H. Denman, for appellant.

P. H. Winston and Thos. M. Vance, for the State.

Opinion

GORDON, J.

This action was instituted by the appellant in the superior court of Thurston county for the purpose of having a judgment awarding a lien in respondent's favor against certain lands in King county decreed to be subject to a prior mortgage held by ****587** plaintiff upon said lands. A demurrer upon the ground that the superior court had no jurisdiction was sustained, and, the plaintiff electing to stand on its pleading, judgment of dismissal was rendered, and the cause appealed.

The question to be determined is, does the act approved March 20, 1895 (Sess. Laws, p. 188), confer jurisdiction upon the superior court of Thurston county to hear and determine controversies of the character herein involved? The act is entitled "An act authorizing actions against the state." Section 1 provides that "any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county." The section further provides for like pleadings as in other actions. Section 2 of the act provides that the complaint shall be served upon the attorney ***75** general, and also upon the secretary of state. Section 3 provides that the attorney general shall appear and act as counsel for the state, and that appeals "may be taken to the supreme court of the state as in other actions." Section 4 provides that no execution shall issue against the state on any judgment, but when final judgment is given against the state the auditor shall audit and pay the amount of damages and costs therein awarded, upon a certified transcript of such judgment being furnished. The last section of the act (section 5) makes the statute of limitations applicable to actions against the state. It is the contention of the attorney general that the word "claim," used in section 1 of this statute, means a claim for money; that the statute is one in derogation of common law, and should be strictly construed. On the other hand, appellant's contention is that the statute is a remedial one, passed in furtherance of a constitutional provision, and that it should receive a liberal construction. And much authority has been cited in support of the respective views of counsel. But we think the statute must be construed as having been passed for the purpose of giving effect to section 26, art. 2, of the state constitution, requiring that "the legislature shall direct by law in what manner and in what courts suits

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may be brought against the state." By this provision we think it was intended that the state might be permitted to be sued in like manner as an individual, and it was left to the legislature to determine in what court such suits should be brought, and to prescribe the method of procedure. In the light of this constitutional provision, we think that the word "claim," used in the statute, was intended to mean, and should be given the same ***76** meaning as the term or phrase "cause of action." We think the question is in no wise affected by the provision of section 4 of the act, requiring the auditor to pay damages and costs awarded against the state by any judgment. That section ought not to be construed as a limitation. The word "suits," as used in the constitution (section 26, supra), is not used in a restricted sense, nor limited to suits for the recovery of money only. Nothing in the provision warrants any such interpretation. We think the word was used in a more comprehensive sense. When the legislature undertook to make the provision effective, it is not to be supposed that it intended to provide a method for bringing some only of the suits contemplated by the constitution. The word "claim" has been variously defined. "In a statute authorizing the courts to order a bill of particulars of the 'claim' of either party, 'claim' is co–extensive with 'case,' and embraces all causes of action and all grounds of defense." Black, Law Dict., under word "Claim." And in Minick v. City of Troy, 83 N. Y. 514, it was construed as synonymous with "cause of action." In Prigg v. Pennsylvania, 16 Pet. 615, the United States supreme court (Story, J.) say: "What is a claim? It is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do or to forbear to do some act or thing, as a matter of duty." See, also, U. S. v. Wilcox, 4 Blatchf. 385, Fed. Cas. No. 16,691; Darby v. Wright, 3 Blatchf. 170, Fed. Cas. No. 3,574; Ellis v. Polhemus, 27 Cal. 350; Gray v. Palmer, 9 Cal. 636. In the last case cited the court say: "The word 'claim' is certainly a very broad term, when used in certain connections, and in reference to certain matters. Lord Coke truly says that 'the word "demand" is the ***77** largest word known to the law, save only "claim," and a release of all demands discharges all right of action.' Chief Justice Nelson says: 'The word "claim" is of much broader import than the word "debt," and embraces rights of action belonging to the debtor, beyond those which may appropriately be called debts.'" The order and judgment will be reversed, and the cause remanded, with directions to the superior court to overrule the demurrer.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

All Citations

42 L.R.A. 33, 18 Wash. 73, 50 P. 586

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152 Wash.2d 299
Supreme Court of Washington,
En Banc.

Kimball D. CHRISTENSEN,
a single man, Respondent,
v.
GRANT COUNTY HOSPITAL DISTRICT
NO. 1 d/b/a Samaritan Hospital, a
nonprofit municipal corporation, Petitioner.

No. 73772–0.
|
Argued Feb. 12, 2004.
|
Decided Aug. 26, 2004.
|
As Amended Aug. 31, 2004.

Synopsis

Background: After paramedic's administrative claim against county hospital district for retaliatory discharge for union activities was decided against him by Public Employment Relations Commission (PERC), he sued county hospital district for tort of wrongful discharge in violation of public policy. The Superior Court, Grant County, Evan E. Sperline, J., granted summary judgment for county hospital district. Paramedic appealed. The Court of Appeals, 114 Wash.App. 579, 60 P.3d 99, reversed, finding that administrative decision by PERC did not preclude his subsequent tort claim. County hospital district petitioned for review.

[Holding:] The Supreme Court, Madsen, J., held that collateral estoppel applied to bar relitigating issue of whether paramedic was discharged in retaliation for union activities.

Judgment of Court of Appeals reversed.

Sanders, J., filed a dissenting opinion in which Chambers and Ireland, JJ., joined.

West Headnotes (18)

[1] **Labor and Employment**
Liability of Employers or Employers' Organizations in General

Discharge that violates statute providing that employees have right to engage in collective bargaining can give rise to tort cause of action for discharge in violation of public policy. West's RCWA 49.32.020.

Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

Appeal and Error
Effect of Findings Below

On appeal from summary judgment, the appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.

12 Cases that cite this headnote

[3] **Appeal and Error**
Cases Triable in Appellate Court

Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo.

13 Cases that cite this headnote

[4] **Judgment**
Scope and Extent of Estoppel in General

"Collateral estoppel," or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties.

27 Cases that cite this headnote

[5] **Judgment**
Scope and Extent of Estoppel in General

Collateral estoppel is distinguished from claim preclusion in that, instead of preventing a

second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.

7 Cases that cite this headnote

[6] **Judgment**
Nature and Elements of Bar or Estoppel by Former Adjudication
Judgment
Scope and Extent of Estoppel in General

"Claim preclusion," also called "res judicata," is intended to prevent relitigation of an entire cause of action, while collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.

17 Cases that cite this headnote

[7] **Judgment**
Nature and Requisites of Former Adjudication as Ground of Estoppel in General

The collateral estoppel doctrine promotes judicial economy, serves to prevent inconvenience or harassment of parties, and provides for finality in adjudications.

2 Cases that cite this headnote

[8] **Judgment**
Matters Actually Litigated and Determined
Judgment
Essentials of Adjudication

Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in an earlier proceeding.

8 Cases that cite this headnote

[9] **Judgment**
Scope and Extent of Estoppel in General

Party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

49 Cases that cite this headnote

[10] **Judgment**
Nature and Requisites of Former Adjudication as Ground of Estoppel in General

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

67 Cases that cite this headnote

[11] **Administrative Law and Procedure**
Res Judicata

In addition to the regular collateral estoppel factors, three additional factors must be considered under Washington law before collateral estoppel may be applied to administrative agency findings: (1) whether the agency acted within its competence; (2) the differences between procedures in the administrative proceeding and court procedures; and (3) public policy considerations.

5 Cases that cite this headnote

[12] **Jury**
Issues of Law or Fact in General

There is no state constitutional right to a jury trial on a factual issue that was already resolved in a prior proceeding.

Cases that cite this headnote

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[13] **Judgment**
Nature and Requisites of Former Adjudication as Ground of Estoppel in General

The injustice component to a collateral estoppel analysis, providing that for collateral estoppel to apply, it must not work an injustice on the party against whom it is applied, is generally concerned with procedural, not substantive irregularity.

28 Cases that cite this headnote

[14] **Labor and Employment**
Conclusiveness of Determination or Order;Res Judicata

Collateral estoppel precluded employee from litigating claim against employer in court for wrongful discharge in violation of public policy, after Public Employment Relations Commission (PERC) issued administrative decision denying employee's claim of retaliatory discharge for union activities; although employee's tort action rested on public policy, a court action was not the only way in which to vindicate such policy, particularly in light of the authority granted to PERC and the express legislative recognition of PERC's expertise. West's RCWA 41.58.005(1).

6 Cases that cite this headnote

[15] **Labor and Employment**
Conclusiveness of Determination or Order;Res Judicata

Evidence failed to establish any procedural unfairness in administrative proceedings resulting in injustice, which would have precluded application of collateral estoppel to prevent employee from litigating claim against employer in court for wrongful discharge in violation of public policy, after Public Employment Relations Commission (PERC) issued administrative decision denying employee's claim of retaliatory discharge for union activities; although employee alleged that he was represented by a union lawyer rather than his own counsel in administrative proceedings, and that his claim was only one of several unfair practices claims brought by union, the record established that he had a full and fair opportunity to litigate, and that he consented to and approved of the union's activities on his behalf, even though he could have declined.

10 Cases that cite this headnote

[16] **Labor and Employment**
Conclusiveness of Determination or Order;Res Judicata

Alleged disparity in remedies between administrative and court proceedings did not preclude application of collateral estoppel, which prevented employee from litigating claim against employer in court for wrongful discharge in violation of public policy, after Public Employment Relations Commission (PERC) issued administrative decision denying employee's claim of retaliatory discharge for union activities; PERC had authority to order payment of damages and reinstatement of employees, and such stakes provided sufficient incentive in the administrative proceedings to vigorously litigate the issue of whether employee was discharged because of his union activities. West's RCWA 41.56.160(2).

3 Cases that cite this headnote

[17] **Labor and Employment**
Conclusiveness of Determination or Order;Res Judicata

Public Employment Relations Commission (PERC) was competent to decide whether employee was discharged because of his union activities in administrative claim for retaliatory discharge, and such decision precluded employee, under doctrine of collateral estoppel, from litigating tort claim against employer in court for wrongful discharge in violation of public policy; issue in the administrative proceedings and the court case were the same, that is, whether employer

discharged employee in retaliation for his union activities, and PERC was competent to resolve factual issues raised in unfair labor practices complaints, including the issue of the reason for employee's discharge.

4 Cases that cite this headnote

[18] Judgment

Nature and Elements of Bar or Estoppel by Former Adjudication

For claim preclusion to apply there must be identical subject matter, cause of action, persons and parties, and the quality of the persons for or against whom the claim is made.

Cases that cite this headnote

Attorneys and Law Firms

****959 *302** Susan Wilder Troppman, Etter McMahon Lamberson & Clary PC, Spokane, for Petitioner.

Michael A. Arch, Foreman Arch Dodge, Volyn & Zimmerman, Wenatchee, Shelley Movae Buckholtz, Mikkelborg, Broz, Wells & Fryer, Seattle, for Respondent.

Michael Barr King, Lane Powell Spears Lubersky LLP, Stewart Andrew Estes, Keating Bucklin & McCormack, Ralph Crockett Pond, Lane Powell Spears Lubersky LLP, Seattle, for Amicus Curiae Washington Defense Trial Lawyers.

Kathleen Phair Barnard and Jeffrey L. Needle, Seattle, for Amicus Curiae Washington Employment Lawyers Association.

Opinion

MADSEN, J.

Petitioner Grant County Hospital District No. 1, doing business as Samaritan Hospital (Samaritan), challenges a Court of Appeals decision reversing a grant of summary judgment in Samaritan's favor. The court held ***303** that if a public employee claiming retaliatory discharge for union activities fails to obtain relief in administrative proceedings on an unfair labor practices claim, collateral estoppel will not preclude relitigation of the reason for discharge in a later court action for wrongful discharge in violation of public policy. The court remanded to allow respondent Kimball D. Christensen's tort claim to go forward. We reverse.

FACTS

Samaritan hired Christensen as a paramedic in January 1996. Christensen became actively involved in efforts to unionize Samaritan's emergency medical service employees. In June 1997, the Public Employment Relations Commission (PERC) certified the International Association of Emergency Medical Technicians and Paramedics (the union) as the exclusive bargaining representative of Samaritan's paramedic employees. At several points coinciding with the labor negotiations, Christensen received unfavorable supervisor evaluations and discipline.

On October 14, 1997, the union filed an unfair labor practices complaint with PERC, alleging that Samaritan discriminated against Christensen and two other employees for their union activities in violation of the Public Employees' Collective Bargaining Act, chapter 41.56 RCW. Before that complaint was resolved, Samaritan terminated Christensen's employment. On January 28, 1998, the union amended its complaint to allege that Samaritan discharged Christensen because of his participation in protected union activities. On Christensen's behalf the union sought his reinstatement, compensatory damages, including back pay, benefits and interest, and costs and attorney fees.

On March 18 and 19, 1998, PERC held a hearing. Christensen was represented by the union's lawyer. During the proceedings counsel made an opening statement, called eight witnesses to testify about the claim involving Christensen and submitted the declarations of two others, ***304** cross-examined Samaritan's witnesses (including the hospital administrator, personnel director, and ambulance director), offered exhibits, and made evidentiary objections. A little over eight pages of the union's posthearing brief evaluated the evidence relating to Christensen's discharge.

On April 30, 1998, the hearing examiner issued his findings of fact, conclusions of law, and order dismissing the union's complaint. The hearing examiner concluded that the union failed to sustain its burden to establish a prima facie case that Samaritan's action in discharging Christensen was substantially motivated by his exercise of rights protected ****960** by chapter 41.56 RCW and also found that Samaritan articulated lawful reasons for the discharge, i.e., sexual harassment, "so that no violation of RCW 41.56.140(1) [1] is established in regard to Christensen." Conclusion of law 2, Clerk's Papers (CP) at 112.

1 RCW 41.56.140(1) makes it an unfair labor practice for a public employer "[t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by" chapter 41.56 RCW (pertaining to public employees' collective bargaining rights).

On May 19, 1999, the union filed an appeal with PERC, and on December 14, 1999, PERC affirmed the examiner's findings, conclusions, and order and adopted them as the PERC decision. Neither party appealed the decision to superior court.

[1] In November 2000, Christensen filed suit in Grant County Superior Court, alleging that Samaritan discharged him in retaliation for his union activities in violation of public policy stated in RCW 49.32.020.[2] On October 25, ***305** 2001, Samaritan moved for summary judgment, arguing that collateral estoppel barred relitigation of the issue whether Christensen was discharged in retaliation for his union activity. On April 1, 2001, the court granted the motion.

2 A discharge that violates RCW 49.32.020 can give rise to a tort cause of action for discharge in violation of public policy. *Bravo v. Dolsen Cos.,* 125 Wash.2d 745, 758, 888 P.2d 147 (1995). RCW 49.32.020 provides:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the state of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the state of Washington is hereby declared as follows:
>
> WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.

Christensen appealed and the Court of Appeals reversed, concluding that *Smith v. Bates Technical College,* 139 Wash.2d 793, 991 P.2d 1135 (2000) "permits a public employee whose union fails to achieve a remedy from PERC to file a separate superior court tort claim for wrongful termination in violation of public policy." *Christensen v. Grant County Hosp. Dist. No. 1,* 114 Wash.App. 579, 581–82, 60 P.3d 99 (2002), *review granted,* 150 Wash.2d 1002, 77 P.3d 650 (2003).

ANALYSIS

[2] **[3]** Summary judgment is appropriate where there are no disputed material facts, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State,* 148 Wash.2d 278, 289, 60 P.3d 67 (2002). The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party. *Williamson, Inc. v. Calibre Homes, Inc.,* 147 Wash.2d 394, 398, 54 P.3d 1186 (2002). Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo. *State v. Vasquez,* 109 Wash.App. 310, 314, 34 P.3d 1255 (2001), *aff'd,* 148 Wash.2d 303, 59 P.3d 648 (2002); *State v. Bryant,* 100 Wash.App. 232, 236–37, 237 n. 9, 996 P.2d 646 (2000), *rev' on other grounds,* 146 Wash.2d 90, 42 P.3d 1278 (2002); *see* ***306** *Purdy v. Zeldes,* 337 F.3d 253, 258 (2d Cir.2003) (district court's grant of summary judgment on the basis of collateral estoppel is reviewed de

novo); *Fireman's Fund Ins. Co. v. Stites,* 258 F.3d 1016, 1020 (9th Cir.2001) (under summary judgment standard of review availability of collateral estoppel is an issue of law reviewed de novo).

[4] **[5]** **[6]** Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, WASHINGTON PRACTICE, ****961** *Civil Procedure* § 35.32, at 475 (1st ed.2003) (hereafter Tegland, *Civil Procedure*). It is distinguished from claim preclusion " 'in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted.' " *Rains v. State,* 100 Wash.2d 660, 665, 674 P.2d 165 (1983) (emphasis added) (quoting *Seattle–First Nat'l Bank v. Kawachi,* 91 Wash.2d 223, 225–26, 588 P.2d 725 (1978)); *Kyreacos v. Smith,* 89 Wash.2d 425, 427, 572 P.2d 723 (1977); *see Shoemaker v. City of Bremerton,* 109 Wash.2d 504, 507, 745 P.2d 858 (1987); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 WASH. L.REV.. 805, 805, 813–14, 829 (1985) (hereafter Trautman, *Claim and Issue Preclusion*); Tegland, *Civil Procedure* § 35.32, at 475. Claim preclusion, also called res judicata,[3] "is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n,* 72 Wash.2d 887, 894, 435 P.2d 654 (1967).

3 The term "res judicata" has sometimes been used to apply to both issue and claim preclusion. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 WASH. L.REV.. 805 (1985).

[7] The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Reninger v. Dep' t of Corr.,* 134 Wash.2d 437, 449, 951 P.2d 782 (1998). Also implicated are principles of ***307** repose and concerns about the resources entailed in repetitive litigation. Tegland, *Civil Procedure* § 35.21, at 446. Collateral estoppel provides for finality in adjudications. Trautman, *Claim and Issue Preclusion,* 60 WASH. L.REV.. at 806.

[8] **[9]** **[10]** Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Shoemaker,* 109 Wash.2d at 507, 745 P.2d 858. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wash.2d 255, 264–65, 956 P.2d 312 (1998). For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger,* 134 Wash.2d at 449, 951 P.2d 782; *State v. Williams,* 132 Wash.2d 248, 254, 937 P.2d 1052 (1997); *Claim and Issue Preclusion,* 60 WASH. L.REV.. at 831.

[11] **[12]** Both state and federal courts have applied collateral estoppel where an issue was adjudicated by an administrative agency in the earlier proceeding. *E.g., Univ. of Tenn. v. Elliott,* 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986); *Miller v. County of Santa Cruz,* 39 F.3d 1030 (9th Cir.1994); *Reninger,* 134 Wash.2d 437, 951 P.2d 782; *Shoemaker,* 109 Wash.2d 504, 745 P.2d 858; *Luisi Truck Lines,* 72 Wash.2d 887, 435 P.2d 654; *see Claim and Issue Preclusion,* 60 WASH. L.REV.. at 830. The United States Supreme Court has applied issue preclusion to enforce repose where an administrative agency has acted in a judicial capacity and resolved disputed issues of fact:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue ***308** identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107–08, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). Three additional factors must be considered under Washington

law **962 before collateral estoppel may be applied to agency findings: (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations. *Reninger,* 134 Wash.2d at 450, 951 P.2d 782; *Shoemaker,* 109 Wash.2d at 508, 745 P.2d 858; *State v. Dupard,* 93 Wash.2d 268, 275, 609 P.2d 961 (1980). [4]

4 The dissent maintains that applying collateral estoppel to bar relitigation of factual determinations made by an administrative agency violates the state constitutional right to a jury. We held, however, in the face of a similar dissenting view, that there is no state constitutional right to a jury trial on a factual issue that was already resolved in a prior proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wash.2d 255, 264–69, 956 P.2d 312 (1998); *see, e.g., Reninger v. Dep't of Corr.,* 134 Wash.2d 437, 951 P.2d 782 (1998) (holding that public employees' claims of tortious interference with business expectancy were collaterally estopped by factual determinations made by the Personnel Appeals Board). While the dissent maintains that *Reninger* was overruled sub silentio by *State v. Vasquez,* 148 Wash.2d 303, 59 P.3d 648 (2002), the majority in *Vasquez* distinguished *Reninger,* disagreeing with the concurring opinion's identical claim in *Vasquez* that *Reninger* was overruled sub silentio. *Vasquez,* 148 Wash.2d at 314 n. 9, 59 P.3d 648 (majority); *id.* at 318, 59 P.3d 648 (concurrence).

[13] Christensen has conceded that the identical issues, final judgment, and privity requirements are satisfied. [5] *309 Thus, at issue are the injustice factor and public policy considerations, and whether the agency acted within its competence. The injustice component is generally concerned with procedural, not substantive irregularity. *Thompson v. Dep't of Licensing,* 138 Wash.2d 783, 795–99, 982 P.2d 601 (1999). This is consistent with the requirement that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly, applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. *Vasquez,* 148 Wash.2d 303, 59 P.3d 648; *Williams,* 132 Wash.2d 248, 937 P.2d 1052. In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum. *Reninger,* 134 Wash.2d at 453, 951 P.2d 782.

5 These concessions are appropriate. The factual issue in the administrative proceeding was whether Christensen's union activity was protected conduct and whether that conduct was a substantial or motivating factor for his discharge. *City of Federal Way v. Pub. Employment Relations Comm'n,* 93 Wash.App. 509, 512–14, 970 P.2d 752 (1998). To succeed on his wrongful discharge claim, he must prove that his protected union activity was a substantial factor in Samaritan's decision to discharge him. *See Wilmot v. Kaiser Aluminum & Chem. Corp.,* 118 Wash.2d 46, 71–72, 821 P.2d 18 (1991); *Gardner v. Loomis Armored, Inc.,* 128 Wash.2d 931, 941–42, 913 P.2d 377 (1996). The issues are identical. The unappealed PERC decision is a final judgment on the merits. Although, as explained in this opinion, Christensen complains that the action was brought by the union, and he was represented by a union lawyer, he does not claim that privity is lacking. Samaritan is correct that this requirement is satisfied. Because Christensen's interest was represented by his union, he was in privity with the union. *Robinson v. Hamed,* 62 Wash.App. 92, 100, 813 P.2d 171 (1991); *Acree v. Air Line Pilots Ass'n,* 390 F.2d 199, 202 (5th Cir.1968); *Handley v. Phillips,* 715 F.Supp. 657, 667 (M.D.Pa.1989).

We have also acknowledged that the injustice factor "recognizes the significant role of public policy." *Vasquez,* 148 Wash.2d at 309, 59 P.3d 648; *Williams,* 132 Wash.2d at 257, 937 P.2d 1052. In *Dupard,* the issue was whether collateral estoppel would be applied in a criminal prosecution where the charges were based on conduct that had been the subject of a parole revocation decision by the Board of Prison Terms and Paroles. The court concluded that the legislature contemplated that new crimes would be processed initially in the criminal justice system and not in a parole revocation hearing. The court specifically noted that RCW 9.95.120 provided a parole hearing within 30 days for violations *other than* felonies or misdemeanors. *Dupard,* 93 Wash.2d at 276, 609 P.2d 961. This indicator of legislative intent weighed against application of collateral estoppel.

In *Williams,* the court determined that public policy reasons weighed against application of collateral estoppel to bar a criminal prosecution for welfare fraud where the *310 same conduct had been the subject of **963

Department of Social and Health Services proceedings. We noted that the purposes of the two proceedings are completely different—one to determine if overpayments had been received and to determine repayment if they had been received, and the other to determine whether a crime had been committed. *Williams,* 132 Wash.2d at 257, 937 P.2d 1052. Further, we noted that application of collateral estoppel would result in the State effectively having to choose between prosecuting for criminal charges in the administrative forum, with attendant inefficiency and reallocation of resources, or forgoing the administrative hearing and recovery of financial losses because of the potential collateral estoppel effect of the administrative decision. *Williams,* 132 Wash.2d at 258, 937 P.2d 1052.

Our decisions thus recognize both the procedural aspects of the injustice inquiry as well as public policy considerations.

[14] The Court of Appeals here, relying on *Smith,* concluded that the injustice-public policy considerations attendant to the tort of wrongful discharge in violation of public policy dictate that collateral estoppel should not apply. The court believed that *Smith* undercuts *Reninger* and discourages use of the administrative forum.

Samaritan contends that the court misinterpreted *Reninger* and *Smith.* We agree. We also agree with Samaritan that, contrary to Christensen's contention, the analysis in *State v. Vasquez,* 148 Wash.2d 303, 59 P.3d 648 (2002) does not foreclose application of collateral estoppel here.

In *Reninger,* two correctional officers were demoted for leaving weapons unattended. A hearing examiner rejected their challenge to the demotions. The officers appealed to the Personnel Appeals Board. The Board, after another hearing, concluded that the officers committed gross misconduct, and their demotions were appropriate. The board rejected their arguments that they had been "set up" by other officers. The officers resigned and later brought an action against the State alleging wrongful constructive discharge in violation of public policy and against the other ***311** officers alleging tortious interference with their employment.

The court held that the officers failed to state a claim for wrongful discharge because they did not show their employment was terminated for a reason that contravenes public policy. *Reninger,* 134 Wash.2d at 446, 951 P.2d 782. The court therefore left unresolved the question whether the tort claim was available in the case of public employees terminable only for cause. The court then determined that collateral estoppel barred the tortious interference claim because the board had found that the officers committed misconduct and that the other officers did not conspire against them.

In *Smith,* the court answered the unresolved question in *Reninger,* holding that public employees terminable only for cause may bring a tort action for wrongful discharge in violation of public policy. In addition, we concluded that such employees are not required to exhaust administrative remedies because "the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law." *Smith,* 139 Wash.2d at 809, 991 P.2d 1135. The court noted the "public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Id.* We explained that the conclusion that exhaustion is not required is "even more compelling after" *Reninger* because under *Reninger*

> an employee who loses in an administrative proceeding will be collaterally estopped from attempting to prove the distinct tort of wrongful discharge in violation of public policy. Thus, if employees are required to exhaust all available administrative remedies in order to bring a civil suit for wrongful termination, the administrative remedy could be the *only* remedy. Such a rule goes beyond the usual understanding of exhaustion as a *prerequisite* to seeking judicial relief ... and ignores the fundamental distinction between contract and tort actions.

Smith, 139 Wash.2d at 811, 991 P.2d 1135.

The Court of Appeals identified this quote as the "center point" of Christensen's appeal, reasoning that *Reninger* encouraged resort to administrative remedies but *Smith* ****964** ***312** discourages that choice when the tort of wrongful discharge in violation of public policy is implicated. *Christensen,* 114 Wash.App. at 588, 60 P.3d

99. The Court of Appeals believed that *Smith* was based on a determination that the public policy nature of the tort is so important that PERC adjudication must be optional. Thus, the Court of Appeals concluded that "an aggrieved employee whose union fails to obtain a remedy from PERC should not be precluded from seeking relief on his own under the separate tort theory of wrongful discharge in violation of public policy." *Christensen,* 114 Wash.App. at 589, 60 P.3d 99. [6]

6 The Court of Appeals cited only one case for the direct proposition that an adverse agency decision should not bar a " 'complete exploration' " of a claim in a court of wrongful discharge in violation of public policy. *Christensen,* 114 Wash.App. at 590, 60 P.3d 99 (citing and quoting *Hahn v. Arbat Sys. Ltd.,* 200 N.J.Super. 266, 491 A.2d 58, 59 (1985)). However, in a later case the New Jersey Superior Court, Appellate Division (the same level court as decided *Hahn*), distinguished *Hahn* on the grounds that the administrative decision in *Hahn* was reached following informal proceedings on unemployment compensation and was factually distinguishable in a number of respects, including the substantially different remedies sought. *Ensslin v. Township of N. Bergen,* 275 N.J.Super. 352, 372–73, 646 A.2d 452 (1994). The court in *Ensslin* added that it disagreed with *Hahn* to the extent that *Hahn* could be read to say that collateral estoppel can never be applied in any case dealing with a claim of discrimination. *Ensslin,* 275 N.J.Super. at 373, 646 A.2d 452. *Hahn* is not persuasive authority.

Reninger did not resolve the issue presented here. It did, however, apply collateral estoppel to administrative determinations of issues of fact, and *Smith* does not undercut that holding. Instead, *Smith* describes the holding in *Reninger* as a "compelling" reason for its conclusion that exhaustion is not required specifically because administrative findings may have preclusive effect. *Smith,* 139 Wash.2d at 811, 991 P.2d 1135.

The Court of Appeals reads too much into *Smith.* Collateral estoppel was not at issue in *Smith.* Thus, *Smith* does not stand for the proposition that as a matter of public policy a wrongful discharge claim may be brought in court regardless of whether a central factual issue was submitted to and decided by an administrative tribunal.

It is true that choosing an administrative proceeding may ultimately preclude a later tort claim due to an ***313** agency's factual findings. However, this is the essence of collateral estoppel. There is nothing inherently unfair about this result provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied. In addition, this record establishes that Christensen chose to litigate in the administrative setting. Having done so, nothing in *Smith* or its analysis of the exhaustion issue indicates he would not be bound by the agency's factual determinations. To the contrary, *Smith* acknowledges that administrative findings can have preclusive effect.

Regardless of *Smith,* we also do not agree that the public policy underpinnings of the wrongful discharge tort dictate that collateral estoppel cannot be applied in this case. We have noted the importance of the tort of wrongful discharge in violation of public policy, recognizing that the tort is not designed to protect purely private interests but instead "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Smith,* 139 Wash.2d at 801, 991 P.2d 1135 (italics omitted). However, the doctrine of collateral estoppel may be applied where important interests are at stake. The United States Supreme Court has held, for example, that findings by a state administrative body will be given preclusive effect in a subsequent 42 U.S.C. § 1983 claim of racially motivated discharge from employment, provided the requirements for issue preclusion are otherwise satisfied. *Elliott,* 478 U.S. at 794–99, 106 S.Ct. 3220. Similarly, under Washington law preclusive effect can be given in a § 1983 civil rights action to an administrative agency's earlier factual findings that the employee's reductions in rank were not retaliatory. *Shoemaker,* 109 Wash.2d 504, 745 P.2d 858. Simply because the tort action rests on public policy does not mean that public policy dictates that collateral estoppel should never be applied.

Christensen says, though, that the legislature expressed relevant public policy in ****965** RCW 49.32.020, and under *Vasquez* collateral estoppel may not be applied to contravene ***314** that policy by effectively precluding a wrongful discharge claim. He maintains that *Vasquez* has limited *Reninger* to its facts.

Vasquez is consistent with *Reninger* and with the doctrine of collateral estoppel in general. In *Vasquez,* a hearing examiner in a license revocation hearing that preceded the

defendant's criminal prosecution found that the arresting officer lacked probable cause to stop the defendant. The defendant argued that collateral estoppel barred the State from revisiting the issue of probable cause in the criminal action, and therefore his convictions for driving under the influence and possession of cocaine should be dismissed. This court declined to give collateral estoppel effect to the administrative determination on probable cause, reasoning that administrative license revocation proceedings are designed to provide swift and certain punishment for those who drink and drive, in an expedited informal hearing with relaxed evidentiary standards. *Vasquez,* 148 Wash.2d at 315–16, 59 P.3d 648. The legislative purpose of swift and expeditious hearings would be frustrated if the State was forced to fully litigate matters at the administrative level because such litigation would cause delays and deplete scarce prosecutorial resources. *Id.* at 317–18, 59 P.3d 648. The court distinguished *Reninger* on the ground that the procedures in the administrative proceeding in *Reninger* were far more extensive. *Id.* at 314 n. 9, 59 P.3d 648. [7]

7 In reaching the conclusion in *Reninger* that collateral estoppel barred the tortious interference claim, we observed that "[v]ery little of significance distinguished the administrative proceedings ... from a formal jury trial in superior court." *Reninger,* 134 Wash.2d at 451, 951 P.2d 782. Both officers were represented by counsel who gave opening statements. They engaged in discovery, including depositions under oath. The officers called witnesses on their behalf and cross-examined the State's witnesses. The officers had sufficient incentive to vigorously litigate the issues in the administrative proceedings. *Reninger,* 134 Wash.2d at 453–54, 951 P.2d 782.

Our focus on legislative intent in *Vasquez* accords with that in other cases where courts have declined to apply collateral estoppel. If a legislative body indicates its intent on the matter of preclusion, that intent generally controls whether the judicially applied doctrine of collateral estoppel will apply. RCW 50.32.097, for example, provides that ***315** any finding or other determination by the Employment Security Department "shall not be conclusive, nor binding, nor admissible as evidence" in any action outside Title 50 RCW. [8] In contrast, RCW 26.27.061 provides for the conclusive effect of court legal and factual determinations on child custody. The intent need not be express. *See, e.g., Elliott,* 478 U.S. at 795–96, 106 S.Ct. 3220 (language and legislative history of Title VII of the Civil Rights Act of 1964 shows congressional intent that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims); *Astoria Fed. Sav. & Loan,* 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d 96 (finding congressional intent that preclusion not apply to administrative proceedings where claim is brought under Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621); *Dupard,* 93 Wash.2d at 276–77, 609 P.2d 961 (finding legislative intent that new crimes be processed in the criminal justice system rather than by a parole revocation hearing).

8 For this reason, the Employment Security Department's conclusion in Christensen's case that he was not discharged for wrongful conduct has no bearing on this case. The same was true in *Reninger,* where this court gave no consideration to a department ruling that the two officers there were justified in resigning.

Here, given the authority granted PERC and express legislative recognition of PERC's expertise in RCW 41.58.005(1), we do not believe that the legislature had in mind that only a court action could vindicate the public policy stated in RCW 49.32.020. Indeed, the public policy that Christensen seeks to vindicate is the same public policy that PERC is empowered to enforce—the fair and appropriate collective bargaining between public employees and their employers, untainted by discrimination against union activists. *See* RCW 41.58.020; RCW 41.56.140. Moreover, this case does not present policy concerns that weighed heavily in cases like *Vasquez* and *Williams,* i.e., concerns relating ****966** to efficient allocation of limited state resources.

Our consideration of procedural fairness in *Vasquez* is also a traditional and essential part of deciding whether collateral estoppel will apply. Thus, *Vasquez* does not break ***316** new ground or depart from *Reninger* and other cases applying collateral estoppel to preclude relitigation of an issue already determined by an administrative tribunal. And, simply because a subject implicates public policy does not mean that application of collateral estoppel *contravenes* public policy.

[15] Christensen complains of procedural unfairness, arguing that his claim was only one of several unfair practices claims brought by a union and that he was represented by a union lawyer rather than by his own lawyer. He says that he did not actively participate in the

union's complaint or legal strategies and decision-making process. Christensen maintains that the union lawyer did not independently investigate his claim, that he had little interaction with her, and that he was not advised of his right to appeal the hearing examiner's decision.

The record establishes, however, that Christensen consented to and approved of the union's activities on his behalf, elected to pursue administrative remedies, discussed his claims with the union's national representative before and after the amended complaint was filed and provided documentary evidence to the union's lawyer. Notably, the union's national representative's uncontroverted declaration states that the complaint and request to amend the complaint were prepared with Christensen's consent, that a number of conversations took place between him and Christensen about the status of the complaint, that Christensen was informed about the progress of the complaint, and that the union would not file a complaint on Christensen's behalf without his consent or approval. The union's lawyer acted on Christensen's behalf, and made an opening statement, called witnesses, cross-examined Samaritan's witnesses, offered exhibits, and made evidentiary objections. The union's posthearing brief addressed the evidence regarding Christensen's discharge.

The undisputed evidence is that Christensen consented to his claim being advanced by the union and could have declined. As the Court of Appeals noted, ***317** Christensen cited no authority preventing him from hiring his own counsel, and no authority that the union lawyer's tactical decisions equate to procedural inadequacy. *Christensen,* 114 Wash.App. at 585–86, 60 P.3d 99. Individuals may bring unfair practices complaints. WAC 391–45–010. Accordingly, the fact that the union brought the claim and Christensen was represented by a union lawyer is not a reason to deny application of collateral estoppel. PERC administrative proceedings are governed by the Administrative Procedure Act (chapter 34.05 RCW) and this court has noted the procedural protections afforded under this act. *Reninger,* 134 Wash.2d at 450–51, 951 P.2d 782. We reiterate that whether the decision in the earlier proceeding was substantively correct is generally not a relevant consideration in determining whether application of collateral estoppel would work an injustice. *Thompson,* 138 Wash.2d at 795–800, 982 P.2d 601.

We perceive no procedural unfairness resulting in injustice to Christensen from applying collateral estoppel. A full and fair opportunity to litigate is required, and Christensen had that opportunity. *See Nielson,* 135 Wash.2d at 264–65, 956 P.2d 312; *Barr v. Day,* 124 Wash.2d 318, 324–25, 879 P.2d 912 (1994); *Rains v. State,* 100 Wash.2d 660, 666, 674 P.2d 165 (1983).

[16] Christensen argues, though, that a significant disparity in remedies exists and therefore collateral estoppel should not apply. In *Reninger,* the court noted that the Personnel Appeals Board has authority to grant relief in the form of reinstatement and back pay, sick leave, vacation accrual, retirement, and other credits. The court concluded there was no disparity of relief that justified a refusal to apply collateral estoppel, despite the argument that a court could award monetary damages for a successful tortious interference claim. In *Shoemaker,* the court observed that the administrative body there could award reinstatement and back pay and this was the same relief available ****967** in federal court in a § 1983 civil rights action. The fact that emotional damages were not available in the administrative proceedings was not enough disparity to conclude that it would be ***318** against public policy to apply collateral estoppel to the administrative findings. [9]

9 By contrast, in *Hadley v. Maxwell,* 144 Wash.2d 306, 27 P.3d 600 (2001), the court held that collateral estoppel is generally not appropriate where all that was at stake in the earlier proceeding was a nominal fine, because the stakes were too low to provide sufficient incentive to fully litigate.

PERC has authority, if it finds an unfair labor practice, to "take such affirmative action as will effectuate the purposes and policy of this chapter [41.56 RCW], such as *the payment of damages* and the reinstatement of employees." RCW 41.56.160(2) (emphasis added). On Christensen's behalf, the union sought reinstatement, compensatory damages, including back pay, benefits and interest, and costs and attorney fees. Thus, the relief available from PERC places this case in the same category as *Reninger* and *Shoemaker.* The stakes were sufficient incentive in the administrative proceedings to vigorously litigate the issue of whether Christensen was discharged because of his union activities. There is no significant disparity of available relief that justifies the conclusion that application of collateral estoppel would work an injustice. Whether emotional distress damages

were available is not a significant distinction. *Shoemaker,* 109 Wash.2d at 513, 745 P.2d 858.

We conclude that the injustice factor and public policy considerations do not foreclose application of collateral estoppel in this case. [10]

10 It is noteworthy that the dissent does not address an important factor in this case. Mr. Christensen chose to proceed in the administrative forum, and it is undisputed that his union would not have brought his claim if he had declined.

[17] Finally, Samaritan argues that the Court of Appeals erroneously concluded that "[a]rguably, Samaritan failed to meet the agency 'competence' criteria." *Christensen,* 114 Wash.App. at 589, 60 P.3d 99. The Court of Appeals said that in *Smith* this court reasoned that PERC is not competent to adjudicate a tort claim. *Christensen,* 114 Wash.App. at 589, 60 P.3d 99. Christensen argues that the Court of Appeals correctly determined that PERC lacks competence because it has no authority to decide a claim of wrongful discharge in violation ***319** of public policy. This argument confuses claim and issue preclusion. [11]

11 This problem of confusing issue and claim preclusion is also found in *Vargas v. State,* 116 Wash.App. 30, 37, 65 P.3d 330 (2003), where the court held that the Personnel Appeals Board lacked competence to address the tort of wrongful discharge in violation of public policy.

[18] In order for an administrative decision to have collateral estoppel effect, the tribunal must have been competent to decide the issue. This case involves issue preclusion, and the same *issue* is involved, i.e., whether Samaritan discharged Christensen in retaliation for his union activity. It does not matter that the claim or cause of action that Christensen seeks to pursue in superior court is not the same claim or cause of action that was decided by PERC, or that PERC lacks authority to decide the tort claim; this case does not involve claim preclusion, which applies to preclude the relitigation of the same *claim* or *cause of action.* Trautman, *Claim and Issue Preclusion,* 60 WASH. L.REV.. at 812. [12]

12 For claim preclusion to apply there must be identical subject matter, cause of action, persons and parties, and the quality of the persons for or against whom the claim is made. Trautman, *Claim and Issue Preclusion,* 60 WASH. L.REV.. at 812.

The relevant inquiry here is whether PERC's determination of the issue in question is within its competence. That is, are its factual findings regarding the decision to discharge within its competence to determine? The agency found that the union failed to make a prima facie case that Christensen was discharged because of his union activities in violation of RCW 41.56.140(1) and found instead that he was discharged because of inappropriate behavior involving the volunteer rider.

****968** Both statute and case law recognize PERC's expertise in labor relations. RCW 41.58.005(1); *City of Yakima v. Int' l Ass'n of Firefighters,* 117 Wash.2d 655, 674–75, 818 P.2d 1076 (1991); *Clallam County v. Pub. Employment Relations Comm'n,* 43 Wash.App. 589, 596–97, 719 P.2d 140 (1986) (noting PERC's expertise where allegation of violation of rights protected under the Public Employees' Collective Bargaining Act, specifically RCW 41.56.140(1), were made). Clearly, PERC is competent to resolve factual issues raised in unfair labor practices complaints, such as a claim of ***320** discharge in retaliation for engaging in union activity. In order to resolve the claimed unfair labor practice involving Christensen, PERC had the issue of the reason for his discharge squarely before it.

In *Shoemaker* this court was confronted by a similar argument. There, a public employee petitioned the Bremerton Civil Service Commission for reinstatement, contending he had been demoted in bad faith and in violation of RCW 41.12.090 in retaliation for testimony he gave regarding irregularities in his department's employment evaluations. The commission concluded his demotion was not retaliatory but was instead a valid reduction in force. The employee brought a civil rights action in federal court, and ultimately the Ninth Circuit certified to this court the question whether the commission's determination was binding under collateral estoppel principles. This court held that collateral estoppel applies, rejecting the employee's claim that the commission had no competence to decide his civil rights claim. *Shoemaker,* 109 Wash.2d at 512–13, 745 P.2d 858. The court said this argument confused claim and issue preclusion, pointing out that while the commission could not have decided the § 1983 civil rights claim, it may have decided a fact common to the administrative claim for reinstatement and the § 1983 claim. *Shoemaker,* 109

Wash.2d at 512, 745 P.2d 858. The court said, "[t]he fact that the issue determined is also a central element in the federal civil rights claim does not mean that giving preclusive effect to that determination is an improper application of claim preclusion or that the Commission has acted beyond its competence." *Id.* at 512–13, 745 P.2d 858. [13]

13 The dissent says it agrees that this case does not involve claim preclusion. The dissent nonetheless concludes, under a strained analysis, that PERC's lack of authority to adjudicate wrongful discharge claims ultimately means that as a matter of public policy no administrative determination should preclude the tort from being litigated in a court. Dissent at 972. If that were true, collateral estoppel would never apply to prevent litigation of a claim of any kind where an administrative agency made the original factual determinations but lacked authority to decide the claim. *Reninger* and *Shoemaker v. City of Bremerton,* 109 Wash.2d 504, 507, 745 P.2d 858 (1987) are clearly to the contrary. More fundamentally, the dissent believes that because the wrongful discharge tort is based on public policy, collateral estoppel cannot be applied. This reasoning reflects a fundamental misunderstanding of the public policy inquiry as it concerns whether collateral estoppel should apply. The question is not whether the later cause of action has public policy aspects but is instead whether application of collateral estoppel contravenes public policy. As explained in the text, equally important causes of action, from a public policy standpoint, have been barred by application of collateral estoppel to preclude relitigation of key factual matters. *E.g., Shoemaker* (civil rights claim).

***321** CONCLUSION

Samaritan has shown that collateral estoppel is appropriately applied here to bar relitigating the issue of whether Christensen was discharged in retaliation for union activities. The fact that the tort of wrongful discharge in violation of public policy rests on public policy does not mean that application of collateral estoppel to preclude relitigating the reason for discharge violates public policy. The doctrine of collateral estoppel requires that the person against whom it is asserted must have had a full and fair opportunity to litigate the relevant issue in the prior proceeding, and Christensen has had that opportunity.

The decision of the Court of Appeals is reversed.

ALEXANDER, C.J., and JOHNSON, BRIDGE, OWENS, and FAIRHURST, JJ., concur.

SANDERS, J. (dissenting).

Kimball D. Christensen sought damages resulting from Samaritan Hospital's alleged ****969** wrongful discharge in violation of public policy, claiming his employment was terminated in consequence of his participation in union activities. Though today's majority holds as a matter of law Mr. Christensen cannot proceed with his suit, one thing is certain: no jury has heard testimony, examined witness demeanor, weighed credibility, or rendered a verdict one way or another as to the merits of Mr. Christensen's legal claim. Nor has any real court of law, acting through a real judge, determined his claim on its merits.

To the contrary, the majority denies Mr. Christensen his constitutional right to present his case to a jury of his peers ***322** because a lone executive branch officer for the Public Employment Relations Commission (PERC) believed the counterstory of the woman Mr. Christensen allegedly sexually harassed, Stephanie Hiatt, over Mr. Christensen's version of the facts. As a result, Mr. Christensen is left at the courthouse steps with no opportunity to present his case to an independent judiciary, much less a jury. Preclusion here epitomizes the intrinsic deficiencies of collateral estoppel where the asserted basis for preclusion is an administrative adjudication. I would protect Mr. Christensen's right to his day in court and strongly dissent from any contrary view.

I. Inviolate Means Inviolate

While the preclusion doctrines of res judicata and collateral estoppel promote judicial economy and finality, *see Clark v. Baines,* 150 Wash.2d 905, 913, 84 P.3d 245 (2004), important goals no doubt, we must remember neither doctrine is "intended to deny a litigant his day in court," *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n,* 72 Wash.2d 887, 894, 435 P.2d 654 (1967). But application of collateral estoppel to administrative

adjudications does, quite literally, "deny a litigant his day in court" because he never had one.

Moreover, I maintain the majority's conclusion is unsupported by a proper application of the test to determine whether to apply collateral estoppel. *See infra* part II. However I first lament the disturbing trend in our jurisprudence, namely vaulting inferior goals of judicial economy and finality over justice and constitutional guaranties. After all, what could be more economical and final than closing down the courthouse?

Paramount in our state is the right to trial by jury as part of an independent judiciary, which is expressly secured by our constitution without equivocation:

> The right of trial by jury shall remain *inviolate,* but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more ***323** jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

CONST. art. I, § 21 (emphasis added). The founders' use of the word "inviolate" suggests nothing less than an unwavering guaranty, as we so recognized 15 years ago: "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Furthermore "the essence of the right's scope" is the jury's province, duty, and ability to make factual determinations. *Id.* at 645, 771 P.2d 711.

Sofie withstood public support for curing "rising insurance premiums for liability coverage" by way of "tort reform," *id.* at 638, 771 P.2d 711, to uphold this fundamental constitutional right, striking down a statutory limitation on noneconomic damages available in a civil action, *id.* at 669, 771 P.2d 711. Yet despite *Sofie's* reluctance to permit the erosion of constitutional rights to serve public policy objectives, this court recently employed collateral estoppel to prevent two litigants from exercising their right to a jury. *See Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wash.2d 255, 956 P.2d 312 (1998). *Nielson* afforded preclusive effect to a federal judge's determination of damages despite the plaintiffs' lack of any opportunity to present their evidence to a jury. *Id.* at 269, 956 P.2d 312. Though *Nielson* prevented litigants from presenting their claim to a jury, at least they had the opportunity to present their claim to a federal judge in a bench trial. But here Mr. Christensen must settle for a ****970** nonjudicial ruling from an employee of the executive branch.

Despite *Sofie's* promise to rebuke any attempt to "diminish over time" the fundamental right to a jury, *Sofie,* 112 Wash.2d at 656, 771 P.2d 711, application of collateral estoppel to administrative adjudications which subsequently deny a litigant his or her right to a jury is contrary to article I, section 21's constitutional guaranty. *Reninger v. Dep't of Corr.,* 134 Wash.2d 437, 454, 951 P.2d 782 (1998), overturned a jury verdict by way of administrative collateral estoppel ***324** to deny two civil servants' claims of tortious interference with business expectancy. This holding was an unwarranted invasion of the jury's province to decide the merits of a litigant's factual allegations and a stark denial of access to an independent judiciary. But *Reninger* has been overruled sub silentio by subsequent enlightened decisions.[1] *See State v. Vasquez,* 148 Wash.2d 303, 317–18, 59 P.3d 648 (2002) (discussed *infra*).

1 *Shoemaker v. City of Bremerton,* 109 Wash.2d 504, 745 P.2d 858 (1987), is not inconsistent since the state constitutional right to a jury was inapposite to the federal court claim at issue there.

As the right to a jury is so elementary in our jurisprudence, I posit a litigant's opportunity to present his or her case to that jury should not be denied unless he or she validly waives that right, *see Godfrey v. Hartford Cas. Ins. Co.,* 142 Wash.2d 885, 898, 16 P.3d 617 (2001) ("waiver of the right to jury trial 'must be voluntary, knowing, and intelligent' " (quoting *City of Bellevue v. Acrey,* 103 Wash.2d 203, 207, 691 P.2d 957 (1984))), or the claim is appropriately precluded by a prior *judicial* adjudication. This would not affect preclusion rightly afforded to summary judgments, consensual arbitral decisions, or bench trials where the litigant had validly waived the jury right. Such cases involve either a failure of the party against whom preclusion is sought to provide a genuine issue of fact for the jury to determine, a contractual waiver of his or her right to a jury, or an express desire to present a case to a judge rather than a jury.

Those cases, however, are markedly different from cases like the one at bar where the litigant proceeds to an administrative forum, not an independent judiciary. Despite the constitutional guaranty that all genuine factual disputes should be resolved by a jury, the majority asserts a litigant who, unknowing of the consequences, proceeds to the administrative tribunal is forever barred from asserting this right.

And the sword cuts both ways. In cases where the administrative claimant prevails, he or she may then seek ***325** to preclude the defending party from relitigating an issue before a jury. Such an scenario would cut off Samaritan Hospital's right to defend before a jury the merits of its decision to terminate Mr. Christensen's employment, as it was a party to the administrative PERC hearing at issue here. The defending party would have *no* choice whatsoever of who should be the fact-finder yet is forced to accept the factual determination of *one person* as binding—a person who is not even a member of the judiciary. This result is facially contrary to the underlying principle of the jury system, not to mention an independent judiciary. As the Supreme Court has noted, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. Louisiana,* 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). [2]

2 That *Duncan* focused on the criminal defendant's right to a jury is an irrelevant distinction from the right to a jury in the civil context as the only difference lies in what is at stake; there is no functional difference between the jury's role in either case. *See* James L. Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards,* 45 S. TEX. L.REV. 449, 516 (2004).

While our constitution demands the right to have factual disputes be resolved by a jury of one's peers, the decision of a lone administrative hearing officer eviscerates the litigant's right to a jury. Such also undermines the necessary separation of the judicial and ****971** executive branches of government. As Dean Roscoe Pound put it:

> There are those in our law schools today who advocate a complete fusion of legislative, executive, and judicial power in administrative boards and bureaus and agencies. Even without constitutional amendment authorizing this, administrative agencies are likely to achieve it in substance unless judicial scrutiny of their action can be preserved and made effective....
>
> *Once established an absolute bureaucracy will not be easy to dethrone.* Control of an omnicompetent administrative hierarchy, ***326** accountable only to an ultimate administrative head, will prove as effective a means of absolute government as was formerly control of an army.

Roscoe Pound, *The Rise of Administrative Justice, in* ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE 35–36 (1942) (emphasis added). The growth of administrative collateral estoppel has reached its critical mass. Either the right to a jury remains "inviolate" as the constitution so demands (article I, section 21), thereby preserving the right of access to justice in a court of law, or this fundamental constitutional guaranty is finished. I follow the constitution and choose the former.

II. Even Allowing Administrative Collateral Estoppel to Continue, Proper Application of Test Still Allows Mr. Christensen His Day In Court

Despite my continued reservations to acquiesce in administrative collateral estoppel when our constitution mandates factual disputes be reserved for the jury, I acknowledge our jurisprudence has permitted such preclusion on occasion. That said, however, the majority has diverted from a principled application of the inquiry used to determine whether to preclude relitigation of an issue. Were the majority to faithfully examine collateral estoppel in the present context, Mr. Christensen would not be left without any opportunity for judicial redress.

Washington follows a stringent four-pronged inquiry which requires affirmative answers to each of the following questions before raising the collateral estoppel flag:

> (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against

> whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

Clark, 150 Wash.2d at 913, 84 P.3d 245. The burden to affirmatively prove each and every prong of this inquiry rests with the party ***327** seeking preclusion, and that party's failure to do so prevents application of the doctrine. *McDaniels v. Carlson,* 108 Wash.2d 299, 303, 738 P.2d 254 (1987).

Here we do not confront the typical collateral estoppel scenario. Rather here the claimed basis for preclusion is an administrative adjudication, not a real "final judgment on the merits" by a court possessing both personal and subject matter jurisdiction. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 1, 17 (1980). Nonetheless, that deficiency is per se not determinative, as our cases recognize collateral estoppel may still prevent relitigation of an issue decided by an administrative tribunal upon consideration of three additional criteria: "(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." *State v. Dupard,* 93 Wash.2d 268, 275, 609 P.2d 961 (1980). As "[p]olicy arguments have been often the deciding factor when collateral estoppel is based upon prior administrative determination," we flatly refuse to apply preclusion "when its application would contravene public policy." *Id.* at 275–76, 609 P.2d 961.

Utilizing the aforementioned criteria, I find three independent grounds to affirm the Court of Appeals' decision to allow Mr. Christensen his day in court: first, applying collateral estoppel here contravenes public policy; second, the procedural deficiencies of PERC hearings demand open access to the courts; and finally, such application works a ****972** patent injustice against litigants in Mr. Christensen's shoes. My reasons follow.

A. Contravening Public Policy

The legal basis for Mr. Christensen's cause of action is the tort of wrongful discharge in violation of public policy. We examined this tort extensively in *Smith v. Bates Technical College,* 139 Wash.2d 793, 804, 811, 991 P.2d 1135 (2000), holding an employee who is terminable only for cause may have a cause of action under the tort and that such employee does not have to exhaust his or her administrative ***328** remedies before an agency like PERC. In so doing we expressly recognized, "[I]n Washington the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy." *Id.* at 801, 991 P.2d 1135.

The majority correctly recognizes the more comprehensive[3] doctrine of res judicata is not presently at issue. This is rightfully so, as PERC has no authority to adjudicate claims seeking damages for the tort of wrongful discharge in violation of public policy. *Smith,* 139 Wash.2d at 811, 991 P.2d 1135. But applying collateral estoppel here denies the damage claim before it can be asserted. *This* case allows collateral estoppel to wholly prevent *any* attempt to "vindicate the *public interest* " through a tort action. *Id.* at 801, 991 P.2d 1135. Yet the majority brushes aside its net effect by claiming the collateral estoppel only "implicates" public policy rather than "contravenes" it. Majority at 966 (emphasis omitted). I disagree. Erecting a preclusive barrier to a litigant's opportunity to litigate the merits of his or her wrongful discharge claim stands in direct opposition to the very essence of the public policy to "vindicate the *public interest.*" *Smith,* 139 Wash.2d at 801, 991 P.2d 1135.

3 *See* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 WASH. L.REV.. 805, 829 (1985) (noting "[i]n one sense res judicata is the more comprehensive doctrine since it bars an entire claim and not just a particular issue").

This view is supported by *Dupard,* the case where we first recognized the impropriety of collateral estoppel when the application thereof "contravene[s] public policy." *Dupard,* 93 Wash.2d at 276, 609 P.2d 961. There we unanimously declined to afford preclusive effect to a parole revocation officer's administrative determination that the defendant was not guilty of possession of a controlled substance. Our decision was grounded in "[p]ractical public policy," which we determined to "require[ ] that new criminal matters, when charged in the criminal justice system, must be permitted ***329** to be there decided, unhampered by any parallel proceedings of the Board of Prison Terms

and Paroles." *Id.* at 277, 609 P.2d 961. The majority avers public policy does not demand as much here due to the legislature's recognition of PERC's expertise. *See* majority at 965–66. However nothing in *Dupard* suggested the Board of Prison Terms and Paroles lacked expertise to determine whether Dupard had possessed cocaine or heroin, a condition precedent to revoking his parole. *Cf. Dupard,* 93 Wash.2d at 270–71, 609 P.2d 961. Nonetheless, we held criminal prosecutions should be decided in the courts rather than in the administrative tribunals. Given that "PERC does not have the authority to adjudicate wrongful discharge tort actions," *Smith,* 139 Wash.2d at 805, 991 P.2d 1135, it logically follows from *Dupard* that no administrative determination should preclude that tort from being litigated in the only available forum: the court.

B. Procedural Differences

In addition, collateral estoppel must be rejected when there are procedural differences between the agency adjudication and its judicial corollary. *Dupard,* 93 Wash.2d at 275, 609 P.2d 961. Though this record demonstrates the PERC hearing itself resembled a trial by its use of counsel and evidentiary objections (notwithstanding the absence of those apparently inconsequential aspects of an independent judiciary and a jury, both of which are supposedly constitutionally preserved), one glaring deficiency of PERC hearings is more than enough to reject collateral ****973** estoppel here: the absence of any meaningful discovery.

By regulation:

> The power of subpoena shall be limited to compelling the testimony of witnesses and production of documents or other tangible evidence at hearings conducted by the agency [PERC].
>
> Pursuant to the authority delegated to the agency by RCW 34.05.446(2), *other forms of discovery shall not be available in proceedings before the agency.*

WAC 391–08–300 (emphasis added). PERC hearings—no matter how much they resemble a judicial proceeding ***330** during the actual hearing (again, pay no attention to the empty jury box and the *executive* officer sitting behind the bench)—are simply not on par with judicial actions. We have noted the "broad right of discovery is necessary to ensure access to the party seeking the discovery. *It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense.*" *Doe v. Puget Sound Blood Ctr.,* 117 Wash.2d 772, 782, 819 P.2d 370 (1991) (emphasis added). Despite the necessity to do so to "effectively pursue" his claim, *id.,* Mr. Christensen was by regulation forbidden from conducting depositions, CR 31, submitting interrogatories, CR 33, or requesting admissions, CR 36.

As a matter of law then, the procedural differences between PERC hearings and judicial actions demand rejection of collateral estoppel here.

C. Injustice

The majority asserts "[t]here is nothing inherently unfair" about using collateral estoppel to deny Mr. Christensen the opportunity to present his case before a jury. Majority at 964. I strongly disagree. It is "unfair" to deny someone access to an independent judiciary based on the executive actions of a hearing examiner who is vested with limited jurisdiction and eschews the judicial and evidentiary norms of decision making.

Not once has any Washington court applied collateral estoppel to an administrative determination to bar a subsequent prosecution. *See State v. Mullin–Coston,* 152 Wash.2d 107, 121, 95 P.3d 321 328 (2004); *Vasquez,* 148 Wash.2d at 318, 59 P.3d 648; *State v. Williams,* 132 Wash.2d 248, 257–58, 937 P.2d 1052 (1997); *State v. Cleveland,* 58 Wash.App. 634, 643–44, 794 P.2d 546 (1990). *Williams* is instructive. There we refused to apply an administrative determination that a mother had not acted willfully and knowingly made false statements to obtain welfare payments to collaterally estop the State from prosecuting the mother for welfare fraud. *See Williams,* 132 Wash.2d at 258, 937 P.2d 1052. We grounded our decision on our refusal to ***331** force the State into a catch–22, where "the State most likely would consider for[ ]going administrative hearings even though such hearings allow it to recoup financial losses resulting from fraud." *Id.*

Logically resulting from *Williams* was *Vasquez.* There we refused to afford preclusive effect to an administrative license suspension hearing at which the hearing officer concluded the police lacked probable cause to initially detain Vasquez's vehicle. *Vasquez,* 148 Wash.2d at 307, 317, 59 P.3d 648. We "noted the 'unfairness of

permitting an adjudication in an informal administrative setting ... to bar later criminal prosecutions.' " *Id.* at 309, 59 P.3d 648 (quoting *Thompson v. Dep't of Licensing,* 138 Wash.2d 783, 796, 982 P.2d 601 (1999)). Accordingly, we declined to "forc[e] the State to fully litigate matters at the administrative level [which] would cause delays and deplete already scarce resources within the prosecutor's office." *Id.* at 317–18, 59 P.3d 648. *Vasquez* rebuked collateral estoppel and allowed factual issues to be determined by an independent judiciary, a result in counterdistinction to *Reninger,* thus leading me to conclude *Reninger* was no longer sound law. *See Vasquez,* 148 Wash.2d at 318, 59 P.3d 648 (Sanders, J., concurring) ("conclud[ing] [*Vasquez*] ... in effect overrules *Reninger* sub silentio").

Even assuming arguendo *Vasquez* and *Reninger* could be harmonized on the ground "the procedures in the administrative proceeding in *Reninger* were far more extensive" than those in *Vasquez,* majority at 965 (citing ****974** *Vasquez,* 148 Wash.2d at 314 n. 9, 59 P.3d 648), *Reninger* based its view on the similarities between the administrative hearings before the Personnel Appeals Board (PAB) and the judicial action at issue. *Reninger,* 134 Wash.2d at 451, 951 P.2d 782. Yet similarities existent in *Reninger* such as discovery are simply not present here. *Compare id.* at 451, 951 P.2d 782 ("[Reninger and Cohen] conducted formal depositions under oath prior to the PAB hearing.") *with* WAC 391–08–300 (prohibiting any discovery outside of subpoenaing documents for the PERC hearing). Thus, while I reject the notion *Vasquez* and *Reninger* are consistent with each other, Mr. Christensen's case leans far more toward *Vasquez* in any event.

***332** The majority attempts however to distinguish Mr. Christensen's case, asserting "this case does not present policy concerns that weighed heavily in cases like *Vasquez* and *Williams,* i.e., concerns relating to efficient allocation of limited state resources." Majority at 965–66. True, the State's budget is not relevant here. However the public policy of ensuring a public employee's unfettered opportunity to seek redress in the courts where no equivalent opportunity lies elsewhere *is at issue.* And I know of no legal principle that relegates that policy below the conservation of finite government assets. To conclude otherwise suggests civil servants seeking judicial redress are not worthy of open access to the courts whereas the prosecutor's office is.

While this court loathed in *Williams* and *Vasquez* to put the State between a rock and a hard place, such is precisely what this majority does to Mr. Christensen and other similarly situated public servants. Those persons who otherwise would seek reinstatement of their occupation of choice will now consider forgoing the administrative hearing before PERC in lieu of damages available in a wrongful discharge tort action, or vice versa. Such a catch–22 is not something collateral estoppel permits as it would "work an injustice on the party against whom collateral estoppel is to be applied." *Clark,* 150 Wash.2d at 913, 84 P.3d 245.

CONCLUSION

I would affirm the Court of Appeals and allow Mr. Christensen his day in court before a jury of his peers. Such an opportunity in my view is not only constitutionally mandatory, but also outside the purview of collateral estoppel's reach. Because our majority denies Mr. Christensen this right, I dissent.

CHAMBERS and IRELAND, JJ., concur.

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- kolouskova@jmmlaw.com
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- litdocket@foster.com
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- pat.schneider@foster.com
- petrice@co.thurston.wa.us
- sdrobinson@karrtuttle.com
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