No. 1033176

Court of Appeals No. 58229-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES and HILARY FRANZ, the Washington Commissioner of Public Lands,

Petitioners,

vs.

COOKE AQUACULTURE PACIFIC, LLC,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' unpublished decision that is the subject of Petitioners' (collectively, "DNR") Petition for Review ("Petition") is not as flawed as DNR suggests. The Court of Appeals correctly articulated how collateral estoppel applies to proceedings with nearly identical facts but different standards of review or burdens of proof. It also recognized that collateral estoppel cannot apply to issues that were not previously raised, let alone actually litigated. The Court of Appeals correctly applied that analysis to two of Respondent Cooke Aquaculture Pacific, LLC's ("Cooke") civil claims that followed an administrative appeal between the parties regarding DNR's termination of Cooke's Port Angeles aquatic lands lease: Cooke's good faith and fair dealing claim and its breach of contract claim. The Court of Appeals, however, inconsistently applied its analysis to Cooke's remaining claim under the Uniform Declaratory Judgments Act ("UDJA").

DNR fails to identify a sufficient basis under RAP 13.4(b) for its Petition. DNR's arguments do not serve a substantial public interest. Instead, DNR inappropriately invites this Court to go beyond the straightforward issues on appeal and make significant changes in the statute to align with DNR's preference for deferential review at the expense of the public.

RCW 79.02.030 contemplates deferential review of administrative actions related to public lands leases but does not purport to foreclose all other means of review. Without any supporting legal authority, DNR asks this Court to effectively rewrite the statute so that the lone source of review of its actions is deferential review under the statute.

Rather than serving a substantial public interest, DNR's Petition threatens a substantial public interest in how our state agencies are held accountable. It is longstanding law in Washington that when members of the public contract with government agencies, "[t]here is not one law for the sovereign and another for the subject." *Architectural Woods, Inc. v. State*,

92 Wn.2d 521, 529, 598 P.2d 1372 (1979). The Court should not disturb this precedent.

DNR also argues that the Court of Appeals' decision conflicts with this Court's collateral estoppel precedent. That argument does not require this Court's review because it is based on DNR's misunderstanding of the law.

The Court of Appeals recognized this Court's well-established principle that collateral estoppel only applies when issues between proceedings are "identical in all respects," including the bundle of applicable legal principles. *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974). Because one of the claims that is subject to DNR's Petition involved substantially different legal standards and burdens of proof, collateral estoppel cannot apply.

The remaining claim referenced in the Petition involved issues that were not raised in the administrative appeal and, therefore, were not actually litigated in that proceeding. *See*

Schibel v. Eymann, 189 Wn.2d 93, 99, 399 P.3d 1129 (2017) (Collateral estoppel precludes only those issues that were actually litigated…"). There is no correction for this Court to make with respect to the issues raised by the Petition.

The Court of Appeals' only error—affirming the superior court's application of collateral estoppel to Cooke's UDJA claim—is worthy of review under RAP 13.4(b)(1), (2), and (3). Specifically, that holding is inconsistent with *Standlee* and other precedent from this Court and the Court of Appeals. It is also internally inconsistent with the Court of Appeals' treatment of Cooke's other two claims. The Court of Appeals failed to appreciate (1) that Cooke did not have the opportunity to fully and fairly litigate its UDJA claim in the administrative appeal; (2) the difference in standards of review associated with Cooke's UDJA claim and the administrative appeal; and (3) that applying collateral estoppel would work an injustice.

There is a substantial public interest in preventing the injustice that results from applying collateral estoppel to Cooke's UDJA claim. Dismissing Cooke's UDJA claim contravenes the standard in *Architectural Woods* by applying one law for the sovereign and another for the subject. This Court's review is necessary to correct that contradiction of established precedent and protect the public's interest in contracting with government agencies.

Cooke respectfully requests that the Court deny DNR's Petition and, pursuant to RAP 13.4(d), accept review of this matter to resolve the Court of Appeals' analysis of Cooke's UDJA claim.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether it is appropriate under RAP 13.4(b) to review the Court of Appeals' correct holding that collateral estoppel cannot apply to Cooke's good faith and fair dealing claim.

2. Whether it is appropriate under RAP 13.4(b) to review the Court of Appeals' correct holding that collateral estoppel cannot apply to Cooke's breach of contract claim.

3. Whether this Court should review the Court of Appeals' application of collateral estoppel to Cooke's UDJA claim pursuant to RAP 13.4(d) and RAP 13.4(b).

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

This dispute involves Cooke's lease with DNR to farm fish in Port Angeles Harbor ("the Lease"). DNR periodically renewed the Lease for Cooke's predecessors and Cooke dating back to the 1980s. Clerk's Papers ("CP") 2397.

After the most recent renewal in 2015, DNR, Cooke, and Cooke's lender negotiated a separate written agreement—a Consent to Assignment of Lease for Security Purposes (the "Assignment")—that recognized Cooke's source of funding and defined the rights of the three parties under the Assignment. *See* CP 2083. The Assignment was "binding upon and inure[d]

to the benefit of the State, [Cooke], and the Lender, and their respective successors and assigns." CP 2087. The Assignment provided that DNR "shall not terminate the Lease… unless Lender has received from [DNR] a notice of default." CP 2085.

On December 15, 2017, DNR terminated the Lease, alleging that Cooke violated three separate provisions of the Lease. CP 432-34. DNR did not provide notice of those alleged violations or defaults to Cooke's lender before terminating the Lease.

B. Legal Challenge and Bifurcation of Claims.

On January 4, 2018, Cooke appealed the termination, asserting two sets of claims. *See* CP 266. First, Cooke asserted a claim for an administrative appeal of DNR's decision to terminate the Lease under RCW 79.02.030. CP 279. Second, Cooke asserted two civil claims: (1) a UDJA claim challenging DNR's lack of basis to terminate the Lease and (2) a claim for breach of the duty of good faith and fair dealing. CP 280.

On April 26, 2019, the Thurston County Superior Court bifurcated Cooke's claims into two separate cases. CP 360-62. The court ordered that the administrative appeal and the civil claims be heard successively, in that order. CP 361.

C. Administrative Appeal.

The superior court held the administrative appeal hearing pursuant to RCW 79.02.030 on February 7, 2020. CP 440. There was no evidence presented, no witness testimony, no cross-examination of those witnesses, and no jury. *Id.* On February 28, 2020, the court issued a decision based solely on the briefing, the certified agency record, and the supplement to the agency record. CP 440-41. The court applied the arbitrary and capricious standard of review and concluded that "DNR's decision [to terminate the Lease] was not arbitrary and capricious even if there is room for two opinions as to one or more of the reasons cited by DNR." CP 442. The court emphasized that it made "no findings of fact, but rather [it]

simply review[ed] the certified DNR record and appl[ied] the arbitrary and capricious standard to that record." *Id*.

Cooke appealed that decision. In an unpublished decision, the Court of Appeals affirmed the superior court's ruling. *See Cooke Aquaculture Pac., LLC v. Washington State Dep't of Nat. Res.*, 20 Wn. App. 2d 1030 (2021), *review denied sub nom. Cooke Aquaculture Pac., LLC. v. Washington State Dep't Nat. Res.*, 200 Wn.2d 1002, 516 P.3d 374 (2022) (hereinafter "*Cooke I*"). Specifically, the Court of Appeals reviewed DNR's factual findings for substantial evidence. *Id.* at *7. The Court of Appeals also held that DNR had the right to terminate the lease and that DNR's decision to do so was not arbitrary and capricious. *Id.* at *7-*8. Notably, the Court of Appeals explicitly did not address any good faith and fair dealing arguments. *Id.* at *7 n. 4. Cooke unsuccessfully sought reconsideration and discretionary review of that opinion. CP 512, 514.

D. Remaining Civil Claims.

On June 29, 2020—after the superior court heard the administrative appeal and pursuant to an order stipulated by the parties—Cooke filed an amended complaint in the second matter. CP 121, 125-45. As relevant to this Petition, Cooke amended its complaint to assert an additional breach of contract claim, alleging that DNR breached the Assignment by failing to provide Cooke's lender with notice of default before terminating the Lease. CP 143. The litigation of Cooke's non-administrative appeal claims was significantly slowed by the administrative appeal, the parties' attempts to agree to a settlement, discovery disputes, and the pandemic.

DNR eventually moved for summary judgment on Cooke's civil claims. *See* CP 229. DNR alleged that "[u]nder principles of collateral estoppel, [the Court of Appeals' administrative appeal] decision has preclusive effect in the present litigation, requiring dismissal of Cooke's remaining claims." CP 230.

The superior court granted DNR's motion for summary judgment and applied collateral estoppel to dismiss Cooke's UDJA, breach of the duty of good faith and fair dealing, and breach of contract claims. CP 2502-03.

E. The Court of Appeals' Opinion.

The Court of Appeals affirmed in part, reversed in part, and remanded the remaining claims for further proceedings. *Cooke Aquaculture Pac., LLC v. Washington State Dep't of Nat. Res.*, 2024 WL 3273999, at *1 (Wash. Ct. App. July 2, 2024) (hereinafter "*Cooke II*"). Three holdings from *Cooke II* are relevant to this Court's analysis.

First, the Court of Appeals held that the superior court did not err in applying collateral estoppel to dismiss Cooke's UDJA claim. The Court of Appeals identified that its opinion in *Cooke I* found substantial evidence supporting DNR's reasoning for terminating the Lease. That prior opinion also interpreted the Lease terms and concluded that DNR had the right to terminate the lease. *Id.* at *6. Therefore, in *Cooke II*, the

Court of Appeals held that collateral estoppel applied because the issues, including the standards of review, were sufficiently identical. *Id.* The Court of Appeals explained that the "substantial evidence standard is similar to the preponderance of the evidence standard that would be applied in Cooke's civil lawsuit." *Id.*

Second, the Court of Appeals agreed with Cooke that the superior court mistakenly applied collateral estoppel to Cooke's good faith and fair dealing claim. *Id.* The Court of Appeals acknowledged that Cooke failed to prove its claims under the deferential arbitrary and capricious standard of review in the administrative appeal. *Id.* at *6–*7. However, it held that the administrative appeal imposed a "substantially higher" burden of proof under the preponderance of evidence standard that would apply to the civil good faith and fair dealing claim. *Id.* Therefore, the Court of Appeals held that collateral estoppel did not apply for lack of identical issues. *Id*. The Court of Appeals found DNR's attempts to argue eventual success on the merits

unpersuasive to an appeal that did not concern the merits. *Id.* at *7.

Lastly, the Court of Appeals reversed the superior court's dismissal of Cooke's breach of contract claim. *Id.* The superior court held that collateral estoppel applied to that claim. *Id.* Cooke did not allege that claim until after the superior court heard the administrative appeal. Recognizing the significance of that timing, the Court of Appeals reversed the superior court's ruling because the issues underlying the breach of contract claim had not been "actually litigated and necessarily decided in the previous action." *Id.* The Court of Appeals again emphasized that DNR's responding arguments were arguments to the merits of the issue that were unpersuasive to whether the issue had already been litigated. *Id.*

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Applied Established Collateral Estoppel Precedent.

The Court of Appeals correctly articulated the principles of collateral estoppel.

> Collateral estoppel applies when (1) the issue decided in the prior action is identical with the one presented in the current action, (2) the prior action ended in a final judgment on the merits, (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior action, and (4) the application of collateral estoppel will not cause an injustice against the estopped party.

Cooke II, 2024 WL 3273999, at *5 (citing *Weaver v. City of Everett*, 194 Wn.2d 464, 474, 450 P.3d 177 (2019)). Additionally, "only those issues that were actually litigated and necessary to the final determination in the earlier proceeding" can be collaterally estopped. *Cooke II*, 2024 WL 3273999, at *5 (quoting *Schibel*, 189 Wn.2d at 99). The Court of Appeals correctly applied collateral estoppel to the issues underlying Cooke's good faith and fair dealing and breach of contract claims.

The first element of collateral estoppel is dispositive of DNR's Petition. That element is only satisfied when the issues between the proceedings are "identical in all respects." *Reeves v. Mason County*, 22 Wn. App. 2d 99, 111, 509 P.3d 859 (2022) (citing *Standlee*, 83 Wn.2d at 408). A particular "issue"

includes both the pertinent facts and applicable legal rules and both "must remain unchanged" between proceedings. *Reeves*, 22 Wn. App. 2d at 111-12. "A difference in the degree of the burden of proof in the two proceedings precludes application of collateral estoppel." *Standlee*, 83 Wn.2d at 407. Even if "the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment." *Id.* at 408 (internal quotation marks omitted).

DNR asserts that the Court of Appeals misapplied *Standlee*. Petition at 25. DNR "cites no authority for the proposition that the rule expressed in *Standlee* is limited to the facts of that case." *Cooke II*, 2024 WL 3273999, at *7.

Standlee remains controlling and its reasoning explains the logical underpinnings of collateral estoppel that are applicable to many types of cases. *See, e.g., Reeves*, 22 Wn. App. 2d at 111-12; *Billings v. Town of Steilacoom*, 2 Wn. App.

2d 1, 15, 408 P.3d 1123 (2017); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 872, 316 P.3d 520 (2014); *Regan v. McLachlan*, 163 Wn. App. 171, 181-82, 257 P.3d 1122 (2011); *Lemond v. State, Dept. of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008).

DNR argues that *Billings* demonstrates that *Standlee* does not control here. *See* Petition at 27. DNR selectively quotes the *Billings* decision, without crucial context. The portion of *Billings* quoted by DNR applied to the court's analysis of the fourth factor for collateral estoppel regarding injustice, not whether the issues were identical. *See Billings*, 2 Wn. App. 2d at 19. With respect to the first factor, the court in *Billings* explained that the prior arbitration proceeding established that the appellant's termination was proper under a higher, clear and convincing burden of proof. *Id.* at 20. Accordingly, that prior proceeding necessarily decided whether termination was proper under the lower burden preponderance of the evidence standard in the subsequent civil proceeding. *Id.*

DNR's concern that this correct reading of the law would mean that "collateral estoppel would likely never apply to administrative decisions" is not based in any authority. *See* Petition at 28. In fact, the decision that DNR highlights to support this allegation directly undercuts its argument. That decision, *Shoemaker v. City of Bremerton*, concerned whether a police officer's reduction in rank was retaliatory. 109 Wn.2d 504, 505-06, 745 P.2d 858 (1987). This Court held that collateral estoppel from an administrative determination was appropriate. *Id.* at 511-12. This Court reasoned, in part, that the question before the administrative commission—"whether there was any retaliation at all"—necessarily decided the issue in the plaintiff's subsequent civil claim—"whether retaliation was a substantial motive" behind the demotion. *Id.* at 512. Because there was no retaliation at all, retaliation could not have been a substantial motive and collateral estoppel was appropriate. *Id.*

B. None of DNR's Remaining Arguments Justify Review of the Issues It Presents in the Petition.

1. DNR Seeks to Insulate Itself from Required Review Rather than Protect a Public Interest.

DNR argues that a substantial public interest warrants this Court's review. Petition at 15. DNR expresses angst that the Court of Appeals' opinion in *Cooke II* will "undermine[] RCW 79.02.030" and "incentivize[] lessees of our State's aquatic lands" to get "another bite at the apple" on legal issues shared between an administrative appeal under the statute and separate civil claims. *Id.* at 17.

DNR fails to identify any legal authority that establishes RCW 79.02.030 as an exclusive means of review. In fact, the statute provides that a party "may appeal" pursuant to that statute. This text stands in stark contrast to other statutes where the Legislature has intended for the statute to remain the exclusive form of review. *See, e.g.,* RCW 36.70C.030(1) (chapter 36.70C RCW "replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions"); RCW 36.70A.295(1) (a

superior court may only review a growth management act petition if "all parties to the proceeding… have agreed to direct review in the superior court").

DNR's arguments run counter to public interests because it is attempting to insulate its actions under a contract with a private party from anything other than the deferential review provided by RCW 79.02.030. Washington law is clear that, when contracting with a private party, an agency's actions must be adjudicated under the same standard that applies to the private party. *See Architectural Woods, Inc.*, 92 Wn.2d at 526-27 (the state consents to being held to "the same responsibilities and liabilities as the private party" in a contract between the two). In Washington, "[t]here is not one law for the sovereign and another for the subject." *Id.* at 529. DNR's attempts to upset this pillar of Washington law in the guise of advancing public interests is dubious at best. DNR's interpretations would harm members of the public when contracting with agencies by

more heavily scrutinizing members of the public that contract with DNR.

DNR invites this Court to rewrite and reinterpret the applicable law to benefit the agency at the expense of the public. The Court should decline that invitation.

2. The Court of Appeals' Decision Did Not Conflict with Collateral Estoppel Precedent as DNR Alleges.

DNR also asserts that the Court of Appeals' decision improperly blurred the lines between res judicata (claim preclusion) and collateral estoppel (issue preclusion) and otherwise conflicted with established precedent. Petition at 18-19. DNR argues that "collateral estoppel requires identity of underlying factual issues—not identity of claims." *Id.* at 18 (emphasis added).

That articulation fails to appreciate an important principle of collateral estoppel. "Collateral estoppel does not apply when a substantial difference in applicable legal standards differentiates otherwise identical issues even though the factual

setting of both suits is the same." *Reeves*, 22 Wn. App. 2d at 112 (emphasis added). In other words, for issues to be identical, "[t]he controlling facts and applicable legal rules must remain unchanged" between the two proceedings. *Id.* at 111-12 (emphasis added); *see also Standlee*, 83 Wn.2d at 408 (even if "the facts remain constant, the adjudication in the first case does not estop the parties in the second, unless the matter raised in the second case involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment" (internal quotation marks omitted)).

The Court of Appeals held that collateral estoppel did not apply to Cooke's good faith and fair dealing claim "[b]ecause the burden of proof in the administrative appeal was substantially higher than that in the instant case" and, therefore, "the issues raised in the second case are not identical to those raised in the administrative appeal." *Cooke II*, 2024 WL 3273999, at *6. DNR attempts to sidestep this conclusion by alleging that the "controlling issue" has already been decided.

See Petition at 20. DNR, however, fails to define this "controlling issue" or explain how the factual and legal principles in that issue were identical between the two proceedings.

DNR also attempts to argue the merits of the good faith and fair dealing claim. *See id.* at 20-21 (arguing why Cooke is not entitled to relief under the duty of good faith and fair dealing). As the Court of Appeals recognized, these arguments do not inform the analysis of whether collateral estoppel applies. *See Cooke II*, 2024 WL 3273999, at *7 (holding that such arguments are "immaterial to whether collateral estoppel applies").[1]

DNR similarly attempts to establish that the "controlling issue" underlying Cooke's breach of contract claim has already been litigated. *See* Petition at 23. DNR argues that Cooke

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[1] Cooke timely appealed the dismissal of its good faith and fair dealing claim in this civil litigation. DNR's arguments to the contrary are not supported by legal authority. *See* Petition at 23.

cannot recover under the breach of contract claim because Cooke's right to cure under the Lease has already been determined. *Id.* at 24. According to DNR, Cooke's lender cannot have any right beyond Cooke's rights. *Id.*

No court has addressed the issue of the lender's rights with respect to Cooke's rights. More to the point, the Assignment concerned not just the right to cure but DNR's obligation to give notice to Cooke's lender before the Lease was terminated. CP 2085 (DNR "shall not terminate the Lease… unless Lender has received from [DNR] a notice of default"). It is undisputed that DNR did not provide notice to Cooke's lender prior to terminating the Lease. No court has assessed the issue of what ramifications flow from that failure. Indeed, no court could have in the administrative appeal because the issues pertaining to the Assignment were not pled until after the superior court heard the administrative appeal. *See Schibel*, 189 Wn.2d at 99 ("Collateral estoppel precludes only those issues that were actually litigated and necessary to

the final determination in the earlier proceeding."). DNR's arguments on the merits of Cooke's breach of contract claim belong in the superior court on remand. They do not inform this Petition.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Pursuant to RAP 13.4(d), Cooke requests that this Court accept review of the lone error committed by the Court of Appeals—holding that the trial court appropriately applied collateral estoppel to Cooke's UDJA claim. As explained below, the court's error was threefold and warrants this Court's review pursuant to RAP 13.4(b)(1), (2), and (4).

A. Cooke Did Not Have the Opportunity to Fully and Fairly Litigate the Issues Underlying the UDJA Claim in the Administrative Appeal.

In addition to the four elements of collateral estoppel, "[t]he question is always whether the party to be estopped had a full and fair opportunity to litigate the issue." *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 491, 334

P.3d 63 (2014), *aff'd*, 184 Wn.2d 176, 357 P.3d 650 (2015). The Court of Appeals overlooked this factor in its analysis.

The cases relied upon by DNR illustrate the test for whether a party had a full and fair opportunity to litigate an issue in a proceeding like this one. For example, in *Reninger v. Dep't of Corr.*, the administrative board permitted parties to call and cross-examine witnesses, subpoena and obtain documents through a formal discovery process, and conduct depositions under oath prior to the hearing. 134 Wn.2d 437, 451, 951 P.2d 782 (1998). Similarly, in *Shoemaker*, the parties were afforded the ability to introduce documentary evidence, present and cross-examine witnesses, and otherwise take testimony under oath. *Shoemaker*, 109 Wn.2d at 510.

Here, the administrative appeal was limited to the certified agency record, without the opportunity to conduct complete discovery, depose witnesses, present witnesses, or cross-examine witnesses. *See* RCW 79.02.030; CP 442 (the

court "simply review[ed] the certified DNR record and appl[ied] the arbitrary and capricious standard to that record").

Cooke did not have the opportunity to conduct complete discovery, conduct depositions, or call or cross-examine witnesses at the hearing—and therefore did not have the opportunity to fully litigate the issues underlying its UDJA claim.

B. The Issues Underlying the UDJA Claim Are Not Identical to Any Issues Litigated in the Administrative Appeal.

The Court of Appeals also erred in holding that the issues underlying Cooke's UDJA claim are identical to issues fully litigated in the administrative appeal. The court acknowledged that the administrative appeal applied the substantial evidence standard to similar facts. *Cooke II*, 2024 WL 3273999, at *6. The court then reasoned that the facts and bundle of legal principles were sufficiently identical because "the substantial evidence standard is similar to the preponderance of the evidence standard that would be applied in Cooke's civil

lawsuit." *Id.* The court did not explain how those standards were similar, and it did not attempt to establish that the standards are "substantially the same" as contemplated by *Standlee*. *See* 83 Wn.2d at 408 (identifying need for "substantially the same bundle of legal principles").

Rather, the court failed to appreciate the deferential nature of the substantial evidence standard as compared to the preponderance of the evidence standard. "The substantial evidence standard is deferential; therefore [a court] view[s] the evidence and any reasonable inferences in the light most favorable to the party that prevailed" before the agency. *Affordable Cabs, Inc. v. Dep't of Employment Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004) (internal quotation marks omitted). Thus, the administrative appeal litigated before the superior court and the Court of Appeals required Cooke to overcome a high burden to prevail on its claims. In stark contrast, in this civil litigation, Cooke's burden is substantially lower under the general civil standard of review. *See State v.*

Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017) (preponderance of the evidence requires proof that "the proposition at issue is more probably true than not true" (internal quotation marks omitted)).

Unlike the administrative appeal, DNR receives no deference in this litigation. As the Court of Appeals recognized with respect to Cooke's good faith and fair dealing claim, these differing legal standards preclude application of collateral estoppel in this litigation. *See, e.g.*, *Standlee*, 83 Wn.2d at 407.

C. Application of Collateral Estoppel to Dismiss the UDJA Claim Would Contravene Public Policy and Result in an Injustice.

Lastly, the Court of Appeals failed to account for Cooke's arguments pertaining to the fourth element of collateral estoppel. Collateral estoppel would contravene public policy and result in an injustice. Washington courts "acknowledge[] that the injustice factor recognizes the significant role of public policy." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 309, 96 P.3d 957 (2004) (internal quotation marks

omitted). In fact, a court "may qualify or reject collateral estoppel when its application would contravene public policy regardless of identifying an injustice." *Reeves*, 22 Wn. App. 2d at 113.

If collateral estoppel is applied here, DNR will succeed in ensuring that its actions under a contract with a private party are only adjudicated under deferential administrative standards of review. However, it is longstanding Washington law that when a government agency is a party to a contract with a private party, it "must not expect more favorable treatment than is fair between [individuals in their] business relations with [other] individuals." *Architectural Woods, Inc. v. State*, 92 Wn.2d at 529. In *Architectural Woods, Inc.*, this Court emphasized that it has long been the rule in Washington that "[t]here is not one law for the sovereign and another for the subject." *Id.* (quoting *State v. Clausen*, 44 Wash. 437, 441, 87 P. 498 (1906)). This Court also adopted reasoning that when a government agency enters into a transaction with a private

party, it impliedly consents to being held to the "same responsibilities and liabilities as the private party." *Architectural Woods, Inc.*, 92 Wn.2d at 526-27.

Applying collateral estoppel here, at DNR's request, would erode public policy of how a government agency is judged when contracting with private parties. Limiting review of the actions of agencies in all contexts to deferential review removes an important check on the governmental agency's power and places private parties at a disadvantage. Shielding DNR from civil liability works an injustice and creates troubling precedent that would contravene established public policy regarding the standards that agencies are held to when transacting with private parties.

VI. CONCLUSION

Cooke respectfully requests that the Court deny DNR's Petition for Review. Cooke further requests that the Court accept review of the issue identified by Cooke pursuant to RAP 13.4(d).

This document contains 4,771 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 6th day of September, 2024.

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DECLARATION OF SERVICE

I declare that I caused the foregoing to be served to each of the following via electronic notification via the electronic court filing system:

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I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED 6th day of September, 2024, in Seattle, Washington.

s/ Eliza Hinkes
Eliza Hinkes,
Paralegal

NORTHWEST RESOURCE LAW PLLC

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