NO. _____

Court of Appeals No. 58229-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES and COMMISSIONER OF PUBLIC LANDS HILARY FRANZ,

Petitioners,

v.

COOKE AQUACULTURE PACIFIC, LLC,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

After Cooke Aquaculture unsuccessfully appealed the Department of Natural Resources' decision to terminate its aquatic lands lease under RCW 79.02.030, the trial court correctly applied collateral estoppel to dismiss Cooke's attempt at a second bite at the apple. As the trial court properly concluded, the claims asserted in Cooke's second lawsuit were all premised on the alleged invalidity of the lease termination—an issue that was necessarily decided in the earlier lawsuit.

The Court of Appeals erred in reversing the dismissal of two of Cooke's claims. Contrary to Cooke's arguments and the Court of Appeals' analysis below, collateral estoppel does not require identity of claims. It requires only that a controlling legal or factual issue was necessarily decided in the prior case.

Here, there is no dispute that Cooke litigated and lost its argument that the State's termination of Cooke's lease violated the lease terms. As the Court of Appeals already concluded in its first decision:

> There is no question that Cooke's failure to pay rent on October 1, 2017 constituted a default…This means that…DNR could declare an event of default if another default occurred within six months. And under section 14.3(a), DNR had the option to terminate the lease if an event of default occurred. We conclude that additional defaults did occur within six months of October 1, 2017.

Cooke Aquaculture Pac., LLC v. Dep't of Nat. Res. & Hilary Franz, No. 54564-1-II, slip op. at 11 (Wash. Ct. App. Dec. 14, 2021) (unpublished) (*Cooke* 1). Therefore, as of December 9, 2017:

> DNR could deem one or more of the subsequent defaults an event of default. Cooke was not entitled to an opportunity to cure.
>
> Accordingly,…DNR had the right under the terms of the lease to terminate Cooke's lease.

Cooke 1, slip op. at 14. This issue is dispositive of Cooke's remaining two claims.

First, "[a]s a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms."

Badgett v. Sec. State Bank, 116 Wn.2d 563, 570, 807 P.2d 356 (1991). Rather, the duty arises only "when one party has discretionary authority to determine a future [undefined] contract term," such as "quantity, price, or time." *Rekhter v. State*, 180 Wn.2d 102, 112, 323 P.3d 1036 (2014). There is no such undefined contract term at issue here. DNR simply exercised a clearly-defined right it had under the contract to terminate Cooke's lease—one which has been conclusively determined in the earlier litigation.

Second, Cooke's argument that DNR failed to provide the *lender* with notice of Cooke's defaults prior to termination is foreclosed because the lender's right is indisputably the same as Cooke's. Clerk's Papers (CP) at 135 ("State grants to Lender the same time to cure any default as is provided to Tenant under the Lease"). The earlier litigation already unqualifiedly determined that, following its earlier default, Cooke had no right under the contract to cure the subsequent defaults that led to the

termination of its lease. *Cooke* 1, slip op. at 14. So, under the undisputed contract terms, the lender had no such right, either.[1]

Both of Cooke's repackaged claims are foreclosed by its earlier failed challenge, which already determined that DNR acted pursuant to its express contractual authority in terminating Cooke's lease. The Court of Appeals' decision holding otherwise conflicts with this Court's collateral estoppel case law, undermines the finality of the statutory process for challenge of public lands leasing decisions, and frustrates the State's ability to protect its aquatic and other public lands. This Court should grant DNR's Petition under RAP 13.4(b)(1) and RAP 13.4(b)(4).

II. IDENTITY OF PETITIONERS

Petitioners are the Washington State Department of Natural Resources, an agency of the State of Washington, and Commissioner of Public Lands Hilary Franz, in her official capacity. The Department of Natural Resources and Commissioner Franz were the Defendants in the Thurston

[1] The lender is not a party to this case.

County Superior Court and the Respondents in the Court of Appeals.

III. COURT OF APPEALS DECISION

DNR seeks review of the Court of Appeals, Division II, decision in *Cooke Aquaculture Pacific, LLC v. Washington State Department of Natural Resources and Hilary Franz*, No. 58229-5-II (filed July 2, 2024) (unpublished) (*Cooke* 2). A copy of the decision is in Appendix A.

IV. ISSUE PRESENTED FOR REVIEW

After Cooke unsuccessfully challenged its lease termination under RCW 79.02.030, are its remaining claims collaterally estopped where they all depend on its argument that the lease termination was invalid under the contract?

V. STATEMENT OF THE CASE

A. Factual Background

The state-owned aquatic lands at issue here are located in Port Angeles Harbor and have been used for finfish aquaculture since the mid-1980s by various lessees. CP at 127; *see also Cooke* 1, slip op. at 2. In 2015, the parties entered into the lease at issue. CP at 130, 284.

1. Lease Provisions

The lease required Cooke to maintain the Property in good order and repair, and in a clean, attractive, and safe condition. CP at 306. The lease defines the term "Property" and "Improvements." CP at 285, 290. The lease also provides that the waiver of any default under any lease term is neither a waiver of the term, nor of any subsequent default of that same term or any other term. CP at 311.

Under Section 14 of the lease, a "default" occurs when Cooke fails to timely pay rent or other expenses, or fails to comply with any other lease provision. CP at 308-09. Generally,

Cooke has 60 days to cure a default, unless the lease otherwise provides a different timeline. CP at 308. But, upon an Event of Default, DNR can terminate the lease without providing Cooke an opportunity to cure.; *Cooke* 1, slip op. at 4.

A default becomes an "Event of Default" in two ways. CP at 308. First, a default constitutes an Event of Default if Cooke fails to cure a default within the cure period after receiving notice from DNR. *Id.* Second, DNR may, in its discretion, deem a default to be an Event of Default "if the default occurs within six (6) months after a default by [Cooke] for which [DNR] has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature." *Id.* DNR is not required to provide Cooke an opportunity to cure an Event of Default. *Id.*; *Cooke* 1, slip op. at 4.

The lease required Cooke to replace un-encapsulated floatation materials on the wooden float by December 1, 2015, and to replace un-encapsulated floatation material on the

concrete float by December 1, 2016. CP at 316. Cooke was also required to "ensure that all Improvements are located entirely on the Property," which included anchors, among other things, by October 1, 2016. CP at 317; *Cooke* 1, slip op. at 3.

2. Termination

In August 2017, a net pen at Cooke's Cypress Island commercial fish farm collapsed. *Cooke* 1, slip op. at 5. Following the net pen collapse, DNR began investigating the causes and inspecting Cooke's other salmon farms for compliance with its maintenance obligations and general lease terms. *Id.* Meanwhile, in October 2017, Cooke failed to timely pay the required annual rent on the Port Angeles leasehold. *Id.* DNR sent Cooke a Notice of Default providing Cooke 60 days to cure, and Cooke timely cured. *Id.*; CP at 428-29.

DNR hired a marine engineering firm, Mott MacDonald, to investigate the cause of the net pen collapse, and inspect Cooke's remaining net pen sites. *Cooke* 1, slip op. at 5. Mott MacDonald reported areas of critical conditions, serious

deficiencies, and severe damage, including but not limited to un-encapsulated floatation materials and disconnected anchors, although the net pen facilities were otherwise in "fair condition." *Id.* Mott MacDonald also determined that anchors on both the primary and secondary net pens were located outside of the leasehold boundary. *Id.*; CP at 433.

Based on these reports, DNR determined that Cooke was in default of the lease in three respects. *Cooke* 1, slip op. at 5-6, 11-12. Specifically, (1) Cooke's failure to encapsulate floatation material on the concrete float by December 1, 2016, violated Exhibit B's requirement to do so; (2) Cooke's failure to ensure all anchors were within the leasehold boundaries violated Exhibit B's requirement that all Improvements be located entirely on the Property; and (3) the disconnected anchor chains and anchor chain with an open link violated Section 11.2's requirement to maintain the Property and Improvements in good order and repair, in a safe, clean, and attractive condition. *Cooke* 1, slip op. at 6.

On December 15, 2017, after reviewing Mott MacDonald's preliminary findings, DNR deemed Cooke's default for failure to comply with Section 11.2 an Event of Default. *Cooke* 1, slip op. at 6-7; CP at 433. DNR then terminated the lease under Section 14. *Cooke* 1, slip op. at 6-7; CP at 433.

B. Bifurcation and Procedural History

Cooke timely appealed DNR's decision to terminate the lease to the superior court under RCW 79.02.030. CP at 266; *Cooke* 1, slip op. at 7. Cooke also sought a declaratory judgment that it was not in default of the lease and that DNR did not have a basis to terminate the lease, and alleged that DNR breached the duty of good faith and fair dealing when it terminated the lease. CP at 280. Cooke first filed its complaint in Clallam County. *Cooke* 1, slip op. at 7. DNR moved to change the venue from Clallam County to Thurston County. *Cooke* 1, slip op. at 7; CP at 327. The Clallam County Superior Court granted DNR's motion and transferred venue to the Thurston County Superior Court. *Cooke* 1, slip op. at 7; CP at 327. The trial court severed

Cooke's RCW 79.02.030 appeal (the administrative appeal) from its other claims, ruling that it would hear the administrative appeal first. CP at 360. Cooke did not oppose bifurcation. *Cooke* 1, slip op. at 7; CP at 365.

The trial court reviewed the Agency Record, which included the lease. CP at 441. The trial court rejected Cooke's claim that DNR's decision to terminate was quasi-judicial, and therefore concluded that the appropriate standard of review was arbitrary and capricious under *Northwest Alloys v. Department of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019, 455 P.3d 138 (2020). CP at 441. The trial court ruled that DNR's decision to terminate the lease was factually supported, and was not arbitrary and capricious. CP at 441-42. The court also concluded that DNR did not waive the lease provisions requiring timely payment of rent, and further stated that "[u]nder the circumstances in this case, waiver cannot apply to avoid compliance with the Lease provisions with DNR,

a public entity." CP at 441. Cooke timely appealed the trial court's decision. CP at 445.

In affirming the trial court, the Court of Appeals, in an unpublished opinion, held that DNR's decision to terminate Cooke's lease was administrative, and therefore the proper standard of judicial review of that decision is arbitrary and capricious. *Cooke* 1, slip op. at 1-2. However, the Court's review of and construction of the lease provisions—a legal question—was de novo. *See id.* at 10-12. The Court affirmed the trial court's decision that DNR did not act in an arbitrary and capricious manner, holding that "DNR's decision to terminate the lease was based on facts supported by substantial evidence, pursuant to plain terms of the contract, was well reasoned and made with due regard to the facts and circumstances." *Cooke* 1, slip op. at 15.

Cooke filed a Motion for Reconsideration, which the Court of Appeals denied. CP at 512. Cooke subsequently petitioned this Court for review, which also denied review. CP at

514. The Court of Appeals issued its Mandate on September 9, 2022. CP at 516.

C. Trial Court's Ruling on Cooke's Bifurcated Claims

In February 2023, DNR filed a motion for summary judgment on Cooke's remaining civil claims, arguing that collateral estoppel precluded Cooke's civil claims, and that its § 1983 due process claims failed as a matter of law. CP at 230. The trial court granted summary judgment to DNR, and dismissed Cooke's claims. CP at 2500; Verbatim Report of Proceedings (03-31-23) at 33. Cooke timely appealed. CP at 2507.

D. Court of Appeals Decision

On appeal to Division II, Cooke abandoned its § 1983 claims, and assigned error to the trial court's dismissal under collateral estoppel of three of its causes of action: 1) its Uniform Declaratory Judgment Act (UDJA) claims for breach of contract; 2) its good faith and fair dealing claims; and 3) its lender notice and right to cure claims. The Court of Appeals, in an unpublished

opinion, affirmed the trial court's dismissal of Cooke's UDJA claims, but reversed the dismissal of Cooke's good faith and fair dealing and lender notice claims. *Cooke* 2, slip op. at 2. The Court of Appeals held that collateral estoppel barred Cooke's UDJA claims because the issues were the same. *Cooke* 2, slip op. at 11. Relying on *Standlee v. Smith*, 83 Wn.2d 405, 518 P.2d 721 (1974), the Court of Appeals also held that the burden was different in the previous administrative appeal, and therefore the issues relating to the two other claims were not the same. *Cooke* 2, slip op. at 12. The Court based this determination on an amorphous distinction between DNR's "right" to terminate the lease versus DNR's "decision" to terminate the lease. *Cooke* 2, slip op. at 12. DNR seeks review of this decision as it pertains to the Court of Appeals reversing and remanding to the trial court Cooke's good faith and fair dealing, and lender notice and right to cure claims.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court should accept review under RAP 13.4(b)(1) and RAP 13.4(b)(4) because the Court of Appeals' decision is contrary to established Supreme Court precedent, misapplies *Standlee*, a criminal law case, to the legislatively mandated appeal procedures of RCW 79.02.030, and undermines those appeal procedures. This decision was wrong, and given the potential impacts to state-owned aquatic lands and the conflicts with precedent, warrants review.

A. This Case Presents a Matter of Substantial Public Interest Because the Court of Appeals' Decision Undermines the Appeal Process of RCW 79.02.030, Harming DNR's Ability to Protect the State's Aquatic Lands

At statehood, Washington State asserted full, fee ownership of the beds and shores of all navigable waters up to the line of ordinary high tide. Const. art. XVII, § 1. The Legislature delegated the responsibility to manage state-owned aquatic lands to DNR "for the benefit of the public." RCW 79.105.010. DNR is required to "strive to provide a

balance of public benefits for all citizens of the state." RCW 79.105.030. Accordingly, DNR has a unique role in managing state-owned aquatic lands in trust for the public by virtue of the Washington Constitution. *Pope Res. v. Dep't of Nat. Res*., 190 Wn.2d 744, 754, 418 P.3d 90 (2018); *Nw. Alloys*, 10 Wn. App. 2d at 185.

The Legislature established the appeal process for DNR's leasing decisions on state-owned aquatic lands under RCW 79.02.030, which provides that:

> [a]ny applicant to purchase, or lease, any public lands of the state, or any valuable materials thereon, and any person whose property rights or interests will be affected by such sale or lease, feeling aggrieved by any order or decision of the board, or the commissioner, concerning the same, may appeal therefrom to the superior court of the county in which such lands or materials are situated, . . . within thirty days from the date of the order or decision appealed from.

RCW 79.02.030 creates the mechanism for judicial review of DNR's leasing decisions. Allowing thirty days for a lessee of state-owned aquatic lands to appeal a decision to terminate a

lease provides for the efficient resolution of situations, such as here, where there is the potential for serious damage to the State's public lands if action is not quickly taken. Indeed, even Cooke recognized the importance of the appeal process, stating that "[t]his is a unique administrative appeal in which the history behind and the context surrounding the decision are crucial for determining the appropriateness of DNR's termination of a longstanding aquatic lands lease for Cooke's salmon farm in Port Angeles." CP at 366.

The Court of Appeals' reversal of summary judgment on Cooke's good faith and fair dealing and lender notice claims undermines RCW 79.02.030. In doing so, the Court of Appeals incentivizes lessees of our State's aquatic lands to simply hedge their bets by appealing under the statute, contemporaneously filing civil claims, and then getting another bite at the apple on the legal issues underlying those claims if they lose their appeal under the statute. This waste of judicial resources and subversion of DNR's ability to efficiently resolve lease disputes to protect

the State's public lands is an issue of substantial public interest warranting review.

B. This Court Should Accept Review Because the Court of Appeals' Decision Conflicts with Established Law by Requiring Identity of Claims

The Court of Appeals held that collateral estoppel did not apply to either the good faith and fair dealing claims, or the lender notice claims because the claims are not identical. *Cooke* 2, slip op. at 12, 14 (agreeing with Cooke's argument that the issues were not addressed because the claims were not addressed in the administrative appeal).

The Court's decision conflicts with longstanding precedent that firmly establishes that collateral estoppel requires identity of underlying factual issues—not identity of claims. *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004); *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983). Unlike res judicata, collateral estoppel prevents relitigation "of one or more of the crucial issues or determinative facts determined in previous litigation."

Christensen, 152 Wn.2d at 306 (quoting *Luisi Truck Lines, Inc. v. Wash. Util. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967)); *Weaver v. City of Everett*, 194 Wn.2d 464, 473, 450 P.3d 177 (2019).

1. *Cooke* 1 decided the controlling legal issue related to Cooke's good faith and fair dealing claims

The Court of Appeals decided the controlling issue. *Cooke* 1, slip op. at 14, 15. Specifically, the Court held that substantial evidence supported DNR's determination that Cooke breached the lease, and that DNR was entitled to terminate based on the plain language of the lease. *Cooke* 1, slip op. at 14, 15.

The Court of Appeals distinguishes between DNR's "right" to terminate a lease and its "decision" to terminate in explaining how the claims differ. *Cooke* 2, slip op. at 12-13. The Court says that "[t]he duty of good faith and fair dealing involves whether the decision to terminate the contract was proper." *Id.* at 12. The Court explained that "a trial of Cooke's breach of the duty of good faith and fair dealing claim" would be based on a

preponderance of the evidence standard, which is a higher burden than the earlier appeal's arbitrary and capricious standard. *Id.* The Court reasoned that therefore, collateral estoppel did not preclude Cooke's claim. *Id.*

The Court's reasoning is flawed because collateral estoppel does not require identical claims, and the controlling issue about DNR's lease termination has already been decided. Resolving Cooke's good faith and fair dealing claim first requires identifying whether the express lease terms give rise to the duty of good faith and fair dealing. "As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms." *Badgett*, 116 Wn.2d at 570. "[T]he implied covenant of good faith and fair dealing cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties." *Rekhter*, 180 Wn.2d at 113. The duty arises only "when one party has discretionary authority to determine a future [undefined] contract term," such

as "quantity, price, or time." *Rekhter*, 180 Wn.2d at 112-13. Where "a contract gives a party unconditional authority to determine a term, there is no duty of good faith and fair dealing." *Rekhter*, 180 Wn.2d at 119-20.

Here, Cooke has not claimed that DNR had discretion to determine undefined terms in the future, or identified any term that would give rise to the duty. Instead, Cooke relies on the notion of a free-floating duty of good faith and fair dealing. Specifically, Cooke argues: "DNR failed to perform in good faith when it declared a default and purported to terminate the Lease and therefore has breached its duties of good faith and fair dealing." CP at 141; *see* Br. of App. at 31. Cooke's reframing of its argument as a new claim does not change the underlying controlling issue. *See Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 596, 416 P.3d 1261 (2018) (noting that in collateral estoppel claims, "the second claim is always different from the first"). "What matters is whether *facts* established in the first

proceeding foreclose the second claim." *Id.* at 597 (emphasis in original).

In conducting a de novo review, the Court of Appeals concluded that the lease language was plain and DNR terminated the lease pursuant to its terms. *Cooke* 1, slip op. at 13-15. Specifically, the Court of Appeals stated: "DNR's decision to terminate the lease was based on facts and supported by substantial evidence, pursuant to the plain terms of the contract, was well reasoned and made with due regard to the facts and circumstances." *Cooke* 1, slip op. at 15; *see Cooke* 2, slip op. at 12 (reiterating the *Cooke* 1 "address[ed] the factual issues on the merits").

Moreover, the Court of Appeals also previously concluded that Cooke's good faith and fair dealing claims were simply repackaged waiver claims, to which it failed to assign error and were thus abandoned. *Cooke* 1, slip op. at 14 n.4 (noting that Cooke argued that DNR failed to act in good faith, "[b]ut these arguments are waiver arguments by another name, and Cooke

did not assign error to the superior court's determination that waiver did not apply."). Cooke raised these arguments before the trial court in the first case but did not appeal those claims, and so cannot raise them now.

2. The controlling legal issue of Cooke's right to cure was decided in the previous appeal. This legal question is dispositive of Cooke's lender notice claim

In its previous appeal, Cooke argued extensively that the lease gave it a right to cure. The Court of Appeals determined, as a matter of law, that Cooke had no such right. *Cooke* 1, slip op. at 14; *Cooke* 2, slip op. at 11. This legal question also forecloses Cooke's subsequent argument that DNR failed to provide the lender with notice and an opportunity to cure. CP at 135, 2085 ("State grants to Lender the same time to cure any default as is provided to Tenant under the Lease.").[2] Since Cooke was not

[2] As Cooke acknowledges, DNR sent a notice of default to Cooke and its lender. CP at 135, 428, 432, 436.

entitled to cure its latest default, the lender could not have any such right under the contract's unambiguous terms.

The Court of Appeals' decision here appears to confuse collateral estoppel (issue preclusion) with res judicata (claim preclusion) when it states that "the issue here is whether the breach of contract claim was actually decided in the appeal, not whether DNR can prevail at trial." *Cooke* 2, slip op. at 14. Breach of contract is the claim, not the controlling issue. Cooke's right to cure is a controlling issue in deciding Cooke's claim, and it was already litigated. *Cooke* 1, slip op. at 14. Specifically, the Court of Appeals previously held:

> DNR provided notice and an opportunity to cure regarding Cooke's default of the rent provision on October 20, 2017. On December 9, 2017, DNR became aware of additional defaults of the lease regarding the property itself. At that point, DNR could deem one or more of the subsequent defaults an event of default. Cooke was not entitled to an opportunity to cure.

Cooke 1, slip op. at 14. As Cooke had no right to cure under these circumstances, neither did its lender.

C. This Court Should Accept Review Because the Court of Appeals Misapplied *Standlee* to RCW 79.02.030's Appeal Process

The Court of Appeals relies on *Standlee* to conclude that it is a "clear rule" that "[a] difference in the degree of the burden in the two proceedings precludes application of collateral estoppel." *Cooke* 2, slip op. at 12 (quoting *Standlee*, 83 Wn.2d at 407). This is wrong for two reasons. First, as the Court of Appeals also recognizes, "[c]contract interpretation is a question of law." *Cooke* 2, slip op. at 12 (citing *Kaiser Found. Health Plan, Inc. v. Brice*, 22 Wn. App. 2d 227, 233, 510 P.3d 1017 (2022)). Questions of law are reviewed de novo, and accordingly, the standard of review for the legal questions of interpreting Cooke's lease were exactly the same in the RCW 79.02.030 appeal as here.

Second, this Court has long recognized that "an administrative decision may have preclusive effect on a subsequent civil action where the parties had ample incentive to litigate issues …." *Thompson v. Dep't of Licensing*, 138 Wn.2d

783, 796, 982 P.2d 601 (1999) (citing *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987); *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). This Court has rejected the argument that a difference in burdens of proof prevents application of collateral estoppel. *Thompson*, 183 Wn.2d at 797.

The Court's reliance on *Standlee* is misplaced. *Standlee* was a criminal case that did not apply to a statutorily mandated appeals process such as RCW 79.02.030. *Standlee* addressed collateral estoppel in the context of a criminal prosecution and a subsequent parole revocation hearing. *Standlee*, 83 Wn.2d at 407. The court acknowledged that parole revocation may be based on facts that constitute a separate crime from the original prosecution. *Id.* In declining to apply collateral estoppel against the State in a parole revocation hearing, the *Standlee* court recognized the different procedures and purposes in a parole revocation hearing from a criminal prosecution, and noted that "the State has an overwhelming interest in being able to return

the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Id.* at 410.

The Court of Appeals cites two cases to assert that *Standlee* has broader application in civil cases. *Cooke* 2, slip op. at 13 n.3 (citing *Reeves v. Mason County*, 22 Wn. App. 2d 99, 509 P.3d 859 (2022); *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 19, 408 P.3d 1123 (2017)). However, unlike here where the legal principles of contract interpretation are the same, *Reeves* involved different underlying substantive law. *See Reeves*, 22 Wn. App. 2d at 112-13. There, the Court concluded that statutory differences between two attorneys' fees statutes made the issues different. *Reeves*, 22 Wn. App. 2d at 112-13. And as the *Billings* court recognized, "an administrative decision may have preclusive effect on a subsequent civil action where the parties had ample incentive to litigate issues even though the remedies available in the two arenas were not identical." *Billings*, 2 Wn. App. 2d at 19.

The burdens between administrative appeals and subsequent civil cases will frequently be different, and if different evidentiary burdens worked as an absolute bar to collateral estoppel, collateral estoppel would likely never apply to administrative decisions. *See, e.g.*, *Shoemaker*, 109 Wn.2d at 511 ("As for the rules of evidence not being in force, this is generally true of administrative hearings. To hold that it deprives the decision here of preclusive effect would, in effect, be to completely abolish administrative collateral estoppel.").

The Court of Appeals committed error when it applied *Standlee* to questions of law that were previously determined in Cooke's RCW 79.02.030 appeal. This decision misapplies *Standlee*, undermines RCW 79.02.030, and warrants review.

VII. CONCLUSION

The Court's decision conflicts with Supreme Court precedent, and raises issues of substantial public interest regarding the preclusive effect that the appeal process of RCW 79.02.030 has on subsequent civil claims that arise out of

the same underlying issues, and the misapplication of this Court's decision in *Standlee* to that appeal process. DNR respectfully requests the Court grant this Petition for Review.

This document contains 4,742 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 31st day of July 2024.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on July 31, 2024, as follows:

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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 31st day of July 2024 at Olympia, Washington.

s/ *Anne M. Caulder*
ANNE M. CAULDER
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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

July 2, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COOKE AQUACULTURE PACIFIC, LLC, Appellant, v. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and HILARY FRANZ, the Washington Commissioner of Public Lands, Respondents.	No. 58229-5-II UNPUBLISHED OPINION

MAXA, J. – Cooke Aquaculture Pacific, LLC (Cooke) appeals the trial court's order granting summary judgment in favor of the Department of Natural Resources (DNR).[1] Cooke leased public lands from DNR for finfish aquaculture. After one of Cooke's aquaculture farms collapsed, DNR closely scrutinized the structural integrity of Cooke's other farms. After investigating Cooke's farm at Port Angeles, DNR concluded that Cooke was in default of the lease and terminated it without giving Cooke a chance to cure its defaults.

Cooke appealed DNR's termination of the lease, filing an administrative appeal under RCW 79.02.030 and a complaint seeking a declaratory judgment that DNR had no basis for terminating the lease and alleging that DNR breached its duty of good faith and fair dealing. The trial court bifurcated the claims, hearing the administrative appeal first. The court affirmed DNR's termination of the lease. This court affirmed on appeal. DNR moved to dismiss Cooke's

[1] The respondents are the Commissioner of Public Lands, Hilary Franz (in her official capacity) and the DNR. Because Cooke's allegations relate primarily to DNR's decision regarding its lease, we refer to respondents collectively as "DNR" except where indicated otherwise.

remaining claims, arguing that Cooke was collaterally estopped from relitigating the controlling issue of whether DNR's termination of the lease violated the terms of the lease. The trial court dismissed Cooke's claims on collateral estoppel grounds.

We hold that (1) the trial court did not err in applying collateral estoppel to Cooke's claim that DNR had no basis for terminating the lease because this court ruled as a matter of law on de novo review that Cooke defaulted on the lease and DNR had the right to terminate the lease, (2) the trial court erred in applying collateral estoppel to Cooke's good faith and fair dealing claim because that claim is not identical to its claim in the administrative appeal, and (3) the trial court erred in applying collateral estoppel to Cooke's breach of contract claim because neither the trial court nor this court addressed that claim in the administrative appeal.

Accordingly, we affirm in part and reverse in part the trial court's order dismissing Cooke's claims and remand for further proceedings.

FACTS

Since 1984, several different private companies have leased the aquatic lands in Port Angeles harbor from DNR for finfish aquaculture. Cooke is the most recent tenant, and negotiated its most recent lease with DNR in October 2015. The lease term was for 10 years, set to expire in September 2025.

Lease Provisions

Relevant to the instant appeal are several provisions of Cooke's lease. The lease provided that Cooke was to pay annual rent to DNR, and that failure to pay timely rent would be considered a default by Cooke.

The lease also provided that Cooke was to keep and maintain the property and improvements "in good order and repair, in a clean, attractive, and safe condition." Clerk's

Papers (CP) at 306. The lease defined "improvements" as "additions within, upon, or attached to the land," including, but not limited to, "fill, structures, bulkheads, docks, pilings, and other fixtures." CP at 290. The lease further provided that, as of the start of the lease, a number of improvements were located on the property, including 38 anchors.

Exhibit B to the lease set forth additional requirements. It provided that Cooke was to "replace existing unencapsulated flotation materials with encapsulated flotation materials . . . on the wooden float by December 1, 2015" and "must replace all unencapsulated flotation material on the concrete float by December 1, 2016." CP at 316. It further required Cooke to "replace existing tires with inert or encapsulated materials such as plastic or enclosed foam . . . by December 1, 2015." CP at 316. In addition, the lease required Cooke to ensure that all improvements were located on the property by October 1, 2016.

Finally, the lease stated that the "State may elect to deem a default by [Cooke] as an Event of Default if the default occurs within six (6) months after a default by [Cooke] for which State has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature." CP at 308. Upon an Event of Default, the State could terminate the lease and remove Cooke. There was no provision for an opportunity to cure for an Event of Default.

DNR Terminates Lease

In August 2017, the net pen at Cooke's Cypress Island farm collapsed. After the collapse, DNR began to review the structural integrity of Cooke's other farms.

In October, Cooke failed to timely pay rent for the Port Angeles harbor farm. DNR sent Cooke a notice of default and granted it a 60-day period to cure. Cooke cured the default five days later.

In November, DNR hired an engineering company to inspect Cooke's net pen locations at the Port Angeles harbor farm. The engineering company documented several issues. It noted that although Cooke's anchor lines were in satisfactory to fair condition, there were errant abandoned anchor line ropes. In addition, some of the flotation devices were unencapsulated, meaning that there was exposed styrofoam in the farm. The engineering company also found that the inspections conducted by Cooke were not done in accordance with manufacturing recommendations or industry standards. Finally, some of Cooke's anchors likely were outside of the limits of the leased area.

In its final report, the engineering company concluded that there were issues with anchors on the property that needed immediate attention because there was a broken link in the chain near the anchor. The report also noted that "mooring lines were 'missing' and were 'wrapped around other lines,' among additional problems." CP at 250.

Based on the results of the engineering company's investigation, DNR determined that Cooke had defaulted on three lease requirements. First, the lease required Cooke to replace all unencapsulated floatation material on the concrete float by December 1, 2016. However, as of December 9, 2017, the styrofoam floatation material on the concrete float was unencapsulated.

Second, the lease required that Cooke ensure all improvements be located on the property by October 1, 2016. However, as of December 9, 2017, anchors associated with the net pens were located outside of the leasehold. And the lease defines anchors as "existing improvements." CP at 290.

Third, the lease required Cooke to keep the leasehold and all improvements "in good order and repair, in a clean, attractive, and safe condition." CP at 306. However, "as of

December 9, 2017, two net pen anchor chains were disconnected from their anchors, and a third anchor chain had an open link that is vulnerable to complete failure." CP at 250.

DNR sent a notice of default and lease termination to Cooke on December 15, 2017. In the notice, DNR stated that it was terminating the lease as a result of an Event of Default because Cooke previously had defaulted by paying untimely rent within a six-month period of the three other defaults mentioned above. DNR did not give Cooke an opportunity to cure its defaults.

Administrative Appeal

In January 2018, Cooke filed an appeal under RCW 79.02.030, which gives a person a right to appeal a decision regarding a DNR lease. Cooke also asserted a complaint for declaratory judgment that DNR had no basis for terminating the lease and alleging that DNR breached its duty of good faith and fair dealing.

The trial court severed the civil complaint from the administrative appeal and ordered Cooke to refile its civil complaint under a new cause number. The court ruled that the administrative appeal would be heard first and the civil complaint would be heard second. Cooke subsequently filed a new civil complaint, in which Cooke again sought a declaratory judgment that DNR has no basis for terminating the lease and alleged that DNR breached its duty of good faith and fair dealing.[2]

In February 2020, the trial court affirmed DNR's lease termination under RCW 79.02.030. The trial court ruled that the case was an administrative law case and applied the arbitrary and capricious standard of review. The court stated, "Although it appears that DNR

[2] Cooke also asserted two constitutional claims, arguing that DNR violated Cooke's procedural and substantive due process rights and requesting damages under 42 U.S.C. § 1983. The trial court dismissed those claims on different grounds, and Cooke does not challenge that ruling on appeal.

may have been enforcing what could be described as technical violations after a high-profile event, under the arbitrary and capricious standard, the court finds there is a basis in the record to support the termination decision." CP at 441. The court continued, "In reaching this decision, the Court is making no findings of fact, but rather is simply reviewing the certified DNR record and applying the arbitrary and capricious standard to that record." CP at 442.

Amended Civil Complaint

Following the trial court's decision in the administrative appeal, Cooke filed an amended complaint in the civil action. The amended complaint contained a new allegation that DNR and Cooke had entered into a Consent to Assignment of Lease for Security Purposes with Cooke's lender. Cooke alleged that the consent to assignment stated,

> State will send to Lender a copy of any notices of default or termination it issues to Tenant under the Lease. Failure to provide notices to Lender shall not relieve Tenant of its obligations under the Lease nor extend the time in which Tenant has the right to cure the default. State grants to Lender the same time to cure any default as is provided to Tenant under the Lease (or as provided in the notice of default issued by State if such time to cure is not specified in the Lease) before such default becomes an Event of Default (as defined in the Lease); provided that Lender shall have the right, but not the obligation, to cure such default. Lender's time to cure shall commence upon State's provision of notice of the default to Lender. State shall not terminate the Lease under Section 14 of the Lease or pursue any other right or remedy under the Lease by reason of any default of Tenant under Section 14 of the Lease unless Lender has received from State a notice of default and until lender's time period to cure such default has expired. Failure by State to send a notice of termination shall not affect the effective date of any notice of termination.

CP at 135.

Cooke alleged that although DNR gave the lender notice of the payment of rent default, DNR terminated the lease without giving the lender a notice of the other defaults. Cooke asserted a new cause of action for breach of contract, claiming that DNR breached its obligations to the lender under the consent to assignment by failing to provide notice of default and an opportunity to cure.

Court of Appeals Decision

Cooke appealed the trial court's RCW 79.02.030 order to this court. In December 2021, this court affirmed the trial court's order in an unpublished opinion. *See Cooke Aquaculture Pac., LLC v. Dep't of Nat. Res.*, No. 54564-1-II (Wash. Ct. App. Dec. 14, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2054564-1-II%20Unpublished%20Opinion.pdf. This court held that DNR's right to terminate the lease was a quasi-judicial action subject to de novo review. *Id.* at *10. However, DNR's decision to terminate the lease was administrative in nature subject to the arbitrary and capricious standard of review. *Id.* at *11.

Applying de novo review and a substantial evidence standard, the court held that DNR had the *right* to terminate the lease under the lease provisions. *Id.* at *14. The court noted that Cooke had defaulted on the lease by failing to pay rent on time and concluded that additional defaults occurred within six months of the first default. *Id.* at *11. Therefore, DNR was entitled to declare an Event of Default, which allowed DNR to terminate the lease without providing an opportunity to cure. *Id.* at *14.

Regarding the *decision* to terminate the lease, the court held that DNR's action was not arbitrary and capricious. *Id.* The court concluded, "DNR's decision to terminate the lease was based on facts supported by substantial evidence, pursuant to plain terms of the contract, was well reasoned and made with due regard to the facts and circumstances." *Id.* at *15.

In a footnote, the court addressed Cooke's claim that DNR violated the duty of good faith and fair dealing. *Id.* at *14 n.4. The court stated, "[T]hese arguments are waiver arguments by another name, and Cooke did not assign error to the superior court's determination that waiver did not apply. Accordingly, we do not reach these arguments." *Id.*

Cooke filed a motion for reconsideration to this court, which this court denied in March 2022. Cooke then filed a petition for review by the Supreme Court, which was denied.

Dismissal of Cooke's Civil Claims

DNR moved for summary judgment in Cooke's civil lawsuit, arguing that collateral estoppel barred the relitigation of the controlling issue behind all of Cooke's claims: whether DNR properly terminated Cooke's lease. Specifically, DNR argued that because DNR's termination of Cooke's lease was upheld in the administrative appeal under RCW 79.02.030, Cooke's remaining claims should be dismissed under collateral estoppel because they all hinged on whether or not the lease termination was proper.

DNR pointed out that Cooke's declaratory judgment claim seeking a declaration that it is not in default of the lease was the same argument that Cooke made in the administrative appeal when it asserted that it did not breach the lease. DNR also argued that Cooke's claim asserting violations of the duties of good faith and fair dealing should be dismissed because this court had already addressed this argument, concluding that Cooke had repackaged its waiver arguments that were rejected by the trial court. Finally, DNR argued that Cooke's new claim about whether DNR gave sufficient notice of the lease termination to its lender should be dismissed because this court already had considered and rejected the question of whether Cooke had a right to cure.

In response, Cooke argued that the trial court should not apply collateral estoppel to dismiss their claims. Cooke pointed out that the issues in the civil case were not identical to those raised in the administrative appeal because different legal standards applied to their civil claims. Cooke also argued that collateral estoppel should not apply because doing so would work an injustice against Cooke since they did not have the opportunity to fully and fairly litigate their claims.

The trial court granted DNR's motion for summary judgment. The court held that collateral estoppel applied to Cooke's claims for declaratory judgment, breach of the duty of good faith and fair dealing, and breach of contract for failure to give timely notice to Cooke's lender. The court dismissed each of the claims. The court explained,

> While the court recognizes that the standards between an administrative appeal and the present matter are different, the Court concludes that this does not prevent the application of collateral estoppel in this case. The Court does not believe that it works an injustice against Cooke to grant Defendants' Motion for Summary Judgment.

CP at 2504.

Cooke appeals the trial court's order dismissing their claims on collateral estoppel grounds.

ANALYSIS

Cooke argues that the trial court erred by granting summary judgment in favor of DNR because collateral estoppel does not apply to their claims. Cooke emphasizes that the standard of review was different in the administrative appeal than it would be in a civil action. We agree in part and disagree in part.

A. SUMMARY JUDGMENT STANDARD

We review summary judgment orders de novo. *Mihaila v. Troth*, 21 Wn. App. 2d 227, 231, 505 P.3d 163 (2022). We view all evidence in the light most favorable to the nonmoving party, including reasonable inferences from the evidence. *Id.* Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists if reasonable minds can come to different conclusions on a factual issue. *Id.* But summary judgment can be determined as a

matter of law if the material facts are not in dispute. *Protective Admin. Servs., Inc. v. Dep't of Revenue*, 24 Wn. App. 2d 319, 325, 519 P.3d 953 (2022).

B. COLLATERAL ESTOPPEL

Collateral estoppel is an equitable doctrine that prevents the relitigation of issues that already have been determined in a prior proceeding. *Weaver v. City of Everett*, 194 Wn.2d 464, 473, 450 P.3d 177 (2019).

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. *Id* at 474. In addition, "[c]ollateral estoppel precludes only those issues that were actually litigated and necessary to the final determination in the earlier proceeding." *Schibel v. Eymann*, 189 Wn.2d 93, 99, 399 P.3d 1129 (2017). Whether collateral estoppel applies is a question we review de novo. *Weaver*, 194 Wn.2d at 473.

Regarding the first requirement, collateral estoppel can be applied only in situations where "the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding" and where "[t]he controlling facts and applicable legal rules . . . remain unchanged." *Reeves v. Mason County*, 22 Wn. App. 2d 99, 111-12, 509 P.3d 859 (2022); *see also Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974). Collateral estoppel is only appropriate if the issue raised in the second case " 'involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,' " even if the facts and issues in the cases are identical. *Standlee*, 83 Wn.2d at 408 (internal quotation marks omitted) (quoting *Neaderland v. Comm'r of Internal Revenue*, 424 F.2d 639, 642 (2d Cir. 1970)).

The Supreme Court in *Standlee* recognized the rule that "a difference in the degree of the burden of proof in the two proceedings precludes application of collateral estoppel." 83 Wn.2d at 407. For instance, "[w]hen a jury acquits, it decides only that an accused is not proven guilty of the offense charged beyond a reasonable doubt, and the [subsequent action] is not foreclosed thereby from attempting to show fraud in the civil counterpart against the same defendant by a fair preponderance of the evidence." *Id.* at 408.

C. CLAIM REGARDING DNR'S RIGHT TO TERMINATE

Cooke argues that collateral estoppel does not apply to its claim that it was not in default under the lease and that DNR had no basis for terminating the lease. We disagree.

Cooke's declaratory judgment claim in part requests the following relief: "Cooke is entitled to a declaratory judgment that it is not in default of the Lease, that DNR has no right to declare a default, Event of Default, or to terminate the Lease, and that the Lease remains in full force and effect." CP at 141.

In the previous appeal, this court ruled against Cooke on all of these issues. The court concluded that substantial evidence supported a finding that additional lease defaults occurred after Cooke failed to pay rent on time. *Cooke Aquiculture Pac.*, slip op. at *11. And the court concluded that DNR had a right under the lease to declare an event of default without an opportunity to cure. *Id.* at *14. Therefore, the court held that DNR had the right to terminate the lease. *Id.*

Cooke focuses on the different standards of review between an administrative appeal and a civil lawsuit. But the court's holding regarding the right of DNR to terminate the lease was based on a *de novo* review and an interpretation of the lease terms, and did not involve the arbitrary and capricious standard. *Id.* at *10, *11-13. That is the same process that the trial court

would apply to Cooke's declaratory judgment claim. Contract interpretation is a question of law. *Kaiser Found. Health Plan, Inc. v. Brice*, 22 Wn. App. 2d 227, 233, 510 P.3d 1017 (2022).

Cooke argued at oral argument that this court applied a substantial evidence standard to determine that a lease had occurred, and that it did not have an opportunity in the administrative appeal to challenge the factual basis of the default finding. But this court did address the factual issues on the merits, and the substantial evidence standard is similar to the preponderance of the evidence standard that would be applied in Cooke's civil lawsuit.

We hold that collateral estoppel applies to Cooke's declaratory judgment claim.

D. GOOD FAIR AND FAIR DEALING CLAIM

Cooke argues that collateral estoppel does not apply to its good faith and fair dealing claim. We agree.

The good faith and fair dealing claim focuses on DNR's decision to terminate the lease. Cooke argues that its duty of good faith and fair dealing claim was not identical to any claim decided in the administrative appeal. The duty of good faith and fair dealing involves whether the decision to terminate the contract was proper, not whether there was a right to terminate the contract. In the previous appeal, this court addressed the *decision* to terminate based on arbitrary and capricious standard of review. But in a trial of Cooke's breach of the duty of good faith and fair dealing claim, the standard of review will be a lower standard – preponderance of the evidence.

The Supreme Court in *Standlee* established a clear rule: "[A] difference in the degree of the burden of proof in the two proceedings precludes application of collateral estoppel." 83 Wn.2d at 407. That rule dictates that collateral estoppel cannot be applied to Cooke's breach of the duty of good faith and fair dealing claim. Because the burden of proof in the administrative

appeal was substantially higher than that in the instant case, we hold that the issues raised in the second case are not identical to those raised in the administrative appeal.

DNR argues that *Standlee* does not control because it addresses collateral estoppel in the context of a criminal prosecution and a subsequent parole revocation hearing, not two civil cases. In *Standlee*, a parolee was acquitted on criminal charges, and the Supreme Court held that collateral estoppel did not bar a subsequent parole revocation based on the same charges. 83 Wn.2d 405. But DNR cites no authority for the proposition that the rule expressed in *Standlee* is limited to the facts of that case.[3] And DNR fails to cite to any legal authority that stands for the proposition it asserts here: that collateral estoppel should apply to bar the litigation of an issue under a lower standard when the plaintiff failed to meet a higher burden of proof in the earlier action.

DNR also argues that it will prevail on the merits of the duty of good faith and fair dealing claim. But that claim is immaterial to whether collateral estoppel applies.

We hold that collateral estoppel does not apply to bar Cooke's breach of the duty of good faith and fair dealing claim. Therefore, the trial court erred in dismissing this claim based on collateral estoppel.

E. BREACH OF CONTRACT CLAIM REGARDING COOKE'S LENDER

Cooke argues that collateral estoppel does not apply to its breach of contract claim regarding its lender asserted in its amended complaint. We agree.

Cooke emphasizes that neither the trial court nor this court on appeal addressed the breach of contract claim regarding Cooke's lender. As noted above, collateral estoppel only

[3] *Standlee* is cited in several civil cases. *E.g.*, *Reeves*, 22 Wn. App. 2d 99; *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 15, 408 P.3d 1123 (2017).

applies to an issue if that issue was actually litigated and necessarily decided in the previous action. *Schibel*, 189 Wn.2d at 99. The trial court could not have considered this issue because the lender breach of contract claim was asserted after the trial court ruled. And this court did not address DNR's obligations *to Cooke's lender* under the consent to assignment. This court addressed only DNR's obligations to Cooke. Whether the consent to assignment gave the lender greater cure rights was not actually litigated.

DNR argues that this court concluded on appeal that DNR did not have to give Cooke an opportunity to cure. Therefore, DNR claims that the lender had no opportunity to cure. However, this court addressed only Cooke's opportunity to cure, not the lender's opportunity to cure. DNR's argument may have merit. But the issue was not actually litigated in the appeal.

DNR also argues that Cooke's breach of contract claim fails because the consent to assignment expressly states that the failure to give notice to the lender does not affect the effective date of any notice of termination. Again, this argument may have merit. But the issue here is whether the breach of contract claim was actually decided in the appeal, not whether DNR can prevail at trial.

We hold that collateral estoppel does not apply to bar Cooke's breach of contract claim. Therefore, the trial court erred in dismissing this claim based on collateral estoppel.

CONCLUSION

We affirm in part and reverse in part the trial court's order dismissing Cooke's claims and remand the case for further proceedings.

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

MAXA, J.

We concur:

CRUSER, C.J.

CHE, J.

ATTORNEY GENERAL'S OFFICE - PUBLIC LANDS & CONSERVATION DIVISION (RES)

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