No. 99724-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MARY A. KELLOGG, as Personal Representative of the ESTATE OF JAMES H. HAMRE,

Respondent/Plaintiff,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK, a District of Columbia Corporation; and DOE DEFENDANTS 1-50,

Petitioner/Defendant.

AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Daniel E. Huntington
WSBA No. 8277
422 Riverside, Suite 1300
Spokane, WA 99201
(509) 455-4201

Valerie McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

On behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system.

II. STATEMENT OF THE CASE

In December 2017, James Hamre was a passenger on an Amtrak train who died when the train derailed. He was unmarried and had no children. James' brother, Thomas Hamre, was appointed the Estate's personal representative. At that time, former RCW 4.20.010-.020 provided that a personal representative could maintain a wrongful death action for damages for the benefit of the spouse, registered domestic partner, or children of the decedent ("first-tier beneficiaries"), or if there were no first-tier beneficiaries, an action could be

maintained for the benefit of the parents or siblings dependent upon the decedent for support ("second-tier beneficiaries"). Under those former statutes, James' mother, Carolyn Hamre, was the only qualified beneficiary.

In April 2018 Thomas executed a release defining "Releasors" as Thomas, as personal representative of the Estate, and the Estate. Thomas was not represented by counsel in his settlement negotiations with Amtrak. The agreement purported to settle claims "sustained or received by the Releasor" and James Hamre as an Amtrak passenger on December 18, 2017. The release stated in part:

> Releasor specifically releases and discharges Releasees from all legal liability...including...all claims, demands, actions, causes of action of every kind...for any injuries or damages...compensation of any kind and losses now existing, or which may hereafter arise, whether known or unknown, sustained or received by the Releasor and Decedent James H. Hamre...

The release provided the Releasor intended to enter into a final agreement "and to ensure that releasees have no further obligations to Releasors for any payments whatsoever for

anything arising out of or in any way related to the underlying incident," and purported to bind "anyone who succeeds to Releasor's rights and responsibilities." No wrongful death action had been filed at the time the release was signed. Carolyn received the entire settlement payment and the personal representative completed the administration of the estate.

Effective July 28, 2019, the Legislature amended RCW 4.20.010-.020 and removed the requirement that second-tier beneficiaries be dependent upon the decedent for support. *See* Laws of 2019, ch. 159, §§ 1, 2. The amendments are remedial and retroactive and apply to all claims that are not time-barred. *See id.*, § 6.

In April 2020, Thomas reopened the Estate to permit James' siblings, Mary Kellogg and Michael Hamre, to bring wrongful death claims. Mary was appointed the successor personal representative and in July 2020 filed a wrongful death action against Amtrak seeking damages on behalf of herself and

Michael. Amtrak moved to dismiss. The federal court denied Amtrak's motion and certified two questions to this Court.

III. ISSUES PRESENTED

1) Is the revised RCW 4.20.020 remedial such that it applies retroactively to permit second-tier beneficiaries who were not eligible to assert wrongful death claims at the time of the decedent's death, or at the time the Estate's Personal Representative settled all claims arising out of the death, to assert wrongful death claims notwithstanding the tortfeasor's settlement with, payment to, and release by, the Personal Representative, so long as such claims are not time-barred?

2) If so, does the application of the revised RCW 4.20.020 to permit such claims in this context affect Amtrak's vested substantive rights, thus violating the Washington Constitution's Due Process (Wash. Const., art. I, § 3) or Contracts (Wash. Const. art. I, § 23) Clauses?

IV. SUMMARY OF ARGUMENT

Washington's wrongful death statutes have existed since territorial days and were enacted to compensate those who suffer loss as the result of the tortious death of a relative. RCW 4.20.020 has been amended numerous times to recognize additional beneficiaries. In 2019, the Legislature again amended the statute,

creating a new class of beneficiaries and declaring the amendment retroactive.

Amtrak's arguments urging the Court to disregard the Legislature's stated intent ignore the context of the wrongful death statutes. While a wrongful death action is maintained by the personal representative, he or she is merely a nominal party acting for the beneficiaries, who are the real parties in interest. Beneficiaries' interests constitute a property right and an entitlement to recover compensatory damages for their independent losses.

Amtrak's arguments contesting retroactive application should be rejected. Amtrak has no vested right in application of the former statute. Generally, retroactive application does not infringe a vested right merely because it disappoints expectations. Regarding the release, Amtrak's vested rights are limited to the rights Amtrak secured in that agreement. When the release was executed, the personal representative acted as an agent for the only party who had a legal basis to recover; the

siblings' right to recover was not yet recognized. A party cannot waive a right that did not exist at the time. The release should be construed to affect the rights of only those beneficiaries whose rights were contemplated by the contracting parties.

Nor should the single cause of action rule bar this claim. While it was developed in early case law, the rule has been applied rarely and has been limited by recent jurisprudence. Assuming the doctrine is retained, it should be understood as a procedural mechanism, and like the parallel doctrines of res judicata and collateral estoppel, should not bar a claim that did not exist, and could not have been asserted, in a prior proceeding.

Acting as it must in its interpretive role, this Court should respect the mandate of the Legislature and apply the 2019 amendment retroactively, to include the instant action.

V. ARGUMENT

A. Brief Overview of Washington's Wrongful Death Statutes.

At common law, no cause of action could be maintained by a relative of a decedent against one who wrongfully caused

the death. *See Gray v. Goodson*, 61 Wn.2d 319, 324, 378 P.2d 413 (1963). In 1846, motivated by the "toll of human life taken by the railways," the English Parliament enacted Lord Campbell's Act "for compensating the families of persons killed by accidents." *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 722, 381 P.3d 32 (2016) (citations omitted). This act was the model for Washington's wrongful death statutes, passed in the first session of Washington's territorial legislature. *See Deggs*, 186 Wn.2d at 723. The "concept" which underlies Washington's wrongful death statutes "plainly is that a person may legally sustain damages when one, with whom a certain relationship existed, is wrongfully killed." *Gray*, 61 Wn.2d at 325. "Since the beneficiary is given the benefit of a cause of action for the wrongful killing of another human being, the statutorily created interest is comparable to a property right." *Id.* at 328.

RCW 4.20.010-.020 are Washington's wrongful death statutes. RCW 4.20.010 creates the wrongful death cause of action, and RCW 4.20.020 defines the beneficiaries entitled to

recover. While RCW 4.20.010 has remained substantially the same since 1875, *see Deggs*, 186 Wn.2d at 723, RCW 4.20.020 and its precursors have undergone multiple amendments to add legally-recognized beneficiaries:

Laws of 1854, § 496	Action for widow or children of a man killed in a duel.
Laws of 1875, § 4	Action added for "his heirs or personal representatives."
Laws of 1909, ch. 129, § 1	Two-tier beneficiary system added, providing action for "heirs or personal representatives," and if "the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him."
Laws of 1917, ch. 123, § 2	Added action for "the wife, husband, child or children" of the decedent.
Laws of 1973, 1st ex. sess., ch. 154, § 2	Removed the age of minority requirement for second-tier beneficiary "brothers".
Laws of 1985, ch. 139, § 1	Added stepchildren as first-tier beneficiaries.
Laws of 2007, ch. 156, § 29	Added state registered domestic partners as first-tier beneficiaries.

In 2018, a bill proposed removal of the requirements in RCW 4.20.020 that second-tier beneficiaries be United States residents and be dependent for support on the decedent. *See* S.B. 6015, 65th Leg., Reg. Sess. (2018). The bill was debated in the House and Senate but was not adopted. Finally, in 2019 the Legislature enacted Substitute Senate Bill 5163 and removed the requirements for dependency and residency for second-tier beneficiaries. *See* Laws of 2019, ch. 159, § 2.

In Washington, wrongful death actions are strictly creatures of statute. *See Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). However, a substantial body of decisional law has developed to aid in construing the wrongful death statutes and effectuating their purposes, and recent jurisprudence has brought clarity regarding the role of the personal representative. While the act assigns to the personal representative the task of maintaining a wrongful death action, the action is for the benefit of statutory heirs, not the decedent or the decedent's estate:

> The right of action 'vests' in the personal representative only in a nominal capacity since the right is to be asserted in favor of the members of the class of beneficiaries. Clearly, at the time of the wrongful death when the cause of action accrues, the beneficiaries are then 'vested' with the right to the benefit of the cause of action. The personal representative is merely a statutory agent or trustee acting in favor of the class designated in the statute, with no benefits flowing to the estate of the injured deceased.

Gray, 61 Wn.2d at 326-27. The beneficiaries' statutory rights are in the nature of a property right. *See id.* at 328. Wrongful death claims are "new causes of action for the benefit of certain named parties and are premised on an alleged wrong to the statutory beneficiaries." *Criscuola v. Andrews*, 82 Wn.2d 68, 69, 507 P.2d 149 (1973).

B. Retroactive Application Of The 2019 Amendment Implicates No Vested Rights Enjoyed By Amtrak, And The Court Should Apply The Amendment Retroactively In Accordance With Legislative Intent.

When the Legislature amended RCW 4.20.020 in 2019, it declared the amendment "is remedial and retroactive and applies to all claims that are not time-barred." Laws of 2019, ch. 159, § 6. A statute that the Legislature intends to apply retroactively will

be effectuated unless it impairs a constitutional or vested right. *See TCAP Corp. v. Gervin*, 163 Wn.2d 645, 653 n.13, 185 P.3d 589 (2008) (citation omitted). A vested right involves more than "a mere expectation" and requires "an actual 'title, legal or equitable, to the present or future enjoyment of property.'" *Serv. Emps. Union v. Dep't of Early Learning*, 194 Wn.2d 546, 553-54, 450 P.3d 1181 (2019) (citation omitted).

Amtrak argues that retroactive application of the amendment "will infringe Amtrak's vested right to have its liability fixed and enjoy immunity from further litigation" in violation of the due process and contracts clauses of the Washington Constitution. *See* Amtrak Op. Br. at 13-14. Alternatively, it contends that it secured vested rights through execution of the release. Neither argument precludes retroactive application of the amendment here.

First, "[a] retroactive amendment does not infringe a vested right merely because it disappoints expectations." *Serv. Emps. Union*, 194 Wn.2d at 553. There is no vested right in

existing statutory law that precludes its amendment. *See Godfrey v. State*, 84 Wn.2d 959, 962-63, 530 P.2d 630 (1975); *Serv. Emps. Union*, 194 Wn.2d at 553. In *Godfrey*, the defendant objected to retroactive application of a statute eliminating contributory negligence as a complete bar to a negligence action. The Court stated that the new enactment did not "create a new *liability* where none previously existed," but rather "permitted *recovery* previously denied, after liability had been established." *Godfrey*, 84 Wn.2d at 963. It noted the defendant would not have acted more or less negligently in reliance upon the existence or lack of the affirmative defense, and held "[o]ne cannot have a vested right in a tort defense... upon which he does not and cannot rely in the initial injury to a plaintiff." *Id.* at 963-64. The Court applied the statute to all causes of action arising during the applicable statutes of limitations prior to the statute's effective date. *See id.* at 968.

Here, Amtrak has made no argument, nor can it, that it relied upon the existence of a dependency requirement for

second-tier beneficiaries in a wrongful death action as affecting its conduct at the time of the train accident. Accordingly, it had no vested right in the continued application of existing statutory law limiting a decedent's siblings' rights to benefits in a death action.

Amtrak also claims retroactive application of the amendment is an unconstitutional impairment of its contract rights obtained in the agreement whereby Carolyn's claim was compromised and released. *See* Amtrak Op. Br. at 13-14. This argument should be rejected.

At the outset, it is notable that the Legislature regularly amended the statute to add additional beneficiaries entitled to a cause of action for wrongful death. "[A] party who enters into a contract regarding an activity 'already regulated in the particular [way] to which he now objects' is deemed to have contracted 'subject to further legislation upon the same topic.'" *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993) (brackets added; citation omitted). There is some question as to

whether Amtrak had a basis to rely upon the version of RCW 4.20.020 in effect on the date of its settlement.

More fundamentally, retroactive application will not constitute a substantial impairment of Amtrak's rights under the release. While the state and federal constitutions protect citizens from state laws that impair the obligation of contracts, the threshold question is whether a contract is substantially impaired by a statute. *See In re Estate of Hambleton*, 181 Wn.2d 802, 830, 335 P.3d 398 (2014). Here, application of the amendment eliminating a support requirement for the siblings to pursue a wrongful death action will not constitute a substantial impairment of Amtrak's contract rights secured by its agreement to settle a parent's wrongful death action.

Thomas Hamre signed an agreement to settle claims on behalf of the decedent's mother, Carolyn. The "releasors" were identified as Thomas, as personal representative, and the estate. Nowhere in the release are the decedent's siblings, Mary and Michael, identified, and nothing in the agreement purports to

settle or release claims on their behalf. Amtrak argues that the language of the agreement whereby the personal representative and the estate released all claims and actions for "losses now existing, or which may hereafter arise, whether known or unknown" operated to release the then nonexistent claims of Mary and Michael. By statutory enactment subsequent to the execution of the release, Mary and Michael were given the benefit of a cause of action for the wrongful death of their brother. That cause of action does not belong to either the personal representative or the estate, but belongs to Mary and Michael – the statutory beneficiaries. *See Deggs*, 186 Wn.2d at 721; *Gray*, 61 Wn.2d at 327-28. In his "nominal" or "procedural" role as the personal representative settling a claim on behalf of the decedent's mother, Thomas's release was not intended to, and should not be deemed to, affect the subsequently-created rights of Mary and Michael to pursue a wrongful death action.

Even if Thomas could be considered to have authority over other beneficiaries' claims, he could not release his siblings'

claims which did not come into existence until a year after the release was executed. Personal injury releases are contracts governed by contract principles. *See Del Rosario v. Del Rosario*, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Contract provisions that waive a future statutory right are invalid. *See Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 384, 858 P.2d 245 (1993) ("Where a statutory right is involved, it cannot be waived before the statute creating the right becomes effective" (citation omitted)); *Panorama Ass'n v. Panorama Corp.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982) ("the right alleged to have been waived must, however, have existed at the time of the purported waiver. Even unilaterally, [a party] could not waive any right it did not yet have" (quoting favorably from *Panorama Ass'n v. Panorama Corp.*, 28 Wn. App. 923, 932, 627 P.2d 121 (1981)); *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) ("The right, advantage, or benefit must exist at the time of the alleged waiver. One against whom waiver is claimed must

have actual or constructive knowledge of the existence of the right").

Generally, a release is ineffective as to unknown claims not within the contemplation of the parties when the release is executed. In *Nevue v. Close*, 123 Wn.2d 253, 258-59, 867 P.2d 635 (1994), finding that there was a material question of fact whether a personal injury release was fairly and knowingly made, this Court quoted *Restatement (Second) of Contracts* § 152, comment *f*:

> [T]he common recital that the release covers all injuries, known or unknown and of whatever nature or extent, may be disregarded as unconscionable if, in view of the circumstances of the parties, the legal representation, and the setting of the negotiations, it flies in the face of what would otherwise be regarded as a basic assumption of the parties.

Brackets added.

In *Nevue*, the Court held that a release "in full compromise settlement of all claims of every nature and kind whatsoever" which "releases all claims whether known or unknown; suspected or unsuspected," was binding as to known injuries and

the unknown consequences of those known injuries, but was not binding per se to an injury unknown to the parties to the release. *See* 123 Wn.2d at 258; *see also Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d 386, 395, 739 P.2d 648 (1987) ("When a person signs a release of all claims and has no knowledge that he has any personal injury... the policy favoring just compensation of accident victims outweighs the policy favoring finality of private settlements... [I]t is unjust to hold him to the release where it is clear that he did not contemplate the possibility that an injury would arise in the future" (brackets added)).

Amtrak argues that parties are generally deemed to contract in reliance on existing law. *See* Amtrak Reply Br. at 12. "Existing law" when the parties executed the release included: 1) statutory rights cannot be waived before the statute creating the right becomes effective, *see Yakima Fire Prot. Dist.*, 122 Wn.2d at 384; 2) a release is not binding as to an unknown injury which was not within the contemplation of the parties at the time of executing the release, *see Nevue*, 123 Wn.2d at 258; 3) under the

version of RCW 4.20.020 then in effect, a cause of action could only be maintained for the decedent's dependent mother and no cause of action existed for the decedent's nondependent siblings.

The limitations placed on the role of the personal representative in *Gray* with respect to the statutory beneficiaries' vested right to pursue a wrongful death action apply with added force here, where the siblings' statutory rights did not even exist when the personal representative released Amtrak for the settlement of the decedent's mother's claim. The "nominal capacity" of the personal representative who released all claims "now existing, or which may hereafter arise, whether known or unknown" in exchange for settlement of Carolyn Hamre's beneficial interest should not operate to foreclose the siblings' claims which were not contemplated and did not come into existence until after the release was signed.

C. The Single Cause Of Action Rule Should Not Operate To Bar A Claim By A Statutory Beneficiary That Did Not Exist And Could Not Have Been Asserted In The Prior Action.

Finally, Amtrak urges strict enforcement of the so-called "single cause of action" rule, which historically provided that the wrongful death statute permits but a single cause of action to be maintained by the personal representative for the benefit of all statutory beneficiaries. Under Amtrak's view, if a personal representative resolves one beneficiary's claim against a wrongful death defendant, all subsequent actions on behalf of other beneficiaries arising out of the same tortious death are barred. It insists its rule of strict enforcement is necessary to comport with the statutory language and to protect defendants from being "vexed by several suits." Op. Br. at 10.

Assuming the Court retains the single cause of action rule, it should reject Amtrak's strict formulation. At a minimum, considering the statutory purposes and language, evolving jurisprudence recognizing the relative roles of the personal representative and statutory beneficiaries, and the law governing claim preclusion more generally, the Court should hold that a personal representative's resolution of a wrongful death action

cannot operate to bar a beneficiary's claim if the subsequent claim could not have been asserted in the prior action.

Early cases construing Washington's wrongful death statute held that it permitted but a single cause of action. *See Hansen v. Stimson Mill Co.*, 195 Wash. 621, 623-25, 81 P.2d 855 (1938), *overruled by Wood v. Dunlop*, 83 Wn.2d 719, 521 P.2d 1177 (1974); *Dodson v. Continental Can Co.*, 159 Wash. 589, 593, 294 P.265 (1930); *Riggs v. Northern Pac. Ry. Co.*, 60 Wash. 292, 294, 111 P.162 (1910); *Copeland v. City of Seattle*, 33 Wash. 415, 421, 74 P. 582 (1903). This "single right of action" rule was at times enforced strictly, barring actions even when it would lead to harsh results. *See, e.g., Hansen*, 195 Wash. at 623-25 (prior settlement of wrongful death claim by administratrix precluded subsequent action by decedent's minor child, despite lack of court approval of settlement or guardian representing child); *In re Perrigo's Estate*, 47 Wn.2d 232, 287 P.2d 137 (1955), *overruled by Wood v. Dunlop*, 83 Wn.2d 719, 521 P.2d 1177 (1974) (similar).

This Court has neither applied the single cause of action rule to extinguish a statutory beneficiary's wrongful death claim, nor had the opportunity to examine the scope and continued vitality of the single cause of action rule since these early cases were decided. In *Wood v. Dunlop*, 83 Wn.2d 719, 521 P.2d 1177 (1974), the Court overruled *Hansen* and *Perrigo's Estate*, to the extent they held that a release of wrongful death claims by a personal representative could bar a subsequent action on behalf of a minor child where the child had not been appointed a guardian and the court had not approved the settlement.

Two justifications have been cited for the single cause of action rule. *See Riggs*, 60 Wash. at 294. First, the Legislature's chosen language has been interpreted to suggest legislative intent that the mechanism for vindicating the rights of all beneficiaries is a single action maintained by the personal representative. *See id.*; RCW 4.20.010 (the "personal representative may maintain *an action*" (emphasis added)). Second, the rule has been

described as necessary to protect defendants against a multiplicity of lawsuits. *See Riggs*, 60 Wash. at 294.

To the first point, neither the statutory language nor the case law construing it support a strict rule of preclusion that would extinguish substantive rights of beneficiaries whose claims did not exist when the first action was resolved. The text that Amtrak relies upon – "an action" (*see* Op. Br. at 10-11) -- is exceedingly common in Washington statutory law. *See, e.g.*, RCW 19.86.090 (persons injured in their business or property by unfair or deceptive acts or practices "may bring a civil action"); RCW 25.05.170 (a partnership "may maintain an action" against one of its partners); RCW 48.30.015 (providing certain insureds "may bring *an action*"); RCW 49.60.030 (persons aggrieved by discriminatory practices under ch. 49.60 RCW "shall have a civil action"). Given the ubiquity of the phrase, there is no reason to believe the Legislature intended to impose a peculiar burden on wrongful death beneficiaries or impose a strict rule of preclusion not applied in other contexts. At most, the reference in the

wrongful death statute to "an action" should be deemed similar to an "action" afforded a plaintiff in any other context.

Regarding multiple lawsuits, this concern is not unique to wrongful death claims. Washington law has long-recognized that plaintiffs can generally not "split" claims, i.e., assert related claims in a subsequent action that were or could have been brought in a prior action. *See Howell v. Hunters Exchange State Bank*, 149 Wash. 249, 270 P. 831 (1928) (recognizing "[t]he rule that a party may not split a single cause of action is well settled in law. It has its foundations in the principle that it avoids a multiplicity of suits. . ." (brackets added)).

Whether claims or issues are barred by prior litigation is determined by application of the equitable doctrines of res judicata and collateral estoppel. *See Weaver v. City of Everett*, 194 Wn.2d 464, 472-73, 450 P.3d 177 (2019).[1] Like the single

[1] While wrongful death actions are a creature of statute, this Court has relied upon common law rules in explicating wrongful death claims. *See, e.g., Gray*, 61 Wn.2d at 328. Additionally, these equitable doctrines share common purposes with the single

cause of action rule, these doctrines "share a common goal of judicial finality and are intended to curtail multiplicity of actions, prevent harassment in the courts, and promote judicial economy." *Weaver*, 194 Wn.2d at 473.

In contrast to Amtrak's strict construction of the single cause of action rule, the doctrines of res judicata and collateral estoppel provide guidelines to ascertain whether a particular action should be barred, and they may not operate to bar a subsequent action where they will work an injustice or contravene public policy. *See Weaver*, 194 Wn.2d at 483. Importantly, preclusion applies only to those claims that "were brought or could have been brought," and it is inappropriate

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cause of action rule, but have more developed jurisprudence and offer greater guidance. Indeed, in one of its earliest cases noting that the wrongful death statutes create a single cause of action, this Court discounted concern about multiple lawsuits by recognizing that existing legal rules can address such concerns. The Court said in *Copeland*: "The danger of a defendant's being subject to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper time." 33 Wash. at 421.

where the cause of action "did not exist at the time of the former judgment." *See id.* at 480-82 (quoting *Harsin v. Oman*, 68 Wash. 281, 284, 123 P. 1 (1912)); *see also Mellor v. Chamberlin*, 100 Wn.2d 643, 646, 673 P.2d 610 (1983) (same).[2]

In a related vein, res judicata and collateral estoppel provide that a subsequent action may be permitted when the plaintiff is seeking to rely on a legal theory that was not available at the time the earlier claim was resolved due to an intervening change in the law. *See Estate of Hambleton*, 181 Wn.2d at 834-35 (rejecting issue preclusion when "a new determination is warranted in order to take into account an intervening change in the applicable legal context or otherwise avoid inequitable

[2] The Court has recognized the legal relevance of notice in the specific context of wrongful death claims. While wrongful death actions ordinarily accrue upon death, the discovery rule has been held to toll the limitations period where the elements of the claim could not have been discovered within the limitations period. *See White v. Johns-Manville Corp.*, 103 Wn.2d 344, 349, 693 P.2d 687 (1985). Accordingly, a wrongful death action does not accrue until the personal representative discovers the elements of the cause of action.

administration of the laws") (citing *Restatement (Second) of Judgments*, § 28(2)(b) (1982)); *see also Restatement (Second) of Judgements* § 26(1)(c). *Restatement* § 26(1)(c), which examines preclusion of claims based on earlier litigation, explains:

> [P]art or all of the claim subsists as a possible basis for a second action . . . [when] [t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Brackets added.

In this case, the single cause of action rule should not preclude Kellogg from bringing the instant action because the intervening change of law created a "new right" that did not exist, and could not have been discovered, at the time the prior claim was resolved. Like the broader doctrines of res judicata and collateral estoppel, the single cause of action rule should not be applied to work an injustice or contravene public policy, and

should not operate to extinguish claims that did not exist and could not have been asserted in the prior action.

In sum, Amtrak's strict formulation of the single cause of action rule should be rejected. Neither of Amtrak's purported justifications offers sufficient support for this arcane and punitive construction. The Court should hold that wrongful death claimants are entitled to the same protection afforded to Washington plaintiffs generally, and clarify that a personal representative's resolution of a prior action cannot extinguish a beneficiary's claim that did not exist, and could not have been brought, in the prior action.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief, and answer "yes" to certified question # 1 and "no" to certified question # 2.

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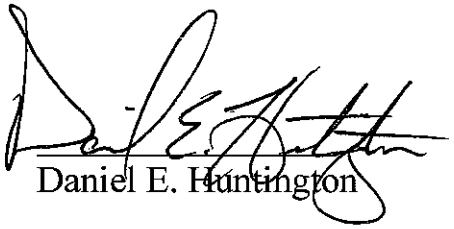
DATED this 1st day of October, 2021



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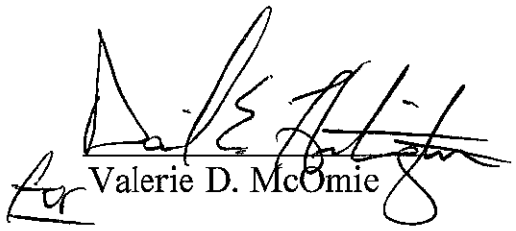

Valerie D. McOmie

On behalf of WSAJ Foundation

APPENDIX

RCW 4.20.010

Wrongful death—Right of action.

(1) When the death of a person is caused by the wrongful act, neglect, or default of another person, his or her personal representative may maintain an action against the person causing the death for the economic and noneconomic damages sustained by the beneficiaries listed in RCW **4.20.020** as a result of the decedent's death, in such amounts as determined by a trier of fact to be just under all the circumstances of the case.

(2) This section applies regardless of whether or not the death was caused under such circumstances as amount, in law, to a felony.

[**2019 c 159 § 1**; **2011 c 336 § 89**; **1917 c 123 § 1**; RRS § 183. FORMER PARTS OF SECTION: 1917 c 123 § 3 now codified as RCW **4.20.005**. Prior: **1909 c 129 § 1**; Code 1881 § 8; **1875 p 4 § 4**; **1854 p 220 § 496**.]

NOTES:

Retroactive application—2019 c 159: "This act is remedial and retroactive and applies to all claims that are not time barred, as well as any claims pending in any court on July 28, 2019." [**2019 c 159 § 6**.]

RCW 4.20.020

Wrongful death—Beneficiaries of action.

Every action under RCW **4.20.010** shall be for the benefit of the spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there is no spouse, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents or siblings of the deceased.

In every such action the trier of fact may give such damages as, under all circumstances of the case, may to them seem just.

[**2019 c 159 § 2**; **2011 c 336 § 90**; **2007 c 156 § 29**; **1985 c 139 § 1**; **1973 1st ex.s. c 154 § 2**; **1917 c 123 § 2**; RRS § 183-1.]

NOTES:

Retroactive application—2019 c 159: See note following RCW **4.20.010.**

Severability—1973 1st ex.s. c 154: See note following RCW **2.12.030.**

S-3120.3

SENATE BILL 6015

State of Washington 65th Legislature 2018 Regular Session

By Senators Hasegawa, Rolfes, Frockt, Pedersen, Hunt, Nelson, Darneille, Miloscia, Chase, Saldaña, and Kuderer

Prefiled 12/08/17. Read first time 01/08/18. Referred to Committee on Law & Justice.

AN ACT Relating to actions for wrongful injury or death; amending RCW 4.20.010, 4.20.020, 4.20.046, 4.20.060, and 4.24.010; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 4.20.010 and 2011 c 336 s 89 are each amended to read as follows:

(1) When the death of a person is caused by the wrongful act, neglect, or default of another person, his or her personal representative may maintain an action ((~~for damages~~)) against the person causing the death((~~; and although~~)) for the economic and noneconomic damages sustained by the beneficiaries listed in RCW 4.20.020 as a result of the decedent's death, in such amounts as determined by a jury to be just under all the circumstances of the case.

(2) This section applies regardless of whether or not the death ((~~shall have been~~)) was caused under such circumstances as amount, in law, to a felony.

Sec. 2. RCW 4.20.020 and 2011 c 336 s 90 are each amended to read as follows:

Every ((~~such~~)) action under RCW 4.20.010 shall be for the benefit of the ((~~wife, husband~~)) spouse, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there ((~~be~~)) is no ((~~wife, husband~~)) spouse, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents((~~, sisters,~~)) or ((~~brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death~~)) siblings of the deceased.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Sec. 3. RCW 4.20.046 and 2008 c 6 s 409 are each amended to read as follows:

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section((~~: PROVIDED, HOWEVER, That~~)).

(2) In addition to recovering economic losses, the personal representative ((~~shall only be~~)) is entitled to recover on behalf of those beneficiaries identified under RCW 4.20.020 any noneconomic damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by ((~~a~~)) the deceased ((~~on behalf of those beneficiaries enumerated in RCW 4.20.020, and such~~)) in such amounts as determined by a jury to be just under all the circumstances of the case. Damages under this section are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action.

(3) The liability of property of spouses or domestic partners held by them as community property and subject to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

((~~(2)~~)) (4) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs

(1) The surviving spouse or state registered domestic partner, or such person as he or she may request to have appointed.

(2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grandchildren; (e) nephews or nieces.

(3) The trustee named by the decedent in an inter vivos trust instrument, testamentary trustee named in the will, guardian of the person or estate of the decedent, or attorney in fact appointed by the decedent, if any such a fiduciary controlled or potentially controlled substantially all of the decedent's probate and nonprobate assets.

(4) One or more of the beneficiaries or transferees of the decedent's probate or nonprobate assets.

(5)(a) The director of revenue, or the director's designee, for those estates having property subject to the provisions of chapter 11.08 RCW; however, the director may waive this right.

(b) The secretary of the department of social and health services for those estates owing debts for long-term care services as defined in RCW 74.39A.008; however the secretary may waive this right.

(6) One or more of the principal creditors.

(7) If the persons so entitled shall fail for more than forty days after the death of the decedent to present a petition for letters of administration, or if it appears to the satisfaction of the court that there is no next of kin, as above specified eligible to appointment, or they waive their right, and there are no principal creditor or creditors, or such creditor or creditors waive their right, then the court may appoint any suitable person to administer such estate.

Sec. 29. RCW 4.20.020 and 1985 c 139 s 1 are each amended to read as follows:

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife ((~~or~~)), husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Sec. 30. RCW 4.20.060 and 1985 c 139 s 2 are each amended to read as follows:

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no

proper charge against any moneys available or appropriated to such employer for payment of current biennial payrolls.

Passed the House March 19, 1985.
Passed the Senate April 12, 1985.
Approved by the Governor April 23, 1985.
Filed in Office of Secretary of State April 23, 1985.

CHAPTER 139

[House Bill No. 675]

STEPCHILDREN——POTENTIAL PLAINTIFFS IN WRONGFUL DEATH ACTION

AN ACT Relating to stepchildren; and amending RCW 4.20.020 and 4.20.060.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 2, chapter 123, Laws of 1917 as amended by section 2, chapter 154, Laws of 1973 1st ex. sess. and RCW 4.20.020 are each amended to read as follows:

Every such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife or husband or such child or children, such action may be maintained for the benefit of the parents, sisters or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Sec. 2. Section 495, page 220, Laws of 1854 as last amended by section 3, chapter 154, Laws of 1973 1st ex. sess. and RCW 4.20.060 are each amended to read as follows:

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse or child living, including stepchildren, or leaving no surviving spouse or ((~~issue~~)) such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse, or in favor of the surviving spouse and such children, or if no surviving spouse, in favor of such child or children, or if no surviving spouse or such child or children,

then in favor of the decedent's parents, sisters or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

Passed the House March 13, 1985.
Passed the Senate April 12, 1985.
Approved by the Governor April 23, 1985.
Filed in Office of Secretary of State April 23, 1985.

CHAPTER 140

[House Bill No. 720]

HIGHWAY CONSTRUCTION STABILIZATION ACCOUNT

AN ACT Relating to the highway construction stabilization account; adding new sections to chapter 46.68 RCW; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The highway construction stabilization account is established in the motor vehicle fund. Moneys in the account may be spent to supplement available motor vehicle fund revenues only for the purposes set forth in section 3 of this act.

NEW SECTION. Sec. 2. (1) There shall be deposited in the highway construction stabilization account the amounts specified by subsection (2) of this section and such other amounts as the legislature may from time to time direct to be deposited in the account.

(2) At the conclusion of each biennium, the state treasurer shall transfer the unexpended cash balance in the motor vehicle fund in excess of the minimum required working capital balance established by the transportation commission to the highway construction stabilization account.

NEW SECTION. Sec. 3. Moneys in the highway construction stabilization account may be spent by the department of transportation only for the following purposes:

(1) To fund state highway improvement program expenditures if available motor vehicle fund revenues are not sufficient to fund legislative appropriations;

(2) To fund state highway improvement program appropriations that otherwise would require the use of bond proceeds; and

(3) To meet temporary seasonal cash requirements in the motor vehicle fund.

NEW SECTION. Sec. 4. Sections 1 through 3 of this act are each added to chapter 46.68 RCW.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state

section 752, page 152, Laws of 1877, section 747, Code of 1881 and RCW 4.24.120; repealing section 2406, Code of 1881 and RCW 26.16.170; repealing section 1, chapter 84, Laws of 1951, section 1, chapter 41, Laws of 1965 and RCW 49.28.070; and defining crimes and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. Section 3, chapter 229, Laws of 1937 as last amended by section 5, chapter 30, Laws of 1971 and RCW 2.12.030 are each amended to read as follows:

((Every judge of the)) Supreme court, court of appeals, or superior court judges of the state who retire((s)) from office under the provisions of this chapter other than as provided in RCW 2.12.012 shall be entitled to receive monthly during the period of ((his)) their natural life, out of the fund hereinafter created, an amount equal to one-half of the monthly salary ((he was)) they were receiving as a judge at the time of ((his)) their retirement, or at the end of the term immediately prior to ((his)) their retirement if ((his)) their retirement is made after expiration of ((his)) their term. The ((widow)) surviving spouse of any judge who shall have heretofore retired or may hereafter retire, or of a judge who was heretofore or may hereafter be eligible for retirement at the time of ((his)) death, if ((she)) the surviving spouse had been married to ((him)) the judge for three years, if ((she)) the surviving spouse had been ((his wife)) married to the judge prior to ((his)) retirement, shall be paid an amount equal to one-half of the retirement pay ((for her husband)) of the judge, as long as ((she)) such surviving spouse remains unmarried. The retirement pay shall be paid monthly by the state treasurer on or before the tenth day of each month. The provisions of this section shall apply to the ((widow)) the surviving spouse of any judge who dies while holding such office or dies after having retired under the provisions of this chapter and who at the time of ((his)) death had served ten or more years in the aggregate as a judge of the supreme court, court of appeals, or superior court or any of such courts, or had served an aggregate of twelve years in the supreme court, court of appeals, or superior court if such pension rights are based upon RCW 2.12.012.

Sec. 2. Section 2, chapter 123, Laws of 1917 and RCW 4.20.020 are each amended to read as follows:

Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or ((minor)) brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Sec. 3. Section 495, page 220, Laws of 1854 as last amended by section 1, chapter 156, Laws of 1927 and RCW 4.20.060 are each amended to read as follows:

No action for a personal injury to any person occasioning ((his)) death shall abate, nor shall such right of action determine, by reason of such death, if ((he have a wife)) such person has a surviving spouse or child living, or leaving no ((wife)) surviving spouse or issue, if ((he have)) there is dependent upon ((him)) the deceased for support and resident within the United States at the time of ((his)) decedent's death, parents, sisters or ((minor)) brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such ((wife)) surviving spouse, or in favor of the ((wife)) surviving spouse and children, or if no ((wife)) surviving spouse, in favor of such child or children, or if no ((wife)) surviving spouse or child or children, then in favor of ((his)) the decedent's parents, sisters or ((minor)) brothers who may be dependent upon ((him)) such person for support, and resident in the United States at the time of ((his)) decedent's death.

Sec. 4. Section 9, page 4, Laws of 1869 as last amended by section 1, chapter 81, Laws of 1967 ex. sess. and RCW 4.24.010 are each amended to read as follows:

((A father, or in case of his death or desertion of his family,)) The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either ((is)), or both, are dependent for support ((, and the mother for the injury or death of an illegitimate minor child, or an illegitimate child on whom she is dependent for support)): PROVIDED, That in the case of an illegitimate child the father cannot maintain or join as a party an action unless paternity has been duly established and the father has regularly contributed to the child's support.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the court finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That when the mother of an illegitimate child initiates an action, notice shall be required only if paternity has been duly established and the father has regularly contributed to the child's support.

CHAPTER 123.

[S. S. B. 312.]

RECOVERY OF DAMAGES FOR WRONGFUL DEATH.

AN ACT granting a right to recover damages for the death of a person caused by the wrongful act, neglect or default of another, and repealing section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

Right of action for wrongful death.

SECTION 1. When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

Beneficiaries.

SEC. 2. Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Application of terms.

SEC. 3. Words in this act denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate.

Repealing clause.

SEC. 4. Section 183 of Remington & Ballinger's Annotated Codes and Statutes of Washington shall be and is hereby repealed: *Provided, however,* That the grant, terms and conditions of said section 183 shall apply to all suits now pending, and all causes of action thereunder for wrongful death accruing within three years immediately prior to the taking effect of this act.

Reservation from repeal.

SEC. 5. This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof.

Passed the Senate February 27, 1917.
Passed the House March 7, 1917.
Approved by the Governor March 14, 1917.

CHAPTER 124.

[H. B. 299.]

POWERS OF THIRD CLASS CITIES AS TO PUBLIC UTILITIES.

AN ACT relating to powers of city councils of cities of the third class, and amending section 16 of chapter 184, Session Laws of 1915 of the State of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 16 of chapter 184, Session Laws of 1915 of the State of Washington be amended to read as follows:

Power to acquire and operate public utilities.

Section 16. The city council of such city shall have power to contract for supplying the city with water, light, power and heat for municipal purposes; to acquire, construct, repair and manage within or without such city, pumps, acqueducts, reservoirs, plants or other works necessary or proper for irrigation purposes or for supplying water, light, power or heat or any by-product thereof for the use of such city or the inhabitants thereof or any other person within such city, and to dispose of any excess of any such supply to any person within or without such city: *Provided*, That when such works or systems are owned by any city after being placed in operation no taxes shall be imposed for maintenance or operation, but such charges shall be paid from the earnings of such works or systems. Maintenance and operation herein mentioned shall include all necessary repairs, replacements, interest on any debts incurred in acquiring,

Earnings to pay maintenance charges.

CHAPTER 129.

[S. B. 76.]

RELATING TO DAMAGES FOR DEATH BY WRONGFUL ACT.

AN ACT amending section 4828 of Ballinger's Annotated Codes and Statutes of Washington, in relation to recovery of damages for the death of a person caused by the wrongful act or neglect of another.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 4828 of Ballinger's Annotated Codes and Statutes of Washington, be, and the same is, hereby amended to read as follows: Section 4828. The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action, when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives, or, if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death, may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, as under all circumstances of the case may to them seem just.

[Am'd. § 4828 Bal., § 256 Pierce.]

Who may sue.

Those dependent.

Defective walk or way.

Passed by the Senate February 4, 1909.

Passed by the House March 11, 1909.

Approved March 13, 1909.

LAWS

OF THE

TERRITORY OF WASHINGTON,

ENACTED BY THE

LEGISLATIVE ASSEMBLY

IN THE YEAR A. D. 1875,

TOGETHER WITH

JOINT RESOLUTIONS AND MEMORIALS.

Published by Authority.

OLYMPIA:
C. B. BAGLEY, PUBLIC PRINTER.
1875.

"SEC. 4. Every action shall be prosecuted in the name of the real party in interest except as is otherwise provided in section five of the said act to which this is an amendment."

And the remainder of said section shall constitute a separate and independent section, which shall be amended to read as follows, that is to say:

"SEC. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment, but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration before maturity."

SEC. 2. That section six of the act to which this is amendatory be so amended as to read as follows:

"SEC. 6. When a married woman is a party her husband must be joined with her, except

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.
2. When the action is between herself and her husband, she may sue or be sued alone.
3. When she is living separate and apart from her husband, she may sue or be sued alone."

SEC. 3. That section seven of the act to which this is amendatory be so amended as to read as follows:

"SEC. 7. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also."

SEC. 4. The following additional section shall follow section eight as a new section in the chapter of said act to which this is amendatory relating to parties to actions, that is to say:

"SEC. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his

heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just.

SEC. 5. The following additional section shall be added to said chapter one of the act to which this is amendatory, that is to say:

"SEC. When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons, in such cases, being served on one or more of the associates, and the judgment in the action shall bind the joint property of all the asssociates in the same manner as if all had been named defendants and had been sued upon their joint liability."

SEC. 6. That section 51 of the act to which this is amendatory be so amended as to read as follows, that is to say:

"SEC. 51. In all othercases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, or may be served with process, or, if none of the defendants reside in this Territory, or if residing in the Territory, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the Territory, such action may be tried in any county where either of the parties resides, or service is had, subject, however, to the power of the court to change the place of trial as provided in this act."

SEC. 7. The following additional section shall follow said section 51, Chapter III, of the said act to which this is amendatory, that is to say:

"SEC. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the

STATUTES

OF THE

TERRITORY OF WASHINGTON:

BEING THE CODE PASSED BY THE

LEGISLATIVE ASSEMBLY,

AT THEIR FIRST SESSION BEGUN AND HELD AT OLYMPIA, FEBRUARY 27TH, 1854.

ALSO, CONTAINING

THE DECLARATION OF INDEPENDENCE, THE CONTITUTION OF THE UNITED STATES, THE ORGANIC ACT OF WASHINGTON TERRITORY. THE DONATION LAWS, &C., &C.

PUBLISHED BY AUTHORITY.

OLYMPIA:
GEO. B. GOUDY, PUBLIC PRINTER.
1855.

from injuries to the person or character of either, and both of them, or from injuries to the property of either, and both of them, or arising out of any contract in favor of either, and both of them.

SEC. 493. Any person required to give bail, may deposit with the clerk the amount of money for which he is required to give bail, and thereupon be discharged from arrest.

SEC. 494. Any action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides, upon whom process may be served against such corporation, unless otherwise provided in this act.

SEC. 495. No action for a personal injury to any person, occasioning his death, shall abate, nor shall such right of action determine by reason of such death, if he have a wife and child living; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children.

SEC. 496. The widow, or widow and children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds, and all aiders and abettors, and shall recover such a sum as to the jury shall seem reasonable.

SEC. 497. The seduction of an innocent unmarried female, shall in itself constitute a good cause of action, in the name of the party injured, and against the party committing the injury, his aiders and abettors:—*Provided*, That in all cases the damages recovered shall be for the exclusive benefit of the said injured party.

SEC. 498. All other forms and rights of action, to recover damages for seduction, or for the consequences thereof, by any other person than the party injured, are hereby abolished: *Provided*, That nothing herein contained shall be construed to prevent actions for the support of bastards, being maintained by the proper authorities.

SEC. 499. When a defendant in execution owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien, and the execution be levied upon the interest of the defendant only. When he owns personal property, jointly, or in co-partnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless the other person having an interest therein, shall give the sheriff a sufficient bond, with surety, to hold and manage the property according to law; and the sheriff shall then proceed to sell the interest of the defendant in such property, describing such interest in his advertisement, as nearly as may be, and the purchaser shall acquire all the interest of such defendant therein; but nothing contained shall be so construed as to deprive the co-partner of any such defendant,

Restatement (Second) of Judgments § 26 (1982)

Restatement of the Law - Judgments June 2021 Update

Restatement (Second) of Judgments

Chapter 3. Former Adjudication: the Effects of a Judicial Judgment

Topic 2. Personal Judgments

Title D. The Scope of "Claim"

§ 26 Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

(2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§ 78- 82.

Cross Reference.

This Section presents a set of exceptional cases in which, after judgment that would otherwise extinguish the claim under the rules of merger or bar (see §§ 18, 19), the plaintiff is nevertheless free to maintain a second action on the same claim or part of it. There is a kinship between this Section and § 20, which describes the exceptions to the general rule of bar. Lines of distinction between the two Sections are suggested at § 20, Comment *a*.

Comment:

a. Consent to or acquiescence in splitting (Subsection (1) (a)). A main purpose of the general rule stated in § 24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.

The parties to a pending action may agree that some part of the claim shall be withdrawn from the action with the understanding that the plaintiff shall not be precluded from subsequently maintaining an action based upon it. The agreement will normally be given effect. Or there may be an effective agreement, before an action is commenced, to litigate a part of a claim in that action but to reserve the rest of the claim for another action. So also the parties may enter into an agreement, not directed to a particular contemplated action, which may have the effect of preserving a claim that might otherwise be superseded by a judgment, for example, a clause included routinely in separation agreements between husband and wife providing that the terms of the separation agreement shall not be invalidated or otherwise affected by a judgment of divorce and that those terms shall survive such a judgment.

Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim. See Illustration 1.

Illustration:

1. After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection (usually called "other action pending") to A's maintaining two actions on parts of the same claim. After judgment for A for the personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to the splitting of the claim.

b. Express reservation by the court (Subsection (1)(b)). It may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action. A determination by the court that its

judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action. Cf. § 20(1)(b), and Comments *f-i* thereto.

For an instance where such special treatment of the plaintiff may be called for, see § 25, Comment *h* (possible reservation of action for restitution relief after plaintiff fails in action for breach of contract).

It is emphasized that the mere refusal of the court in the first action to allow an amendment of the complaint to permit the plaintiff to introduce additional material with respect to a claim, even where the refusal of the amendment was urged by the defendant, is not a reservation by the court within the meaning of Clause (b). The plaintiff's ordinary recourse against an incorrect refusal of an amendment is direct attack by means of appeal from an adverse judgment. See § 25(a), Comment *b*.

c. Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)). The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

The formal barriers referred to may stem from limitations on the competency of the system of courts in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure—the forms of action or the separation of law from equity or vestigial procedural doctrines associated with either.

(1). Limitations on the jurisdiction of a system of courts. A given transaction may result in possible liability under the law of a state and alternatively under a federal statute enforceable exclusively in a federal court. When the plaintiff brings an action in the state court, and judgment is rendered for the defendant, the plaintiff is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute. See Illustration 2. Compare § 25(1), Comment *e*.

Similarly, a given transaction may result in possible liability under several theories of the law of a state, but the state's provisions for "long-arm" service of process may, on the facts presented, limit judicial jurisdiction over the defendant to the adjudication of only one of those theories. For example, an out-of-state defendant may be subject to a state's jurisdiction for the commission of a tort but not, on the particular facts, for a breach of contract. In such a case, the plaintiff, having lost his action in tort, should not be precluded from pursuing a contract remedy in a state in which jurisdiction over the defendant can be obtained.

Illustration:

2. A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

(2). Effect of the persistence of older modes of procedure. Section 25, Comments *i* and *l*, describe a series of situations in which a plaintiff in earlier times was disabled from presenting his full claim in a single action because of formal inhibitions imposed by the historical division between "law" and "equity," or the forms of action, or related procedural modes. The rules of merger and bar reflected those disabilities and in various situations permitted a plaintiff to present in a second action what he was disabled from presenting in the first. In a modern system of procedure such disabilities should no longer exist, and the law as to merger and bar adjusts itself correspondingly. Where, however, a jurisdiction has not yet modernized its procedure, then, to the extent that the disabilities continue, the older law of merger and bar, as sketched in the cited Section and Comments, would apply to judgments rendered by those courts.

d. Erroneous decision that formal barrier exists. Where the court determines that the plaintiff cannot enforce a given claim or a part of it in that action but must enforce it, if at all, in another action, the judgment does not preclude the plaintiff from maintaining the other action even though it appears that the determination made in the first action was erroneous. The determination is binding between the parties under the principle of direct estoppel. See § 17, Comment *c*. It is immaterial that no appeal was taken from the ruling of the court in the first action. See Illustration 3.

Although the erroneous decision in the first action does not preclude the plaintiff from maintaining a second action, it does not necessarily follow that the second court will entertain the action; for example, the action may be based on a subject matter which is beyond the subject matter jurisdiction of the second court.

Illustration:

3. A brings suit against B upon a contract by which A agreed to buy from B, and B to sell and deliver to A, certain shares of stock. A prays specific performance of the contract, or if that remedy be not available, for money damages. The court finds that the contract is not of a type subject to specific performance, and thereupon dismisses the action stating that the plaintiff must start a fresh action "at law." A is entitled to maintain an action seeking to recover money damages, although the court in the second action is persuaded that under the controlling precedents the dismissal of the first action was erroneous and that that action should have gone forward on the demand for money damages.

e. Implementation of a statutory or constitutional scheme (Subsection (1)(d)). The adjudication of a particular action may in retrospect appear to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for even though it would normally be precluded as arising upon the same claim. See Illustration 4. Again, it may appear from a consideration of the entire statutory scheme that litigation, which on ordinary analysis might be considered objectionable as repetitive, is here intended to be permitted. See Illustration 5.

Similar inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar, especially when there is a change of law after the initial decision. When such inequities involve important ongoing social or political relationships, a second action should be allowed even if the claim set forth is not viewed as different from that presented in the initial proceeding. See Illustration 6.

Illustrations:

4. At the time a bank is closed for insolvency, 326 shares of bank stock stand in the name of shareholder A; 325 shares have been previously presented to the bank for transfer but have not in fact been transferred. B, the superintendent of banks, sues for the statutory assessment on the one share not presented for transfer and recovers judgment. After it is decided in separate litigation against other shareholders that there is statutory liability on shares not actually transferred prior to closing, B sues A on the 325 shares. The action may be maintained. Ordinarily the action would be precluded as B would be held to have split his claim, but here the interest in uniform treatment of shareholders of the bank, the policy that none should benefit by mistake or even misconduct of the public official, predominates.

5. For nonpayment of rent, landlord A brings a summary action to dispossess tenant B from leased premises. A succeeds in the action. A then brings an action for payment of the past due rent. The action is not precluded if, for example, the statutory system discloses a purpose to give the landlord a choice between, on the one hand, an action with expedited procedure to reclaim possession which does not preclude and may be followed by a regular action for rent, and, on the other hand, a regular action combining the two demands.

6. A et al., black pupils and parents, bring suit against the B board of education to invalidate and enjoin the operation of a state school "tuition grant" law on the ground that it fosters racial discrimination and is therefore unconstitutional. The court holds the law constitutional as applied and enters judgment for the defendant. Appeal is not taken, and is not warranted by the state of the law at the time of the judgment. Thereafter the United States Supreme Court in another action between different parties strikes down as unconstitutional a similar tuition grant law of another state. A et al. then commence a new action against the B board seeking the relief that was denied in the previous action. Whether or not the claims in the two actions by A et al. are regarded as the same, the second action is not barred by the first judgment. In a matter of such public importance the policy of nationwide adherence to the authoritative constitutional interpretation overcomes the policies supporting the law of res judicata.

See also §§ 83, 86.

f. Substantive policy: rationale for Subsection (1)(e). Just as the allowance of several actions with respect to the same transaction may be required by a statutory scheme of regulation, so the courts, unaided by statute, may conclude that strong substantive policies favor such allowance with respect to cases involving anticipated continuing or recurrent wrongs. Illustrations from the fields of contracts and torts are discussed in Comments *g* and *h*.

g. Contracts—plaintiff's option in case of material breach. A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action. Compare § 24, Comment *d*. But if the initial breach is accompanied or followed by a "repudiation" (see Restatement, Second, Contracts § 250), and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid "splitting," to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract.

In the event of a "material" breach (see Restatement, Second, Contracts § 241) that is not accompanied or followed by a repudiation, the plaintiff is entitled to treat the contract as at an end and to recover damages for performances not yet due as well as those already due on the theory that there has been a total breach of contract. If the plaintiff does this, a judgment extinguishing the claim under the rules of merger or bar precludes another action by him for further recovery on the contract. On the other hand, although the breach is material, the plaintiff may elect to treat it as being merely a partial breach. If he so elects, he is entitled to maintain an action for damages sustained from breaches up to the time of the institution of the action, and the judgment does not preclude a further action by him for a breach occurring after that date. See Illustration 7, and Restatement, Second, Contracts § 236, Comment *b*.

Illustration:

7. A and B make a contract under which A employs B. B commits a material breach of the contract, but requests A to allow the employment to continue. A says that he will do so, but that he must have damages for the breach already committed. A accordingly brings an action against B for the breach. Judgment is given for A. A is not precluded from thereafter maintaining an action against B for a breach of the contract committed after the first action was commenced.

h. Nuisance—plaintiff's option to treat as "temporary" or "permanent". When the defendant is maintaining a structure or operating a business on his own land which causes continuing or recurrent harm to the plaintiff in the use of his land, it is clear that in suing for damages the plaintiff, to avoid splitting, must claim all damages suffered to the time of suit. This follows from the same principle that applies to an action for repeated trespasses. See § 24, Comment *d*.

A number of jurisdictions distinguish "temporary" from "permanent" nuisances, the plaintiff being confined to successive actions for damages when the nuisance is temporary, but allowed only a single action for total damages when the nuisance is "permanent." However, the criteria for deciding whether a nuisance is temporary or permanent are often unclear. The plaintiff is then at risk if he mistakenly believes that the nuisance is temporary rather than permanent. He is in danger of splitting his claim if he seeks and recovers only past damages; and if he delays his suit, believing that on the footing of a temporary nuisance he can at least recover the damages sustained during the period of limitations preceding the institution of suit, he may lose his claim for damages altogether, for with respect to a permanent nuisance, limitations may be held to run as a single period from the time when the nuisance arose, and that period may have expired.

To avoid the traps just described, the Restatement, Second, Torts § 930(1) and Comment *b* thereon, supported by some authority, would allow the plaintiff an option in cases of "continuing or recurrent tortious invasions." The plaintiff may elect, at least in doubtful cases, to treat a nuisance as temporary and sue from time to time for damages sustained in the period next preceding the institution of suit without fear of splitting. On the other hand the plaintiff may elect to sue for total damages alleging that the nuisance will probably continue for the indefinite future. If the defendant disputes the allegation, the issue is tried, and if held for the plaintiff, he recovers in full; otherwise he is remitted to successive actions. (In some instances, where the public interest precludes injunctive relief against a nuisance, an award of damages for the past and future is said to rest on a theory of "inverse condemnation.")

i. Extraordinary situations where merger or bar is inapposite (Subsection (1)(f)). In addition to cases falling within Subsections (a)-(e), there remains a small category of cases in which the policies supporting merger or bar may be overcome by other significant policies. Such an exception to the rules of merger and bar is not lightly to be found but must be based on a clear and convincing showing of need. And although it may not be feasible to compile an exhaustive description of cases in this category, it is both feasible and desirable to describe illustrative instances in an effort to give content to the concept of "extraordinary circumstances." Confined within proper limits, this concept is central to the fair administration of the doctrine of res judicata.

One instance is a case in which the question at issue is the validity of a continuing restraint or condition having a vital relation to personal liberty. Although civil actions attacking penal custody resulting from criminal convictions are beyond the scope of this Restatement, such actions do illustrate the need to moderate conventional notions of finality when personal liberty is at stake. A similar need may be found in cases involving civil commitment of the mentally ill, or the custody of a child. And substantive policy may militate in favor of allowing one spouse to sue the other for divorce even though the grounds sued upon could fairly have been comprehended within the transaction, or nucleus of facts, underlying a previous action between the same parties. See Illustration 8.

It is not suggested that the concept of finality has no place in such cases, or that the court in every such case must allow splitting or relitigation without limit. What is indicated is the need for greater flexibility and, in some matters of this type, the need for special legislative treatment.

See also the discussion in § 24, Comment *f*, of situations in which changed circumstances afford a basis for concluding that the second action constitutes a different claim from the first.

Another instance is a case in which the prior litigation has failed to yield a coherent disposition of the controversy. Such cases are extremely rare, but may occur, for example, when the disposition of a claim and counterclaim in a prior action has left the parties with inconsistent interests in disputed property. See Illustration 9.

Illustrations:

8. A wife, A, sues her husband, B, for separate maintenance on the basis of desertion, and secures a judgment. A later commences another action for divorce against B on grounds which existed when she sued for maintenance. A should not be precluded, for it is unwise to compel her to demand the most drastic remedy against B in the first action, and also unwise to deprive her of a divorce if she is now prepared to make the case for it.

9. Husband A contracts to sell a farm by warranty deed to be signed also by his wife to release her dower; the purchaser B makes a down payment and enters into possession. The wife then refuses to join in the deed. B sues A for a form of specific performance unprecedented in the jurisdiction, namely, a deed from A alone but with some allowance or arrangement to provide for the outstanding inchoate dower. A answers and counterclaims for rescission. Judgment goes against B on the main claim as the requested relief is held to be unavailable; judgment is against A on the counterclaim as no basis for rescission on his part is shown. Subsequently A commences an action for ejectment against B because of B's refusal to complete payment except on the impossible condition of the tender of a deed in which the wife joins. B in his answer relies on the dismissal of the counterclaim in the first action as res judicata, and he counterclaims, tendering the balance of the purchase price and seeking specific performance in the form of a deed by A alone. A's reply to the counterclaim relies on the dismissal of B's claim in the first action as res judicata. By the usual rules both claim and counterclaim might well be precluded. But here the previous action has left the parties not in a state of repose but in an unstable and

intolerable condition. A cannot complain of harassment as he himself has commenced the second action. B's position is the more equitable. B is entitled to judgment on his counterclaim.

j. Mistake or fraud, concealment, or misrepresentation by the defendant. A defendant cannot justly object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud. Thus, when the defendant takes several articles at one time and on being asked by the plaintiff fraudulently denies taking some of them and suit is brought for the remainder, a judgment in that action does not bar the plaintiff from subsequently maintaining an action for those articles not included in the first action. So when there have been several breaches of contract some of which are concealed by the defendant, a judgment for the other breaches does not prevent an action for those concealed although prior in occurrence to the others. So also when the plaintiff brings an action against the defendant for cancellation of a contract made between them, alleging that the plaintiff was mentally incompetent at the time of the making of the contract, and a verdict and judgment are given for the defendant, the plaintiff is not precluded from maintaining a second action for the cancellation of the contract on the ground of a misrepresentation the defendant concealed from the plaintiff at the time when the first action was brought. See §§ 71, 72.

The result is the same when the defendant was not fraudulent, but by an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action.

The result is different, however, where the failure of the plaintiff to include the entire claim in the original action was due to a mistake, not caused by the defendant's fraud or innocent misrepresentation.

k. Procedural condition upon certain Subsection (1) cases. The reference in Subsection (2) to the procedure set forth in Chapter 5 points to a possible requirement that the plaintiff in the specified cases must apply to the court that rendered the first judgment for a decision as to whether a second action is maintainable. See § 78.

Reporter's Note

(§ 61.2, Tent. Draft No. 5.) Comment *a* accords with former § 62(c), dealing with the defendant's consent to the plaintiff's splitting his claim.

Illustration 1 is based on a leading case, Georgia Ry. & Power Co. v. Endsley, 167 Ga. 439, 145 S.E. 851 (1928). See also Shaw v. Chell, 176 Ohio St. 375, 199 N.E.2d 869 (1964); Empire Oil & Ref. Co. v. Chapman, 182 Okla. 639, 79 P.2d 608 (1938); cf. United Bank & Trust Co. v. Hunt, 1 Cal.2d 340, 34 P.2d 1001 (1934); Bliss v. New York Cent. & H.R.R. Co., 160 Mass. 447, 36 N.E. 65 (1894); Wolverine Ins. Co. v. Klomparens, 273 Mich. 493, 263 N.W. 724 (1935); Annot., 40 A.L.R.3d 108 (1971).

Comment b. In Dudley v. King, 285 P.2d 425 (Okla.1955), the first action was for breach by the defendant of an express promise to pay the plaintiff builder one-third of the profits received by the defendant on the sale of certain houses. The action failed because of lack of sufficient proof of the making of the promise. Judgment for the defendant reserved all questions except the making of the express contract and specifically reserved the question of the liability of the defendant for the cost of labor and materials furnished by the plaintiff in building the houses. The plaintiff was allowed to maintain a second action for these costs, the court relying in part on the reservation in the first judgment. Compare § 25(b), Comment *h*. See also Pearlstein v. Scudder & German, 429 F.2d 1136, 1143-44 (2d Cir.1970), cert. denied, 401 U.S. 1013, 91 S.Ct. 1250, 28 L.Ed.2d 550 (1971), on remand, 335 F.Supp. 83 (S.D.N.Y.1971), on remand, 346 F.Supp. 443 (1972), rev'd, 527 F.2d 1141 (2d Cir.1975); Equitable Fire & Marine Ins. Co. v. Bradford Builders, Inc., 174 So.2d 44 (Fla.App.1965), cert. denied, 183 So.2d 218 (Fla.1965); Powell

Restatement (Second) of Judgments § 28 (1982)

Restatement of the Law - Judgments June 2021 Update

Restatement (Second) of Judgments

Chapter 3. Former Adjudication: the Effects of a Judicial Judgment

Topic 2. Personal Judgments

Title E. Issue Preclusion

§ 28 Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Comment:

a. Inability to obtain review (Subsection (1)). As noted in § 27, Comments *h* and *i*, the availability of review for the correction of errors has become critical to the application of preclusion doctrine. If review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of § 27 is inapplicable by its own terms. Similarly, if there was an alternative determination adequate to support the judgment, the rule of § 27 does not apply.

There is a need for an analogous exception to the rule of preclusion when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure. Such cases can arise, for example, because the controversy has become moot, or because the law does not allow review of the particular category of judgments.

The exception in Subsection (1) applies only when review is precluded as a matter of law. It does not apply in cases where review is available but is not sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied; such denials by a first tier appellate court are generally tantamount to a conclusion that the questions raised are without merit.

Note: With respect to controversies that have become moot, it is a procedural requirement in some jurisdictions, in order to avoid the impact of issue preclusion, that the appellate court reverse or vacate the judgment below and remand with directions to dismiss.

Cross-reference. An acquittal in a criminal case in certain limited contexts can have preclusive effect in a subsequent civil proceeding, even though the prosecution is unable to obtain review. See § 85. One reason why such effect is generally not accorded is the difference in the burden of proof in the two proceedings. Cf. Comment *f*, below.

b. Issues of law (Subsection (2)). The distinction between issues of fact and issues of law is often an elusive one. In an action tried to a jury, a party may be entitled to a directed verdict "as a matter of law," or a question like that of the meaning of a written contract may be a question of "law" in the sense that it is decided by the judge rather than the jury. In addition, courts and commentators frequently refer to "mixed question of fact and law," suggesting that the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide. Thus the question whether A negligently caused injury to B, for example, may involve the application of a recognized legal standard to a set of undisputed historical facts, may involve a dispute over the allocation and extent of the burden of persuasion, or over the legal standard of due care, or may involve a dispute over what actually happened.

When the claims in two separate actions between the same parties are the same or are closely related—for example, when they involve asserted obligations arising out of the same subject matter—it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. If the issue has been actually litigated and determined and the determination was essential to the judgment, preclusion will apply. See § 27, and Comment *c* and Illustration 6 thereto. See also Illustration 1, below. In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law." Thus if a corporation issues a series of notes for the repayment of a loan, and the holder of the notes brings an action on one of them, and the corporation's defense that issuance of the notes was ultra vires is rejected by the court, the judgment is conclusive on that issue in a subsequent action on another of the notes.

On the other hand, if the issue is one of the formulation or scope of the applicable legal rule, and if the claims in the two actions are substantially unrelated, the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens. A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position. See Illustration 2.

Illustrations:

1. A brings an action against B to recover for infringement of the trademark "Florasynth" by use of the trade name "Flora Essential Oils." The court grants judgment for B on B's motion to dismiss for failure to state a claim, holding that the name "Flora" is a descriptive word of extensive and common use and is not subject to appropriation as a trademark. In a second action by A against B for infringement of the same trademark, in which the allegations of the complaint are the same except that the asserted infringement is limited to the period after the first judgment, the judgment in the first action is conclusive on the issue whether the name "Flora" is subject to appropriation as a trademark.

2. A brings an action against the municipality of B for tortious injury. The court sustains B's defense of sovereign immunity and dismisses the action. Several years later A brings a second action against B for an unrelated tortious injury occurring after the dismissal. The judgment in the first action is not conclusive on the question whether the defense of sovereign immunity is available to B. Note: The doctrine of stare decisis may lead the court to refuse to reconsider the question of sovereign immunity. See § 29, Comment *i*.

c. Change in applicable legal context; avoidance of inequitable administration of the laws. Even when claims in two actions are closely related, an intervening change in the relevant legal climate may warrant reexamination of the rule of law applicable as between the parties. Such reexamination is particularly appropriate when the application of the rule of issue preclusion would impose on one of the parties a significant disadvantage, or confer on him a significant benefit, with respect to his competitors. See Illustration 3. But even when such competition is lacking, reexamination is appropriate if the change in the law, or other circumstances, are such that preclusion would result in a manifestly inequitable administration of the laws. See Illustration 4.

In determining whether the applicable legal context has changed, or that applying preclusion would result in inequitable administration of the law, it is important to recognize that two concepts of equality are in competition with each other. One is the concept that the outcomes of similar legal disputes between the same parties at different points in time should not be disparate. The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards. Applying issue preclusion invokes the first of these concepts, treating temporally separated controversies the same way at the expense of applying different legal standards to persons similarly situated at the time of the second litigation. The problem is illustrated by the situation where a taxpayer's liability for tax in a certain transaction in one tax year is determined according to a particular interpretation of the tax law, and that interpretation is thereafter abandoned in favor of another interpretation. If issue preclusion is applied in a subsequent tax year, the taxpayer will receive treatment different from that accorded to other taxpayers similarly situated at that time. On the other hand, refusing to apply issue preclusion invokes the second concept of equality. Thus, in the situation posed, if the taxpayer's liability in subsequent years is determined according to the new interpretation of the law, the taxpayer will be treated in those years in the same way as other taxpayers but in a way inconsistent with the determination previously made with respect to him. Comparable problems can arise in other types of transactions in which the same fact pattern presents itself in adjudications occurring over the course of time.

In deciding whether to apply issue preclusion, or instead to apply a subsequent emerging legal standard, the choice is between two forms of disparity in resolution of legal controversy. In making the choice, the courts sometime pose the question as whether

the "rights" involved in the two successive actions are the same. This only poses the problem in different terminology. The same is true of attempting a distinction between an issue of "mixed law and fact" and an issue of the "governing legal rule" because the essential problem is that there has been change in the law but not the facts. Rather, the choice must be made in terms of the importance of stability in the legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law.

Illustrations:

3. A, a state agency, brings an action against B to revoke B's wholesale liquor license on the ground that B has violated the law governing the license by selling only to himself as a retailer. The court grants B's motion to dismiss for failure to state a claim, holding that the conduct charged does not violate the law. In a subsequent action by A against C, a higher court holds that identical conduct by C is ground for the revocation of C's wholesale liquor license. In a second action against B for revocation of B's license, A is not precluded from asserting that since the first dismissal, B has continued, as before, to sell only to himself as a retailer.

4. A, a non-profit organization, brings an action against B, the tax commissioner, for a refund of property taxes on the ground that it is exempt as a charity. The court gives judgment for B, adopting a narrow definition of the charitable exemption. Shortly after, a higher court of the same jurisdiction grants a property tax refund to C, an organization quite similar to A, and in doing so formulates a much broader definition of the exemption. In a subsequent action by A against B for a refund of property taxes paid for the following year, A is not precluded from asserting that it is entitled to the charitable exemption. It does not matter that the nature of A's activities has not changed since the first action.

5. A, an employer, brings an action against B, a labor union, to enjoin a strike in breach of a collective bargaining agreement. The action is dismissed on the ground that a statute deprives the court of jurisdiction to issue such injunctions. In a subsequent case involving two different parties, the decision in A v. B is overruled and jurisdiction to enjoin such a strike is sustained. A is not precluded from asserting jurisdiction in an action to enjoin B from continuing the same strike, from engaging in another strike in breach of the same contract, or from engaging in a strike in breach of a subsequent contract.

d. Courts of the same state (Subsection (3)). Not infrequently, issue preclusion will be asserted in an action over which the court rendering the prior judgment would not have had subject matter jurisdiction. In many such cases, there is no reason why preclusion should not apply; the procedures followed in the two courts are comparable in quality and extensiveness, and the first court was fully competent to render a determination of the issue on which preclusion is sought. In other cases, however, there may be compelling reasons why preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim. The scope of review in the first action

may have been very narrow. Or the legislative allocation of jurisdiction among the courts of the state may have been designed to insure that when an action is brought to determine a particular issue directly, it may only be maintained in a court having special competence to deal with it. In such instances, after a court has incidently determined an issue that it lacks jurisdiction to determine directly, the determination should not be binding when a second action is brought in a court having such jurisdiction. The question in each case should be resolved in the light of the nature of litigation in the courts involved and the legislative purposes in allocating jurisdiction among the courts of the state.

Illustrations:

6. A brings an action against B to recover for property damage in a court whose jurisdiction is limited to claims not exceeding $2,000. The rules governing the conduct of litigation applicable in the court are substantially the same as those in courts of general jurisdiction. After trial, verdict and judgment are rendered for A on the basis of a finding of B's negligence. In a subsequent action by B against A for $10,000 for personal injuries arising out of the same occurrence, the finding of B's negligence in the first action is conclusive.

7. The facts are the same as in Illustration 6, except that the first action is brought in a small claims court which has a jurisdictional ceiling of $500, and which operates informally without pleadings, counsel, or rules of evidence. The finding of B's negligence is not conclusive in the second action.

8. In a probate court proceeding involving the estate of A, in which B and C are active and adverse participants, it is determined that C is A's legitimate son. A subsequent action by B against C is brought in a court of general jurisdiction for a declaratory judgment that C is not entitled to share in the proceeds of a certain inter vivos trust because he is not A's legitimate son. The procedures followed in the probate court are of comparable quality to those in the court of general jurisdiction. The determination of legitimacy in the prior action is conclusive.

9. H brings an action for forcible entry and detainer against W before a justice of the peace. W defends on the ground that the parties are legally married and that under the law of the State such an action cannot be maintained between spouses. The justice of the peace rejects the defense, ruling that the parties are not legally married. A subsequent action for divorce is brought between W and H in the domestic relations court, which has exclusive jurisdiction over divorce actions. The determination in the prior action that the parties are not legally married is not conclusive.

e. Courts of different states; state and federal courts. This Restatement deals primarily with the effect of a judgment in the courts of the state in which it was rendered. The problem covered in Subsection (3), however, frequently arises when the second action is brought in the courts of another state, or in the federal courts. The problem also arises when the first action brought in a federal court and the second action in a state court. In many such cases, the Full Faith and Credit Clause or the Supremacy Clause of the United States Constitution, or federal statutes or rules of decision, may require that preclusive effect be given to the first judgment. For example, in a state court action on a patent license agreement, a determination may be made that the agreement terminated on a particular date; such a determination would be conclusive in a subsequent federal court action between the same parties for patent infringement. See 28 U.S.C. § 1738. And in a federal court action for patent infringement, a determination that the patent is invalid would be conclusive on that issue in a subsequent state court action on a license

agreement. See Article VI, Clause 2, of the U.S. Constitution (the Supremacy Clause). On the other hand, a determination in a state court action on a patent license agreement upholding the defense that the patent was invalid for want of invention would not be held binding in a subsequent federal court action for patent infringement if the Congressional grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise. The question in each such case would be resolved in the light of the legislative purpose in vesting exclusive jurisdiction in a particular court. See § 86. See also the related discussion in Comment *d* to this Section.

As a further example, a court in State A may determine an issue involving title to land in State B, even though the A court would not have had jurisdiction over the land itself. In such a case, the determination is conclusive as between the parties to the proceeding in State A and should be given preclusive effect in State B and other states. See Restatement, Second, Conflict of Laws § 95. The different question of the extraterritorial effect of a decree ordering the conveyance of land in another state, or of other equity decrees, is dealt with in Restatement, Second, Conflict of Laws § 102, and discussed in § 18, Comment *d*.

f. Differences in the burden of persuasion (Subsection (4)). To apply issue preclusion in the cases described in Subsection (4) would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden being imposed. While there may be many occasions when such a holding would be correct, there are many others in which the allocation and weight of the burden of persuasion (or burden of proof, as it is called in many jurisdictions) are critical in determining who should prevail. Since the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied. This is a major reason for the general rule that, even when the parties are the same, an acquittal in a criminal proceeding is not conclusive in a subsequent civil action arising out of the same event. See § 85.

Illustrations:

10. A brings an action against B for injuries incurred in an automobile accident involving cars driven by A and B. Under the governing law, A has the burden of proving his freedom from contributory negligence. Verdict and judgment are given for B on the basis that A has not sustained that burden. In a subsequent action by B against A for injuries incurred in the same accident, the issue of A's negligence (on which B now has the burden of persuasion) is not concluded by the first judgment.

11. A brings an action against B to recover on a promissory note. B defends on the ground that he was induced by A's fraud to give this and other notes in the series, but fails to establish fraud by clear and convincing evidence as required by law. After judgment for A, the law is changed to provide that in such cases fraud need be proved only by a preponderance of the evidence. In an action by A on another note in the series, B is not precluded from asserting the defense of fraud.

g. Rationale for Subsection (5). As stated in the introduction to Title E, the policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts. But such instances must be the rare exception, and litigation to establish an exception in a particular case should not be encouraged. Thus it is important to admit an exception only when the need for a redetermination of the issue is a compelling one.

h. Potential adverse impact on persons not parties. There are many instances in which the nature of an action is such that the judgment will have a direct impact on those who are not themselves parties. For example, an agency of government may bring an action for the protection or relief of particular persons or of a broad segment of the public, or an individual may sue as representative of a class. In such cases, when a second action is brought, due consideration of the interests of persons not themselves before the court in the prior action may justify relitigation of an issue actually litigated and determined in that action. For example, in a class action, see § 41, members of the class may be content to have a particular person represent them in connection with one claim, not knowing or having reason to know that an issue may be litigated in the action that is crucial to the determination of another, unrelated claim in which they have an interest.

i. Unforeseeability that issue would arise in the context of the second action. As noted in § 27, Comment *j*, it is not necessary to the application of the rule of preclusion that the issue be one of "ultimate fact" in either the first or the second action. But at the same time, preclusion should not operate to foreclose redetermination of an issue if it was unforeseeable when the first action was litigated that the issue would arise in the context of the second action, and if that lack of foreseeability may have contributed to the losing party's failure to litigate the issue fully. Such instances are rare, but they may arise, for example, between institutional litigants as a result of a change in the governing law. Thus, a determination in an action between the taxing authorities and a corporate taxpayer that a transfer of property has not occurred may become relevant to a wholly different question of tax liability under an amendment to the tax law passed after the initial judgment was rendered. Another example of a case in which a determination may have unforeseeable consequences is one in which that determination is relevant to a claim involving property acquired after the first judgment has become final.

j. Lack of fair opportunity to litigate in the initial action. In an action in which an issue is litigated and determined, one party may conceal from the other information that would materially affect the outcome of the case. Such concealment may be of particular concern if there is a fiduciary relationship between the parties. Or one of the parties may have been laboring under a mental or physical disability that impeded effective litigation and that has since been removed. Or it may be evident from the jury's verdict that the verdict was the result of compromise. Or the amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair.

In some of these instances, relief from the first judgment may be available, at least within specified time limits, see §§ 70- 73; in others such relief is unavailable. But whether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. Such a refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous. But confined within proper limits, discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

Reporter's Note

(§ 68.1, Tent. Draft No. 4.) This Section is new. It is designed to replace §§ 69-72 of the first Restatement and to group under one heading the various bases for exceptions to the preclusion doctrine.

Subsection (1) is drawn from § 69 of the first Restatement. Part of former § 69, dealing with the effect of an appeal, is now covered in Comment *o* to § 27. The remainder of former § 69, dealing with inability to obtain appellate review because of mootness or immateriality, has furnished the basis of a broader exception for situations in which, as a matter of law, review is unavailable, and Comment *a* links this exception to the pervasive importance of reviewability in the application of preclusion doctrine.

As an example of a limitation on the availability of review not involving mootness, a number of jurisdictions limit appeals to cases involving more than a specified amount or value. See 4 Am.Jur.2d, Appeal and Error §§ 20-23 (1962). When review

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2021, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

Counsel for Kellogg:

Benjamin T. G. Nivison
Ross Vucinovich, PC
1000 Second Ave. Suite 1780
Seattle, WA 98104
Phone: (425) 646-8003
Email: bnivison@rvflegal.com

Counsel for Amtrak:

Timothy D. Wackerbarth
Andrew G. Yates
Lane Powell, PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111-9402
Phone: (206) 223-7000
Email: wackerbartht@lanepowell.com
YatesA@lanepowell.com

Daniel E. Huntington, WSBA #8277
WSAJ Foundation

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