September
### 2010
**Division II Staffing Model**

#### Judge to Staffing Ratio Model

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#### Division Staffing Comparison Actual

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<td>9 (-1.0)</td>
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October
1. President Lila Silverstein called the October 11, 2010 Appellate Practice Section General Meeting to order at 12:00 noon at the King County Bar Association offices in Seattle, Washington.

2. New business:
   
a. Secretary/Treasurer Emmelyn Hart presented the proposed amendment to Article 4, section 4.3.1 of the By-Laws, which would specify the number of Executive Committee members constituting a quorum for executive meetings. By direction of the Executive Committee, a motion was made and seconded to amend Article 4, section 4.3.1 of the By-Laws by inserting the following sentence at the end of the first sentence of the subsection: A majority of the members of the Executive Committee shall constitute a quorum.

   Motion adopted.

3. Second Vice President Melissa White introduced the guest speaker, retired judge Paris K. Kallas. Judge Kallas is now with Judicial Dispute Resolution, LLC. Judge Kallas presented an informative program on RAP 2.3 involving decisions of the trial court which may be reviewed by discretionary review. A handout was provided and is attached to these minutes.

4. There being no further business, the President adjourned the meeting at 1:00 p.m.

Reported by: Emmelyn Hart  
Secretary/Treasurer
BY-LAWS OF
THE APPELLATE PRACTICE SECTION OF THE
KING COUNTY BAR ASSOCIATION

A. INTRODUCTION AND RATIONALE

During the August 25, 2010 Executive Committee meeting, the Executive Committee adopted a recommendation calling for an amendment to Article 4, section 4.3.1 of the By-Laws to specify the number of Committee members constituting a quorum. This amendment will strengthen the Executive Committee’s accountability and transparency.

The Executive Committee requests the Section’s approval of an amendment to Article 4, section 4.3.1 of the By-Laws, which is reprinted below in Section B. A redlined version of the proposed section, marked to show the proposed amendment to section 4.3.1, is shown below in Section C.

B. ORIGINAL ARTICLE

ARTICLE 4. OFFICE AND OFFICERS

... ...

4.3 Members of the Executive Committee & Election of Officers:

4.3.1. Executive Committee. The Executive Committee shall be composed of the Officers, the At Large Representative, one or more Honorary Members appointed by the Executive Committee, and the Chair of any special committees of the Section.

C. PROPOSED AMENDMENT

ARTICLE 4. OFFICE AND OFFICERS

... ...

4.3 Members of the Executive Committee & Election of Officers:

4.3.1. Executive Committee. The Executive Committee shall be composed of the Officers, the At Large Representative, one or more Honorary Members appointed by the Executive Committee, and the Chair of any special committees of the Section. A majority of the members of the Executive Committee shall constitute a quorum.
RULE 2.3
DECISIONS OF THE TRIAL COURT WHICH MAY BE REVIEWED BY DISCRETIONARY REVIEW

(a) Decision of Superior Court. Unless otherwise prohibited by statute or court rule, a party may seek discretionary review of any act of the superior court not appealable as a matter of right.

(b) Considerations Governing Acceptance of Review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

(c) Effect of Denial of Discretionary Review. Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

(e) Acceptance of Review. Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted.

[Amended December 24, 2002]
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICHOLAS ENSLEY,

Plaintiff;

v.

CLIFFORD PITCHER and "JANE DOE"

PITCHER, husband and wife, and the marital
community composed thereof;

Defendants.

Cause No.: 07-2-39823-6 SEA

[PROPOSED] AMENDED ORDER (1)
DENYING DEFENDANT'S MOTION TO
DISMISS, (2) CERTIFYING ISSUES FOR
APPEAL AND (3) STAYING CASE
PENDING RESOLUTION OF
APPELLATE PROCEEDINGS

THIS MATTER having come on duly and regularly before the undersigned Judge of
the above entitled Court upon Defendant’s Motion for Certification of the Court’s Order
Denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
Judgment and the Court having considered the following:

1. Defendant’s Motion for Certification of the Court’s Order Denying Defendant’s
Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;

2. Plaintiff’s Opposition to Motion for Certification of the Court’s Order Denying
Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;

3. Defendant’s Reply in Support of Motion for Certification of the Court’s Order
Denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
Judgment;

[PROPOSED] AMENDED ORDER DENYING DEFENDANT’S MOTION TO
DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 1
hereby STAYED until appellate proceedings have concluded.

DONE IN OPEN COURT this 21 day of April, 2008.

LAURA C. INVEEN
Honorable Laura Inveen

Presented by:
COZEN O'CONNOR

By: J. Brown, WSBA No. 27952
Maggie Peterson, WSBA No. 31176
Attorneys for Defendant Clifford Pitcher,
an employee of Red Onion

Approved as to Form:
THE ADEE LAW FIRM

By: A. Adee, WSBA No. 27409
Attorney for Plaintiff Nicholas Ensley

[PROPOSED] AMENDED ORDER DENYING DEFENDANT'S MOTION TO DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 3
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the marital
community composed thereof,

Defendants.

Cause No.: 07-2-39823-6 SEA

MOTION TO CERTIFY CR 12(B)(6)
AND SUMMARY JUDGMENT ORDERS
FOR IMMEDIATE APPEAL

I. RELIEF REQUESTED

COMES NOW Defendant Cliff Pitcher ("Defendant" or "Pitcher") respectfully requests
that the Court certify for immediate appeal the orders denying Defendant’s 12(b)(6) Motion to
Dismiss and Motion for Summary Judgment, and denying Defendant’s Motion for
Reconsideration. Defendant’s request is made on the basis that the Court’s decisions involve
controlling questions of law as to which there are substantial grounds for differences of opinion
and that immediate review of the legal questions may materially advance the ultimate
termination of this action. See RAP 2.3(b)(4).

The controlling questions relate to whether a plaintiff is permitted to commence a new
lawsuit against a defendant, after having received an order that dismissed those same claims on
MOTION TO CERTIFY ORDERS FOR IMMEDIATE APPEAL - 1
the merits in a separate lawsuit. The potential application of res judicata and/or collateral
estoppel where the scope of evidence presented in each action may potentially differ is an issue
of first impression in Washington. At issue are significant public policy issues critical to a
defendant’s right to finality following a dismissal and a plaintiff’s right to present a case.
Reflected in the arguments submitted by the parties are substantial grounds for differences of
opinion on these important issues. As the Court observed during oral argument, appellate
guidance is needed. Therefore, Defendant requests that the Court (1) amend its previous orders
to add express findings to support certification of these issues for immediate appeal under RAP
2.3(b)(4), and (2) stay this underlying action until the appellate proceedings have concluded.

II. STATEMENT OF FACTS

This matter arises out of a motor vehicle accident which occurred in the early hours of
suffered injury when a motor vehicle driven by Rebecca Humphries (“Humphries”) collided
with two parked cars. Plaintiff and Humphries patronized the Impromptu Wine & Art Bar, the
Red Onion, and the Twilight Exit earlier that night.¹

On December 18, 2007, after failing to establish vicarious liability against Red Onion,
Defendant’s employer, Plaintiff filed the present suit against Defendant.² Plaintiff served
Defendant with the Summons and Complaint the day after Christmas.³

On January 15, 2008, Defendant filed his Motion to Dismiss/Motion for Summary
Judgment with the Court, arguing Plaintiff’s claims against him are barred by res judicata and

¹ See Plaintiff’s Complaint.
² See Plaintiff’s Complaint.
³ See Id.
collateral estoppel.\(^4\) On February 13, 2008, the Court denied said motion.\(^5\) On February 22, 2008, Defendant's Motion for Reconsideration was filed with the Court.\(^6\) Defendant's Motion for Reconsideration was denied by the Court without explanation via Order dated March 13, 2008.

Defendant filed his Answer and Affirmative Defenses on February 25, 2008.\(^7\) On February 28, 2008, Plaintiff filed a Motion to Strike Certain Affirmative Defenses.\(^8\) On March 25, 2008, Plaintiff's motion was granted as to the affirmative defenses of res judicata, collateral estoppel and pre-existing injury, and denied as to the remaining affirmative defenses.\(^9\)

On March 20, 2008, Plaintiff filed a Motion to Amend the Complaint to add Red Onion owner Timothy Johnson and "Jane Doe" Johnson as defendants to the present suit.\(^10\) That motion was denied on the basis of res judicata and collateral estoppel via order dated March 31, 2008.\(^11\)

II. ISSUE PRESENTED

Should the Court certify the orders denying Defendant's Motion to Dismiss Pursuant to 12(b)(6)/Motion for Summary Judgment, and denying Defendant's Motion for Reconsideration, where the orders involve controlling questions of law as to which there are substantial grounds for differences of opinion, and where immediate review may materially advance the ultimate termination of this action?

\(^4\) See Defendant's Motion to Dismiss/Motion for Summary Judgment.
\(^5\) See Order Denying Defendant's Motion to Dismiss/Motion for Summary Judgment.
\(^6\) See Defendant's Motion for Reconsideration.
\(^7\) See Defendant's Answer and Affirmative Defenses.
\(^8\) See Plaintiff's Motion to Strike Affirmative Defenses.
\(^9\) See Order granting/denying Plaintiff's Motion to Strike Affirmative Defenses.
\(^10\) See Plaintiff's Motion to Amend Complaint.
\(^11\) See Order Denying Plaintiff's Motion to Amend Complaint.
III. EVIDENCE RELIED UPON

This motion is supported by the pleadings and other documents on file, including those filed in Ensley v. Red Onion et al.

IV. LEGAL ANALYSIS AND ARGUMENT

A. The Court Should Certify the Orders Because They Involve Controlling Questions of Law as to Which There are Substantial Grounds for Differences of Opinion and Certification is Likely to Lead to the Ultimate Resolution of this Case.

1. This Court Has the Authority to Certify Its Orders for Immediate Appeal.

As the Court has not yet entered a final judgment in this case, the orders denying Defendants Motion to Dismiss Pursuant to 12(b)(6)/Motion for Summary Judgment, and denying Defendant’s Motion for Reconsideration are not subject to appellate review as a matter of right. See RAP 2.2(a). Therefore, the appropriate means for the parties to obtain appellate review is by discretionary review. See RAP 2.3(a). Rule of Appellate Procedure 2.3(b)(4) authorizes trial courts to certify an order for immediate appeal. That rule states in relevant part as follows:

DECISIONS OF THE TRIAL COURT WHICH MAY BE REVIEWED BY DISCRETIONARY REVIEW

***

[D]iscretionary review may be accepted only in the following circumstances:

***

The superior court has certified . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4). Certification of an order under this rule assists the Court of Appeals in providing a unique mid-case assessment of whether interlocutory determination would be of assistance to the Court and to the parties. Commentators have observed that this provision is
most effective where (as here) there is no binding precedent to guide the trial court.\textsuperscript{12}

2. \textit{The Subject Court Orders Involve Controlling Questions of Law as to Which There are Substantial Grounds for Differences of Opinion.}

This Court’s orders involve controlling questions of law; namely, whether Plaintiff’s claims against Pitcher are barred by res judicata and/or are barred by collateral estoppel. As reflected in the parties’ briefing and the cases cited therein, these controlling legal issues are ones over which substantial room for difference of opinion exists.

First, in denying Defendant’s Motion to Dismiss, the Court concluded that the application of res judicata was improper, because Defendant failed to establish that the proceedings involve the “same evidence,” since evidence deemed inadmissible against Red Onion in the first proceeding may be admissible in the second proceeding against Pitcher.

Defendant argued that this interpretation misapplies the “same evidence” element of res judicata, because it does not require that the evidence ultimately deemed admissible in each action be identical, and because binding precedent does not state that courts should consider the identity of admissible evidence when determining whether res judicata applies.

Secondly, in denying Defendant’s Motion to Dismiss on the basis of collateral estoppel, the Court concluded that Pitcher failed to establish “identity of issue” between the first and second proceedings. The Court did not explain how the issue of whether Humphries was apparently intoxicated at the time of Pitcher’s service differs from that issue, which was previously decided in \textit{Ensley v. Red Onion}, except to suggest that the issue in the present action has not been fully litigated, since certain evidence was deemed inadmissible in the first action.

\textsuperscript{12} See, \textit{e.g.}, \textit{WASHINGTON APPELLATE PRACTICE DESKBOOK} § 10.8(1), at 10-12 (Wash. State Bar Assoc. 2005).
that the Court improperly applied the res judicata “same evidence” requirement to its collateral estoppel analysis.

As demonstrated by the parties’ arguments and cited authorities, there are substantial grounds for differences of opinion on these threshold questions. No Washington case has addressed the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in each action may potentially differ. Defendant has urged dismissal in accordance with the dismissal order he obtained in the prior litigation. By contrast, Plaintiff has argued that he has a right to re-litigate his claims if there is a chance that different evidence will ultimately be admitted. These issues highlight vital public policy issues on both sides, and, as the Court observed during oral argument, appellate guidance is needed.

3. Certification of the Subject Court Orders will Advance the Ultimate Resolution of this Case.

Certification of these issues under RAP 2.3(b)(4) will promote judicial economy and expediency, and is likely to advance the ultimate resolution of this case. The legal issues of whether Plaintiff’s claims are barred by res judicata and/or collateral estoppel should be fully addressed before the Court and the parties are forced to expend substantial time, fees, and costs litigating this case. Immediate review by the Court of Appeals will allow the parties, if necessary, to focus any remaining discovery efforts and potentially resolve this case short of trial.

The legal issues before the Court are threshold questions, the resolution of which dictates whether dismissal is appropriate. If the issues are determined in Defendant's favor, then this case will be resolved. No further trial proceedings will be appropriate and the parties and the Court will not have wasted resources developing this case. If the issues are determined
in Plaintiff’s favor, then the parties can proceed with discovery, motions practice, and trial (if necessary) at the conclusion of the appellate proceedings. Plaintiff will not be significantly prejudiced by delay necessary to complete an appeal. Considering that Plaintiff did not even commence this lawsuit until after litigating the previous one\textsuperscript{13} and only recently sought to amend the complaint,\textsuperscript{14} this case has only just begun. By contrast, if the Court does not endorse an early appellate ruling, Defendant will lose his ability to rely on the previous court’s dismissal of Plaintiff’s claims on the merits and be forced to litigate this case to its conclusion. Under these circumstances, Defendant will suffer unfair prejudice. It is therefore appropriate for this Court to amend its prior orders to certify the important issues for immediate appeal.

B. The Court Should Enter a Stay Until Appellate Proceedings Have Concluded.

Should this Court agree with the above analysis and determine that certification of these issues is appropriate, Defendant requests that all trial court proceedings be stayed pending resolution of this matter on appeal. “The court has inherent power to stay its proceedings where the interest of justice so requires.” \textit{King v. Olympic Pipeline Co.}, 104 Wn. App. 338, 350, 16 P.3d 45 (2000) (citing \textit{Landis v. N. Am. Co.}, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). Pending Defendant’s efforts to obtain discretionary review and thereafter (if appropriate) appellate rulings on the merits, the Court should enter a stay of all proceedings at the trial level. Plaintiff will not be prejudiced by a stay for the same reasons articulated above. No discovery or motions practice should be permitted to take place until after the appellate proceedings have concluded and the parties know for certain whether Plaintiff’s claims against

\textsuperscript{13} Plaintiff’s Complaint was filed on December 18, 2007, after his claims against Pitcher were dismissed in the prior action, and Defendant answered on February 25, 2008 following resolution of the CR 12(b)(6) motion.

\textsuperscript{14} Plaintiff’s Motion to Amend the Complaint was filed on March 20, 2008.
Defendant can proceed in this action.

V. CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that this Court certify, pursuant to RAP 2.3(b)(4), the orders denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment and denying Defendant’s Motion for Reconsideration.

A Proposed order is attached hereto that (1) amends the previous orders to add certification findings under RAP 2.3(b)(4), and (2) stays this underlying action until the appellate proceedings have concluded.
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NICHOLAS ENSLEY, )
 ) No. 61537-8-I
 ) COMMISSIONER’S RULING
Respondent, ) GRANTING DISCRETIONARY
v. ) REVIEW
CLIFFORD PITCHER and “JANE )
DOE” PITCHER, husband and wife, )
and the martial community composed )
thereof, )
Petitioners. )

Clifford Pitcher and his wife seek discretionary review of the trial court
order denying his motion to dismiss Nicholas Ensley’s claim that Pitcher, a
bartender at the Red Onion Tavern, negligently over served alcohol to a woman
who crashed her car causing serious injuries to Ensley. Because summary
judgment had been granted in a separate lawsuit dismissing Ensley’s identical
negligence claim against the owners of the Red Onion Tavern, Pitcher moved to
dismiss arguing that res judicata and collateral estoppel bars this lawsuit. The
trial court denied Pitcher’s motion to dismiss, accepting Ensley’s argument that
“different evidence” in the form of Pitcher’s alleged admissions as a party
opponent would support this lawsuit, and therefore, the “substantially the same
evidence” standard is not satisfied.

But the trial court entered a RAP 2.3(b)(4) certification that this is a
controlling issue of first impression in Washington, for which there is a basis for
difference of opinion and that a prompt appeal would advance the termination of the litigation. The trial court's certification supports discretionary review.

FACTS

Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars early in the morning. Ensley sued Humphries and the owners of the Red Onion and two other businesses that served alcohol to Humphries the night before the collision. The Red Onion moved for summary judgment based on the evidence that Humphries was at The Red Onion for less than 30 minutes, she consumed less than one drink at that location, others present at the Red Onion observed that Humphries was not apparently intoxicated when she was at the Red Onion, and she consumed several additional drinks after leaving the Red Onion before the collision.

Ensley opposed summary judgment relying in part on the deposition of Daniel Ahern, who spoke with the bartender Cliff Pitcher at the Red Onion a couple of days after the collision. Ahern recalled that Pitcher acknowledged that Humphries had kind of glassy eyes and that he should not have served her. The Red Onion moved to strike Ahern's testimony as hearsay. Ensley argued that Pitcher was a speaking agent for the Red Onion and thus the testimony was admissible as a statement against interest, and that Pitcher's statements to Ahern revealed his state of mind. The trial court struck Ahern's testimony as inadmissible hearsay, granted partial summary judgment dismissing Ensley's claims against the Red Onion and denied reconsideration.
I denied Ensley's motion for discretionary review of the summary judgment dismissing the owners of the Red Onion. (No. 54727-5-I).

Ensley moved the trial court to amend his complaint to include claims against Pitcher. The motion to amend was filed just weeks before the discovery cutoff and two months before the scheduled trial, and Ensley had known of Pitcher's alleged statements to Ahern for almost ten months. The trial court denied the motion to amend noting that it would not be fair to the defendants to delay the case so close to the scheduled trial date.

Ensley then filed this new lawsuit naming Pitcher as the defendant for negligent service of alcohol to Humphries at the Red Onion Tavern. Pitcher moved to dismiss arguing that the summary judgment in favor of the owners of the Red Onion Tavern in the first lawsuit bars the new lawsuit. The trial court denied the motion to dismiss, and Pitcher's motion for reconsideration. But the court granted a certification under RAP 2.3(b)(4) with a statement explaining the reasons for the certification:

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant's right to finality following a dismissal and a plaintiff's right to present a case. There are substantial grounds for differences of opinion on these important issues, as reflected in the arguments and case law submitted by the parties in this case. This is an issue of first impression in Washington. Immediate interlocutory review by the Court of Appeals will allow for immediate dismissal of this action, without the need for potentially unnecessary development of this case.

Petitioner's Motion for Discretionary Review at Appendix A-2.
CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

(1) The superior court has committed an obvious error which would render further proceedings useless;
(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

In the first lawsuit, the trial court excluded Ahern’s testimony of Pitcher’s statements as hearsay. For purposes of ER 801(d)(2), a bar manager is not necessarily a speaking agent for admitting key facts related to liability, even in an overservice case.¹ The state of mind hearsay exception under ER 803(a)(3) is limited to a person’s “then existing state of mind…but not including a statement of memory or belief” and Pitcher’s statement a couple of days after the collision was a statement of memory or belief.

In the current lawsuit, Pitcher is the defendant and likely his statements to Ahern are admissible as a statement of a party opponent. Therefore, based on Ahern’s testimony, it is possible that Ensley’s claims against Pitcher individually may survive a summary judgment.

¹ Barrie v Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980).
"Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington." Landry v. Luscher, 95 Wn. App. 779, 780, 976 P.2nd 1274 (1999). Res judicata bars such claim splitting if the claims are based upon the same cause of action. "Since the purpose of the res judicata doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Landry, 95 Wn. App. at 783. The determination whether the same causes of action are present includes the factor whether the evidence presented in the two actions is "substantially the same." Landry, 95 Wn. App. at 784.

The trial court rejected Pitcher's argument that the two lawsuits involved substantially the same evidence even though Ahern's testimony may be admissible in the new lawsuit against Pitcher as a statement of a party opponent. But the court recognized in its RAP 2.3(b)(4) certification that such a change in the scope of evidence presents an issue of first impression. I accept the trial court's certification as a proper basis for discretionary review.

I note one concern is the res judicata/collateral estoppel requirement that the first lawsuit has been resolved by a final judgment. Ensley's claims against Humphries are still pending in the first lawsuit, although a settlement has been reached with Humphries. Ensley contends that the settlement is complicated and a final dismissal remains in doubt. Pitcher contends that Ensley has been in
Court of Appeals of Washington, Division 1.
Nicholas ENSLEY, Respondent,
v.
Clifford PITCHER and "Jane Doe" Pitcher, husband and wife, and the marital community composed thereof, Petitioners.
Nos. 61537-8-I, 61723-1-I.

Nov. 2, 2009.

**Background:** Injured passenger filed a complaint against bartender that alleged bartender negligently overserved alcohol to patron who later crashed her car and injured passenger. The Superior Court, King County, Laura Inveen, J., denied bartender's motion to dismiss, certified a question for review, and denied passenger's motion to add owner of bar as a defendant.

**Holding:** The Court of Appeals, Appelwick, J., held that the doctrine of res judicata barred injured passenger's negligence action against bartender.

Remanded for dismissal with prejudice.

**FACTS**

¶ 2 Ensley also filed a motion for discretionary review, asking the court to find that the trial court erred in denying his motion to amend the complaint to add the owner of Red Onion as a defendant, and add a claim of vicarious liability against him. Because the suit against Pitcher is barred by res judicata, Ensley's motion is moot.

¶ 3 Nicholas Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars after an evening of drinking. Ensley first brought suit against the owner of Red Onion Tavern, Humphries, and two other businesses that served alcohol to Humphries the night of the collision. Red Onion moved for summary judgment based on the evidence that Humphries was at Red Onion for less than 30 minutes, she consumed less than one alcoholic drink at that location, others present at Red Onion observed that Humphries was not apparently intoxicated while at Red Onion, and she consumed several additional drinks after leaving Red Onion and before the accident.

FN1. Under Washington law, a patron's intoxication must be apparent to a commercial host in order for a third party injured in a drunk driving accident to prevail on an overservice claim. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash.2d 259, 272-74, 96 P.3d 386 (2004).

**Opinion of the Court:**

¶ 1 Ensley sued Pitcher, a bartender, claiming he negligently overserved alcohol to a woman who crashed her car, causing serious injuries to Ensley. Pitcher asked the trial court to dismiss on the grounds of res judicata and collateral estoppel. Summary judgment had been granted in a separate lawsuit, dismissing Ensley's identical negligence claim against Pitcher's employer. The trial court denied Pitcher's motion to dismiss and certified a question for this court on discretionary review: whether Pitcher's alleged admissions to a third party, which had been excluded as hearsay in the suit against the employer, would be admissible as admissions of a party opponent, therefore supporting this lawsuit, because there was not "substantially the same evidence." Because Ensley's suit against Pitcher is barred by res judicata, we remand for dismissal with prejudice.

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**Opinion of the Court:**

¶ 2 Ensley also filed a motion for discretionary review, asking the court to find that the trial court erred in denying his motion to amend the complaint to add the owner of Red Onion as a defendant, and add a claim of vicarious liability against him. Because the suit against Pitcher is barred by res judicata, Ensley's motion is moot.

**FACTS**

¶ 3 Nicholas Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars after an evening of drinking. Ensley first brought suit against the owner of Red Onion Tavern, Humphries, and two other businesses that served alcohol to Humphries the night of the collision. Red Onion moved for summary judgment based on the evidence that Humphries was at Red Onion for less than 30 minutes, she consumed less than one alcoholic drink at that location, others present at Red Onion observed that Humphries was not apparently intoxicated while at Red Onion, and she consumed several additional drinks after leaving Red Onion and before the accident.

FN1. Under Washington law, a patron's intoxication must be apparent to a commercial host in order for a third party injured in a drunk driving accident to prevail on an overservice claim. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash.2d 259, 272-74, 96 P.3d 386 (2004).

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served her. Ahern testified:

Q Since the crash who have you talked to about the facts of that night?

A I've discussed it with Chris, Stacy, Cliff the owner, and Cliff the bartender at the Red Onion.

Q What did you and Cliff at the Red Onion discuss?

A I was just asking—just kind of wanted to get a sense of what he saw from that—from that night, and just if—how everybody looked. And I just kind of wanted to get—just to get a sense of that.

Q When did this conversation take place?

A A couple days after the accident.

*896 Q At the Red Onion?

A Yes.

Q Were you drinking at the time?

A No. I just stopped in after work and was on my way home.

Q What did Cliff the bartender at Red Onion tell you?

A He said Rebecca looked a little glassy-eyed, and I don't remember what he said about Nick.

Q From your—well, do you remember anything else about that conversation?

A No.

Q Did he say how you looked?

A He said I looked a little glassy, but not enough that he wouldn't serve me a beer.

Q Did he say that Rebecca looked in a condition where he wouldn't serve her a beer?

A He said she looked a little more glassier than us, but ...(Pause.)

Q So—

A Yes.

Q —did he say that Rebecca was in a condition where he would not have served her a beer?

A Yes. I believe so, yes.

¶ 5 Red Onion moved to strike Ahern's testimony as hearsay. Ensley argued that Pitcher was a speaking agent for Red Onion, and thus the testimony was admissible as an admission of a party opponent. The trial court granted the motion to strike Ahern's testimony as inadmissible hearsay, granted partial summary judgment dismissing Ensley's claims against Red Onion, and denied reconsideration.


FN2. The commissioner reasoned that Ensley failed to establish that it was an obvious or probable error for the trial court to conclude that Ensley had not met his burden of demonstrating that Pitcher, a part-time bartender, was a speaking agent for Red Onion. Because Pitcher was not a named defendant in the suit against the tavern owners, Ahern's deposition testimony of what Pitcher said was not admissible as an admission of party opponent. Nor was the statement a state of mind hearsay exception under ER 803(a)(3). These are issues that Ensley will have the opportunity to argue on appeal.

FN3. Final judgment has since been entered, and Ensley filed a notice of appeal on April 24, 2009.
¶ 7 On November 21, 2007, Ensley asked the trial court to allow him to amend his complaint to include a claim against Pitcher individually. The motion was filed well into discovery and Ensley had known of Pitcher’s alleged statements to Ahern since at least February 2007. The trial court denied the motion to amend, noting that it would not be fair to the defendant to delay the case so close to the scheduled trial.

¶ 8 Ensley then filed a new lawsuit, the subject of this appeal, naming Pitcher as the defendant, for negligent service of alcohol to **Humphries at the Red Onion. Pitcher moved to dismiss, arguing that summary judgment in favor of the owner of Red Onion in the first lawsuit barred the new lawsuit. The trial court denied the motion to dismiss. The order stated that the plaintiff’s claims against Pitcher are neither res judicata nor barred by collateral estoppel. The court also denied Pitcher’s motion for reconsideration. The trial court then entered a certification pursuant to RAP 2.3(b)(4), with a statement explaining the reasons for certification:

FN4. Ensley asserts that the trial court granted the motion to strike Pitcher’s res judicata and collateral estoppel affirmative defenses, and that Pitcher has not assigned error to this order. However, the motion to dismiss, to which Pitcher assigned error, and the court’s statement supporting certification, expressly concern the application of res judicata and collateral estoppel to the overservice claim against Pitcher.

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of *evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant’s right to finality following a dismissal and a plaintiff’s right to present a case. There are substantial grounds for differences of opinion on these important issues, as reflected in the arguments and case law submitted by the parties in this case. This is an issue of first impression in Washington. Immediate interlocutory review by the Court of Appeals will allow for immediate dismissal of this action, without the need for potentially unnecessary development of this case.

The trial court also certified its order denying defendant’s motion to dismiss. Based on the certification, a commissioner granted review.

¶ 9 Meanwhile, Ensley filed a motion to amend the complaint in this case to add the owner of Red Onion as a defendant and to add a claim of vicarious liability against him. The trial court denied Ensley’s motion to amend the complaint and his motion to reconsider. Ensley filed a motion for discretionary review of the court’s denial of his motion to amend the complaint, which a commissioner consolidated with our review of the order denying the defendant’s motion to dismiss, and passed the motion to the panel deciding Pitcher’s motion on the merits.

FN5 Pitcher filed a motion in this court to strike Ensley’s designation of clerk’s papers, contending they are not needed to review the issues presented to the appellate court in accordance with RAP 9.6(a). The commissioner’s ruling by notation on July 22, 2008, made it clear that no further briefing would be permitted on the issues related to the amendment of the complaint. Ensley has not provided further briefing, with the exception of a short procedural explanation in his response brief. The clerk’s papers in No. 61723-1-I (Ensley’s motion for discretionary review of his motion to amend the complaint) are largely duplicative of the clerk’s papers in No. 61537-8-I. We decline to rule on the motion to strike.

**DISCUSSION**

1. Res Judicata

[1][2][3][4] ¶ 10 "Filing two separate lawsuits based on the same event-claim splitting-is precluded in Washington." *Landry v. Lascher, 95 Wash.App. 779, 780, 976 P.2d 1274 (1999)." "The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Marino Prop. Co. v. Port Comm’rs, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff, 52 Wash.2d 285, 287, 201 P.2d 215 (1949)). Res judicata bars..."
such claim splitting if the claims are based upon the same cause of action. See 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.33, at 479 (1st ed.2007) (distinguishing collateral estoppel's requirement that the issue be actually litigated from res judicata's more lenient standard where issues that could have been litigated and resolved are barred). Whether res judicata bars an action is a question of law we review de novo. Kuhlman v. Thomas, 78 Wash.App. 123, 120, 897 P.2d 365 (1995); Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co., 137 Wash.App. 296, 302, 153 P.3d 211 (2007).

**103 FN6** Enos does not dispute that the summary judgment motion was valid or on the merits.

[6] ¶ 12 Enos contends that the summary judgment granted in favor of Red Onion in the suit against the tavern owners was not a final judgment, because the trial court had not entered the requisite order of finality pursuant to CR 54(b). Enos However, the finality requirement for preclusion is distinct from the finality requirement for purposes of appeal. See Cunningham v. State, 61 Wash.App. 107, 120, 888 P.2d 225 (1991); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4432, at 52-60 (2d ed.2002). In Cunningham, we addressed the definition of finality for collateral estoppel purposes by looking to the Restatement (Second) of Judgments (1982) and other federal authority. We do the same here to address the definition of finality for res judicata.

FN7. CR 54(b) provides a specific procedure for entry of final judgment in suits with multiple claims or multiple parties:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

FN8. While both issue and claim preclusion require finality, it is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4434, at 110 n. 1 (2d ed.2002).

¶ 13 The Restatement (Second) of Judgments states "[t]he rules of res judicata are applicable only when a final judgment is rendered." RESTATMENT (SECOND) OF JUDGMENTS: FORMER ADJUDICATION: THE EFFECTS OF A JUDICIAL JUDGMENTTTT § 13 (1982). The comments contrast this finality requirement with the finality requirement of appellate review and conclude they are quite similar. Id. at cmt. b (explaining that the definition of finality for res judicata resembles the traditional concept of finality for appellate review: "when res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim, see Comment e below) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court."). Comment e provides for the application of res judicata in multi-party, multi-claim

litigation, stating that “[a] judgment may be final in a res judicata sense as to a part of an *901 action although the litigation continues as to the rest.” Id. at cmt. e. Undoubtedly, CR 54(b) provides the correct procedure for entering final judgment as to a claim or party in this circumstance. “Summary judgment as to part of an action may be made final under Civil Rule 54(b) ... and then is final for preclusion purposes as well as appeal purposes.” 18A Wright, supra, § 4444, at 297-99. However, “[t]here may also be circumstances in which expanded modern views of finality warrant preclusion on the ground that there is no apparent reason to anticipate reconsideration and that the alternative of denying preclusion would entail substantial costs.” Id.

§ 14 The record here overwhelmingly satisfies the finality requirement, analyzed under the more modern view articulated in Federal Practice and Procedure, as well as under the traditional factors as articulated in Restatement (Second) of Judgments. The trial court **104 granted partial summary judgment dismissing all of the claims against Red Onion from the suit. The parties had a full and fair opportunity to litigate Red Onion’s liability. The trial court then heard and denied reconsideration. Ensley filed for discretionary review of this decision, and we denied review, finding neither obvious nor probable error. Further, the trial court entertained and denied Ensley’s motion to amend his complaint to include Pitcher. The addition of Pitcher to the lawsuit may have provided a basis for admitting Ahern’s deposition testimony and reversing the summary judgment motion, but the court’s decision on the motion to amend the complaint reinforced its decision that Red Onion had been dismissed. While the record does not include an entry of final judgment under CR 54(b) as to the summary judgment dismissing Red Onion, there are no other indicia in the record that the summary judgment decision was not final as a practical matter. Further, by the time we considered this appeal, final judgment had been *902 entered in the suit against Red Onion and the other tavern owners. 262

FN9. We take judicial notice of Ensley’s appeal from final judgment in case No.63407-1-I, where the correspondence file contains counsel’s assurances of a final judgment, as well as the trial court documentation dismissing the last of the defendants from the suit against the tavern owners.

§ 15 Therefore, the entry of summary judgment in favor of Red Onion and dismissal with prejudice of Ensley’s claims against Red Onion in the suit against the tavern owners is a final judgment on the merits, allowing application of res judicata.

[7][8] § 16 Because res judicata ensures the finality of judgments and eliminates duplicative litigation, dismissal on res judicata grounds is appropriate where the subsequent action is identical with a prior action in four respects: “(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Landry, 95 Wash.App. at 783, 976 P.2d 1274. The party asserting the defense of res judicata bears the burden of proof. Hisle, 151 Wash.2d at 865, 93 P.3d 108.

[9] § 17 Pitcher asserts that the trial court erred in its analysis of the same claim or cause of action element of res judicata. In the certification of the issue for appeal, the trial court stated: “The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ.”

A. Persons and Parties

[10][11] § 18 Different defendants in separate suits are the same party for res judicata purposes as long as they are in privity. Kulman, 78 Wash.App. at 121, 897 P.2d 365. The employer/employee relationship is sufficient to establish privity. Id. at 121-22, 897 P.2d 365 (holding that where the ultimate issue of whether the employer had violated the plaintiff’s rights turned on the propriety of its employees conduct, the parties must be viewed as sufficiently the same, “if not identical”); see also Kulman’s discussion of federal law therein. Pitcher and *903 Red Onion are clearly in privity. Ensley could have sought to establish Pitcher’s personal liability in the first suit. The fact that Ensley did not name Pitcher as a defendant does not defeat the identity of the parties where the employer’s liability turns solely on vicarious liability.

FN10. Neither party disputes that Red Onion would be vicariously liable for Pitchers alleged overservice. Vicarious liability is es-
B. Causes of Action

[12] The determination whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Pederson v. Potter*, 103 Wash.App. 62, 72, 11 P.3d 833 (2000); *Landry*, 95 Wash.App. at 784, 976 P.2d 1274. These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim. *Kuhiman*, 78 Wash.App. at 122, 897 P.2d 265 ("there is no specific test for determining identity of causes of action"); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev., 805, 816 (1984). Pitcher argues that the court's reliance on the "substantially the same evidence" criterion in denying Pitcher's motion to dismiss constitutes error.

[20] The trial court's certification involves the "substantially the same evidence" consideration. The principle concern was the potential application of the preclusion doctrine where the "scope of evidence presented in successive lawsuits may potentially differ." The "substantially the same evidence" factor requires analysis of whether the evidence necessary to support each action is identical. See *Kuhiman*, 78 Wash.App. at 123, 897 P.2d 365 (in analyzing this factor, looking to "the evidence needed to support each action"). To prove an *overservice claim, Enslay must prove that it was apparent to Pitcher that Humphries was intoxicated and that he served her in spite of her intoxication. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash.2d 259, 273, 96 P.3d 386 (2004). Enslay's argument that Ahern's deposition testimony (containing Pitcher's statement to Ahern about Humphries' appearance) would be admissible in the second suit against Pitcher is of no moment. Whether some evidence inadmissible in the first suit may be admissible in the second suit does not alter Enslay's burden to produce evidence that Pitcher had notice of Humphries' apparent intoxication when he served her. *Kuhiman*, 78 Wash.App. at 123, 897 P.2d 365. The "substantially the same evidence" factor is satisfied.

[21] Further, consideration of the other factors suggests that Enslay's second suit is barred by res judicata. The two suits arise out of the same transactional nucleus of facts. Examination of the complaints filed in each of the two suits reveals that Enslay told the same story: that Humphries was apparently intoxicated at the Red Onion, but that Pitcher served her nevertheless. The claim against Red Onion in the first suit is based solely on vicarious liability for the alleged overservice of Humphries by Pitcher. Red Onion's rights and interests established in the prior summary judgment order—that it was not liable for overserving Humphries—could be destroyed by prosecution of the second action. Lastly, the suits involved infringement of the same right: the right to be protected from bars providing alcohol to persons apparently under the influence.

[22] The identical nature of the claims, including the facts alleged in the complaints and the theories of the case argued, leave only one conclusion: that Enslay's negligent overservice claim against Pitcher is the same cause of action as Enslay's negligent overservice claim against Red Onion.

C. Subject Matter

[23] The analysis of the first and second elements of res judicata demonstrates that the subject matter of the *overservice* first and second suits is identical. Pitcher correctly argues that the tort claim in the suit against the tavern owners was identical to the tort claim here; namely, whether Humphries appeared intoxicated at the time of Pitcher's service at Red Onion. *Enslay* contends that the ultimate issue in the action against Red Onion was whether Red Onion was liable to Enslay, and that the ultimate issue in the action against Pitcher is whether Pitcher is liable to Enslay. Given that Enslay alleges negligent overservice by Pitcher in one suit and by Red Onion in the other suit, that Pitcher and Red Onion are jointly and severally liable, and that Red Onion is vicariously liable for Pitcher's negligent acts within the scope of *his employment, the two suits concern the same subject matter. See, e.g., *Kuhiman*, 78
Wash.App. at 124, 897 P.2d 365 (finding the same subject matter even where the claims were different, because the basis of the claims was the plaintiff's alleged deprivation of a constitutional right and tortious harm resulting from false allegations).


D. Quality of Persons For or Against Whom the Claim is Made

¶ 24 The fourth element of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit. See 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed.2007) (explaining that the “identity and quality of parties” requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties).

¶ 25 Restatement (Second) of Judgments: Parties and Other Persons Affected by Judgments § 51 (1982), explains the preclusive effect of a judgment against a party where that party and another party have a relationship such that one of them is vicariously liable:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.


FN12. Ensley also argues that res judicata does not apply, because Red Onion utilized a personal defense and only a valid judgment on the merits not based on a personal defense bars a subsequent action by the plaintiff against another responsible for the commission of a tort. Although not entirely clear from Ensley’s briefing, it appears he argues that Red Onion’s assertion that Ahern’s testimony of Pitcher’s statements about Humphries is hearsay is a personal defense. Ensley cites to no authority for the proposition that an evidentiary ruling is a personal defense, so we do not address it. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

¶ 26 We hold that the claim of negligent overservice by Ensley against Pitcher is barred by res judicata. FN11 Red Onion and Pitcher are in privity. This action is identical to the cause of action in the suit against the tavern owners, the subject matter of the two suits is identical, and all the parties in the second suit are bound by the judgment in the first suit.
FN13. We need not reach Pitcher's collateral estoppel argument. However, we note that collateral estoppel may not be applicable. Collateral estoppel prevents a relitigation of a particular issue in a later proceeding involving the same parties, even though the later proceedings involve a different claim or cause of action. *King v. City of Seattle*, 84 Wash.2d 239, 243, 525 P.2d 228 (1974). Here, the claim or cause of action is identical: negligent overservice.

II. *Ensley's Motion for Discretionary Review*

¶ 27 Ensley contends that the trial court committed obvious error rendering further proceedings useless under RAP 2.3(b)(1), and/or committed probable error substantially altering the status quo or limiting his freedom to act under RAP 2.3(b)(2), when it **107 denied his motion to amend the complaint to add Red Onion as a defendant.**

FN14. A commissioner referred Ensley's motion for discretionary review to the panel considering Pitcher's appeal on the merits and consolidated the two cases.

¶ 28 We deny Ensley's motion for discretionary review on this issue. Because Ensley's suit against Pitcher is barred by res judicata with or without Red Onion as a named defendant, the trial court's ruling was not error. Ensley's motion for discretionary review is moot.

¶ 29 We remand for dismissal of Ensley's suit against Pitcher with prejudice.

WE CONCUR: LAU and AGID, JJ.
Ensley v. Pitcher
152 Wash.App. 891, 222 P.3d 99

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NICHOLAS ENSLEY, )
) No. 61537-8-I
 )
Respondent, ) )
 ) ) COMMISSIONER’S RULING
v. ) ) GRANTING DISCRETIONARY
 ) ) REVIEW
 )
CLIFFORD PITCHER and “JANE
DOE” PITCHER, husband and wife, )
and the martial community composed )
thereof, )
 )
Petitioners. )

Clifford Pitcher and his wife seek discretionary review of the trial court
order denying his motion to dismiss Nicholas Ensley’s claim that Pitcher, a
bartender at the Red Onion Tavern, negligently over served alcohol to a woman
who crashed her car causing serious injuries to Ensley. Because summary
judgment had been granted in a separate lawsuit dismissing Ensley’s identical
negligence claim against the owners of the Red Onion Tavern, Pitcher moved to
dismiss arguing that res judicata and collateral estoppel bars this lawsuit. The
trial court denied Pitcher’s motion to dismiss, accepting Ensley’s argument that
“different evidence” in the form of Pitcher’s alleged admissions as a party
opponent would support this lawsuit, and therefore, the “substantially the same
evidence” standard is not satisfied.

But the trial court entered a RAP 2.3(b)(4) certification that this is a
controlling issue of first impression in Washington, for which there is a basis for
difference of opinion and that a prompt appeal would advance the termination of the litigation. The trial court’s certification supports discretionary review.

**FACTS**

Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars early in the morning. Ensley sued Humphries and the owners of the Red Onion and two other businesses that served alcohol to Humphries the night before the collision. The Red Onion moved for summary judgment based on the evidence that Humphries was at The Red Onion for less than 30 minutes, she consumed less than one drink at that location, others present at the Red Onion observed that Humphries was not apparently intoxicated when she was at the Red Onion, and she consumed several additional drinks after leaving the Red Onion before the collision.

Ensley opposed summary judgment relying in part on the deposition of Daniel Ahern, who spoke with the bartender Cliff Pitcher at the Red Onion a couple of days after the collision. Ahern recalled that Pitcher acknowledged that Humphries had kind of glassy eyes and that he should not have served her. The Red Onion moved to strike Ahern’s testimony as hearsay. Ensley argued that Pitcher was a speaking agent for the Red Onion and thus the testimony was admissible as a statement against interest, and that Pitcher’s statements to Ahern revealed his state of mind. The trial court struck Ahern’s testimony as inadmissible hearsay, granted partial summary judgment dismissing Ensley’s claims against the Red Onion and denied reconsideration.
I denied Ensley's motion for discretionary review of the summary judgment dismissing the owners of the Red Onion. (No. 54727-5-I).

Ensley moved the trial court to amend his complaint to include claims against Pitcher. The motion to amend was filed just weeks before the discovery cutoff and two months before the scheduled trial, and Ensley had known of Pitcher's alleged statements to Ahern for almost ten months. The trial court denied the motion to amend noting that it would not be fair to the defendants to delay the case so close to the scheduled trial date.

Ensley then filed this new lawsuit naming Pitcher as the defendant for negligent service of alcohol to Humphries at the Red Onion Tavern. Pitcher moved to dismiss arguing that the summary judgment in favor of the owners of the Red Onion Tavern in the first lawsuit bars the new lawsuit. The trial court denied the motion to dismiss, and Pitcher's motion for reconsideration. But the court granted a certification under RAP 2.3(b)(4) with a statement explaining the reasons for the certification:

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant's right to finality following a dismissal and a plaintiff's right to present a case. There are substantial grounds for differences of opinion on these important issues, as reflected in the arguments and case law submitted by the parties in this case. This is an issue of first impression in Washington. Immediate interlocutory review by the Court of Appeals will allow for immediate dismissal of this action, without the need for potentially unnecessary development of this case.

Petitioner's Motion for Discretionary Review at Appendix A-2.
CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

(1) The superior court has committed an obvious error which would render further proceedings useless;
(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

In the first lawsuit, the trial court excluded Ahern’s testimony of Pitcher’s statements as hearsay. For purposes of ER 801(d)(2), a bar manager is not necessarily a speaking agent for admitting key facts related to liability, even in an overservice case. The state of mind hearsay exception under ER 803(a)(3) is limited to a person’s “then existing state of mind...but not including a statement of memory or belief” and Pitcher’s statement a couple of days after the collision was a statement of memory or belief.

In the current lawsuit, Pitcher is the defendant and likely his statements to Ahern are admissible as a statement of a party opponent. Therefore, based on Ahern’s testimony, it is possible that Ensley’s claims against Pitcher individually may survive a summary judgment.

1 Barrie v Hosts of Am., Inc., 94 Wn.2d 640, 618 P.2d 96 (1980).
"Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.” Landry v. Luscher, 95 Wn. App. 779, 780, 976 P.2nd 1274 (1999). Res judicata bars such claim splitting if the claims are based upon the same cause of action. “Since the purpose of the res judicata doctrine is to ensure the finality of judgments and eliminate duplicitous litigation, dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Landry, 95 Wn. App. at 783. The determination whether the same causes of action are present includes the factor whether the evidence presented in the two actions is “substantially the same[.]” Landry, 95 Wn. App. at 784.

The trial court rejected Pitcher’s argument that the two lawsuits involved substantially the same evidence even though Ahern’s testimony may be admissible in the new lawsuit against Pitcher as a statement of a party opponent. But the court recognized in its RAP 2.3(b)(4) certification that such a change in the scope of evidence presents an issue of first impression. I accept the trial court’s certification as a proper basis for discretionary review.

I note one concern is the res judicata/collateral estoppel requirement that the first lawsuit has been resolved by a final judgment. Ensley’s claims against Humphries are still pending in the first lawsuit, although a settlement has been reached with Humphries. Ensley contends that the settlement is complicated and a final dismissal remains in doubt. Pitcher contends that Ensley has been in
No. 61537-8-I/6

possession of the final settlement documents for more than two months and may
be delaying the entry of the final judgment in the first lawsuit for a tactical
advantage in the second lawsuit. The trial court did not base its ruling on the
"final judgment" requirement. It would be troublesome to deny discretionary
review if the delayed entry of the final judgment is a manipulation by Ensley.
Generally, either a summary judgment or a judgment after trial is a valid basis for
application of res judicata or collateral estoppel.2 And there is at least some
authority that even a summary judgment as to limited issues may be adequate.3

Based upon the trial court's certification under RAP 2.3(b)(4), I accept
discretionary review.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted.

Done this 26th day of June, 2008.

[Signature]

Court Commissioner

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3 See Estate of Black, 153 Wn.2d 152, 171, 102 P.3d 796 (2004) (where the trial
court limited the issues considered in deciding whether to admit a lost will to probate, res
judicata applied to bar relitigation of the issues considered in that limited summary
judgment but not to claims of competency or undue influence not addressed in that
summary judgment.)
Injured passenger filed a complaint against bartender that alleged bartender negligently overserved alcohol to patron who later crashed her car and injured passenger. The Superior Court, King County, Laura Inveen, J., denied bartender's motion to dismiss, certified a question for review, and denied passenger's motion to add owner of bar as a defendant.

Holding: The Court of Appeals, Appelwick, J., held that the doctrine of res judicata barred injured passenger's negligence action against bartender.

Remanded for dismissal with prejudice.

*894 ¶ 1 Ensley sued Pitcher, a bartender, claiming he negligently overserved alcohol to a woman who crashed her car, causing serious injuries to Ensley. Pitcher asked the trial court to dismiss on the grounds of res judicata and collateral estoppel. Summary judgment had been granted in a separate lawsuit, dismissing Ensley's identical negligence claim against Pitcher's employer. The trial court denied Pitcher's motion to dismiss and certified a question for this court on discretionary review: whether Pitcher's alleged admissions to a third party, which had been excluded as hearsay in the suit against the employer, would be admissible as admissions of a party opponent, therefore supporting this lawsuit, because there was not "substantially the same evidence." Because Ensley's suit against Pitcher is barred by res judicata, we remand for dismissal with prejudice.

¶ 2 Ensley also filed a motion for discretionary review, asking the court to find that the trial court erred in denying his motion to amend the complaint to add the owner of Red Onion as a defendant, and add a claim of vicarious liability against him. Because the suit against Pitcher is barred by res judicata, Ensley's motion is moot.

*895 FACTS

¶ 3 Nicholas Ensley suffered serious injuries when Rebecca Humphries crashed her car into two parked cars after an evening of drinking. Ensley first brought suit against the owner of Red Onion Tavern, Humphries, and two other businesses that served alcohol to Humphries the night of the collision. Red Onion moved for summary judgment based on the evidence that Humphries was at Red Onion for less than 30 minutes, she consumed less than one alcoholic drink at that location, others present at Red Onion observed that Humphries was not apparently intoxicated while at Red Onion, and she consumed several additional drinks after leaving Red Onion and before the accident.\fn1

**100 Jennifer L. Brown, Maggie E. Diefenbach, Melissa O'Loughlin White, Cozen O'Connor, Seattle, WA, for Petitioners.


APPELWICK, J.

¶ 4 Ensley opposed summary judgment, relying in part on the deposition of Daniel Ahern, in which Ahern recalled a conversation he had with Clifford Pitcher, the bartender at Red Onion. Ahern recalled that Pitcher acknowledged that Humphries had kind of glassy eyes and that he should not have
served her. Ahern testified:

Q Since the crash who have you talked to about the facts of that night?

A I've discussed it with Chris, Stacy, Cliff the owner, and Cliff the bartender at the Red Onion.

Q What did you and Cliff at the Red Onion discuss?

A I was just asking-I just kind of wanted to get a sense of what he saw from that-from that night, and just if-how everybody looked. And I just kind of wanted to get-just to get a sense of that.

Q When did this conversation take place?

A A couple days after the accident.

*896 Q At the Red Onion?

A Yes.

Q Were you drinking at the time?

A No. I just stopped in after work and was on my way home.

Q What did Cliff the bartender at Red Onion tell you?

A He said Rebecca looked a little glassy-eyed, and I don't remember what he said about Nick.

Q From your-well, do you remember anything else about that conversation?

A No.

Q Did he say how you looked?

A He said I looked a little glassy, but not enough that he wouldn't serve me a beer.

Q Did he say that Rebecca was in a condition where he would not have served her a beer?

A Yes. I believe so, yes.

¶ 5 Red Onion moved to strike Ahern's testimony as hearsay. Ensley argued that Pitcher was a speaking agent for Red Onion, and thus the testimony was admissible as an admission of a party opponent. The trial court granted the motion to strike Ahern's testimony as inadmissible hearsay, granted partial summary judgment dismissing Ensley's claims against Red Onion, and denied reconsideration.


FN2. The commissioner reasoned that Ensley failed to establish that it was an obvious or probable error for the trial court to conclude that Ensley had not met his burden of demonstrating that Pitcher, a part-time bartender, was a speaking agent for Red Onion. Because Pitcher was not a named defendant in the suit against the tavern owners, Ahern's deposition testimony of what Pitcher said was not admissible as an admission of party opponent. Nor was the statement a state of mind hearsay exception under ER 803(a)(3). These are issues that Ensley will have the opportunity to argue on appeal.

FN3. Final judgment has since been entered, and Ensley filed a notice of appeal on April 24, 2009.
¶ 7 On November 21, 2007, Ensley asked the trial court to allow him to amend his complaint to include a claim against Pitcher individually. The motion was filed well into discovery and Ensley had known of Pitcher’s alleged statements to Ahern since at least February 2007. The trial court denied the motion to amend, noting that it would not be fair to the defendants to delay the case so close to the scheduled trial.

¶ 8 Ensley then filed a new lawsuit, the subject of this appeal, naming Pitcher as the defendant, for negligent service of alcohol to Humphries at the Red Onion. Pitcher moved to dismiss, arguing that summary judgment in favor of the owner of Red Onion in the first lawsuit barred the new lawsuit. The trial court denied the motion to dismiss. The order stated that the plaintiff’s claims against Pitcher are neither res judicata nor barred by collateral estoppel. The court also denied Pitcher’s motion for reconsideration. The trial court then entered a certification pursuant to RAP 2.3(b)(4), with a statement explaining the reasons for certification:

FN4 Ensley asserts that the trial court granted the motion to strike Pitcher’s res judicata and collateral estoppel affirmative defenses, and that Pitcher has not assigned error to this order. However, the motion to dismiss, to which Pitcher assigned error, and the court’s statement supporting certification, expressly concern the application of res judicata and collateral estoppel to the overservice claim against Pitcher.

The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ. At issue are significant public policy issues critical to a defendant’s right to finality following a dismissal and a plaintiff’s right to present a case. There are substantial grounds for differences of opinion on these important issues, as reflected in the arguments and case law submitted by the parties in this case. This is an issue of first impression in Washington. Immediate interlocutory review by the Court of Appeals will allow for immediate dismissal of this action, without the need for potentially unnecessary development of this case.

The trial court also certified its order denying defendant’s motion to dismiss. Based on the certification, a commissioner granted review.

¶ 9 Meanwhile, Ensley filed a motion to amend the complaint in this case to add the owner of Red Onion as a defendant and to add a claim of vicarious liability against him. The trial court denied Ensley’s motion to amend the complaint and his motion to reconsider. Ensley filed a motion for discretionary review of the court’s denial of his motion to amend the complaint, which a commissioner consolidated with our review of the order denying the defendant’s motion to dismiss, and passed the motion to the panel deciding Pitcher’s motion on the merits.

FN5 Pitcher filed a motion in this court to strike Ensley’s designation of clerk’s papers, contending they are not needed to review the issues presented to the appellate court in accordance with RAP 9.6(a). The commissioner’s ruling by notation on July 22, 2008, made it clear that no further briefing would be permitted on the issues related to the amendment of the complaint. Ensley has not provided further briefing, with the exception of a short procedural explanation in his response brief. The clerk’s papers in No. 61723-1-I (Ensley’s motion for discretionary review of his motion to amend the complaint) are largely duplicative of the clerk’s papers in No. 61537-8-I. We decline to rule on the motion to strike.

DISCUSSION

I. Res Judicata

[1][2][3][4] ¶ 10 “Filing two separate lawsuits based on the same event-claim splitting-is precluded in Washington.” *899* Landry v. Luscher, 95 Wash.App. 779, 780, 976 P.2d 1274 (1999), “‘The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.’” *Marino Prop. Co. v. Port Comm’rs*, 97 Wash.2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash.2d 285, 287, 201 P.2d 215 (1949)). Res judicata bars
such claim splitting if the claims are based upon the same cause of action. See 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.33, at 479 (1st ed.2007) (distinguishing collateral estoppel’s requirement that the issue be actually litigated from res judicata’s more lenient standard where issues that could have been litigated and resolved are barred). Whether res judicata bars an action is a question of law we review de novo. Kuhlman v. Thomas, 78 Wash.App. 115, 120, 897 P.2d 365 (1995); Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co., 137 Wash.App. 296, 302, 153 P.3d 211 (2007).

**103 [5] ¶ 11 The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit. Hisle v. Todd Pac. Shipyards Corp., 151 Wash.2d 853, 865, 93 P.3d 108 (2004). We have held that summary judgment can be a final judgment on the merits with the same preclusive effect as a full trial, and is therefore a valid basis for application of res judicata. DeYoung v. Cenex Ltd., 100 Wash.App. 885, 892, 1 P.3d 587 (2000).

FN6. Ensley does not dispute that the summary judgment motion was valid or on the merits.

[6] ¶ 12 Ensley contends that the summary judgment granted in favor of Red Onion in the suit against the tavern owners was not a final judgment, because the trial court had not entered the requisite order of finality pursuant to CR 54(b).56 However, the finality requirement for preclusion is distinct from the finality requirement for purposes of appeal.500 See Cunningham v. State, 61 Wash.App. 562, 566-67, 811 P.2d 225 (1991); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4432, at 52-60 (2d ed.2002). In Cunningham, we addressed the definition of finality for collateral estoppel purposes by looking to the Restatement (Second) of Judgments (1982) and other federal authority. We do the same here to address the definition of finality for res judicata.

FN7. CR 54(b) provides a specific procedure for entry of final judgment in suits with multiple claims or multiple parties:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court’s own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

FN8. While both issue and claim preclusion require finality, it is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4434, at 110 n. 1 (2d ed.2002).

¶ 13 The Restatement (Second) of Judgments states “[t]he rules of res judicata are applicable only when a final judgment is rendered.” RESTATMENT (SECOND) OF JUDGMENTS: FORMER ADJUDICATION: THE EFFECTS OF A JUDICIAL JUDGMENT § 13 (1982). The comments contrast this finality requirement with the finality requirement of appellate review and conclude they are quite similar. Id. at cmt. b (explaining that the definition of finality for res judicata resembles the traditional concept of finality for appellate review: “when res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim, see Comment e below) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court.”). Comment e provides for the application of res judicata in multi-party, multi-claim
litigation, stating that “[a] judgment may be final in a res judicata sense as to a part of an *901 action although the litigation continues as to the rest.” Id. at cmt. e. Undoubtedly, CR 54(b) provides the correct procedure for entering final judgment as to a claim or party in this circumstance. “Summary judgment as to part of an action may be made final under Civil Rule 54(b) ... and then is final for preclusion purposes as well as appeal purposes.” 18A Wright, supra, § 4444, at 297-99. However, “[t]here also may be circumstances in which expanded modern views of finality warrant preclusion on the ground that there is no apparent reason to anticipate reconsideration and that the alternative of denying preclusion would entail substantial costs.” Id.

¶ 14 The record here overwhelmingly satisfies the finality requirement, analyzed under the more modern view articulated in Federal Practice and Procedure, as well as under the traditional factors as articulated in Restatement (Second) of Judgments. The trial court **104 granted partial summary judgment dismissing all of the claims against Red Onion from the suit. The parties had a full and fair opportunity to litigate Red Onion’s liability. The trial court then heard and denied reconsideration. Ensley filed for discretionary review of this decision, and we denied review, finding neither obvious nor probable error. Further, the trial court entertained and denied Ensley’s motion to amend his complaint to include Pitcher. The addition of Pitcher to the lawsuit may have provided a basis for admitting Ahern’s deposition testimony and reversing the summary judgment motion, but the court’s decision on the motion to amend the complaint reinforced its decision that Red Onion had been dismissed. While the record does not include an entry of final judgment under CR 54(b) as to the summary judgment dismissing Red Onion, there are no other indicia in the record that the summary judgment decision was not final as a practical matter. Further, by the time we considered this appeal, final judgment had been *902 entered in the suit against Red Onion and the other tavern owners.

FN9. We take judicial notice of Ensley’s appeal from final judgment in case No. 63407-1-L, where the correspondence file contains counsel’s assurances of a final judgment, as well as the trial court documentation dismissing the last of the defendants from the suit against the tavern owners.

¶ 15 Therefore, the entry of summary judgment in favor of Red Onion and dismissal with prejudice of Ensley’s claims against Red Onion in the suit against the tavern owners is a final judgment on the merits, allowing application of res judicata.

[7][8] ¶ 16 Because res judicata ensures the finality of judgments and eliminates duplicative litigation, dismissal on res judicata grounds is appropriate where the subsequent action is identical with a prior action in four respects: “(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.” Landry, 95 Wash.App. at 783, 976 P.2d 1274. The party asserting the defense of res judicata bears the burden of proof. Hisle, 151 Wash.2d at 865, 93 P.3d 108.

[9] ¶ 17 Pitcher asserts that the trial court erred in its analysis of the same claim or cause of action element of res judicata. In the certification of the issue for appeal, the trial court stated: “The threshold issue in this case is the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in successive lawsuits may potentially differ.”

A. Persons and Parties

[10][11] ¶ 18 Different defendants in separate suits are the same party for res judicata purposes as long as they are in privity. Kuhlman, 78 Wash.App. at 121, 897 P.2d 365. The employer/employee relationship is sufficient to establish privity. Id. at 121-22, 897 P.2d 365 (holding that where the ultimate issue of whether the employer had violated the plaintiff’s rights turned on the propriety of its employees conduct, the parties must be viewed as sufficiently the same, “if not identical”); see also Kuhlman’s discussion of federal law therein. Pitcher and *903 Red Onion are clearly in privity. Ensley could have sought to establish Pitcher’s personal liability in the first suit. The fact that Ensley did not name Pitcher as a defendant does not defeat the identity of the parties where the employer’s liability turns solely on vicarious liability.

FN10. Neither party disputes that Red Onion would be vicariously liable for Pitchers alleged overservice. Vicarious liability is es-
tablished if the relationship is that of employer-employee, and the tort committed was within the scope of employment. *Kuehn v. White*, 24 Wash.App. 274, 277, 600 P.2d 679 (1979).

B. Causes of Action

¶ 19 The determination whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. **Pederson v. Potter**, 103 Wash.App. 62, 72, 11 P.3d 833 (2000); *Landry*, 95 Wash.App. at 784, 976 P.2d 1274. These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim. *Kuhlman*, 78 Wash.App. at 122, 897 P.2d 365 ("there is no specific test for determining identity of causes of action"); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 WASH. L.REV., 805, 816 (1984). Pitcher argues that the court’s reliance on the “substantially the same evidence” criterion in denying Pitcher’s motion to dismiss constitutes error.

¶ 20 The trial court’s certification involves the “substantially the same evidence” consideration. The principle concern was the potential application of the preclusion doctrine where the “scope of evidence presented in successive lawsuits may potentially differ.” The “substantially the same evidence” factor requires analysis of whether the evidence necessary to support each action is identical. See *Kuhlman*, 78 Wash.App. at 123, 897 P.2d 365 (in analyzing this factor, looking to “the evidence needed to support each action”). To prove an *overservice* claim, Ensley must prove that it was apparent to Pitcher that Humphries was intoxicated and that he served her in spite of her intoxication. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wash.2d 259, 273, 96 P.3d 386 (2004). Ensley’s burden to produce evidence that Pitcher had notice of Humphries’s apparent intoxication when he served her. *Kuhlman*, 78 Wash.App. at 123, 897 P.2d 365. The “substantially the same evidence” factor is satisfied.

¶ 21 Further, consideration of the other factors suggests that Ensley’s second suit is barred by res judicata. The two suits arise out of the same transactional nucleus of facts. Examination of the complaints filed in each of the two suits reveals that Ensley told the same story: that Humphries was apparently intoxicated at the Red Onion, but that Pitcher served her nevertheless. The claim against Red Onion in the first suit is based solely on vicarious liability for the alleged overservice of Humphries by Pitcher. Red Onion’s rights and interests established in the prior summary judgment order—that it was not liable for overserving Humphries—could be destroyed by prosecution of the second action. Lastly, the suits involved infringement of the same right: the right to be protected from bars providing alcohol to persons apparently under the influence.

¶ 22 The identical nature of the claims, including the facts alleged in the complaints and the theories of the case argued, leave only one conclusion: that Ensley’s negligent overservice claim against Pitcher is the same cause of action as Ensley’s negligent overservice claim against Red Onion.

C. Subject Matter

¶ 23 The analysis of the first and second elements of res judicata demonstrates that the subject matter of the *first* and second suits is identical. Pitcher correctly argues that the tort claim in the suit against the tavern owners was identical to the tort claim here; namely, whether Humphries appeared intoxicated at the time of Pitcher’s service at Red Onion. Ensley contends that the ultimate issue in the action against Red Onion was whether Red Onion was liable to Ensley, and that the ultimate issue in the action against Pitcher is whether Pitcher is liable to Ensley. Given that Ensley alleges negligent overservice by Pitcher in one suit and by Red Onion in the other suit, that Pitcher and Red Onion are jointly and severally liable, and that Red Onion is vicariously liable for Pitcher’s negligent acts within the scope of his employment, the two suits concern the same subject matter. See, e.g., *Kuhlman*, 78
Wash.App. at 124, 897 P.2d 365 (finding the same subject matter even where the claims were different, because the basis of the claims was the plaintiff's alleged deprivation of a constitutional right and tortious harm resulting from false allegations).


D. Quality of Persons For or Against Whom the Claim is Made

¶ 24 The fourth element of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit. See 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed.2007) (explaining that the “identity and quality of parties” requirement is better understood as a determination of who is bound by the first judgment-all parties to the litigation plus all persons in privity with such parties).

¶ 25 Restatement (Second) of Judgments: Parties and Other Persons Affected by Judgments § 51 (1982), explains the preclusive effect of a judgment against a party where that party and another party have a relationship such that one of them is vicariously liable:

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.


FN12. Ensley also argues that res judicata does not apply, because Red Onion utilized a personal defense and only a valid judgment on the merits not based on a personal defense bars a subsequent action by the plaintiff against another responsible for the commission of a tort. Although not entirely clear from Ensley’s briefing, it appears he argues that Red Onion’s assertion that Ahern’s testimony of Pitcher’s statements about Humphries is hearsay is a personal defense. Ensley cites to no authority for the proposition that an evidentiary ruling is a personal defense, so we do not address it. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

¶ 26 We hold that the claim of negligent overservice by Ensley against Pitcher is barred by res judicata. Red Onion and Pitcher are in privity. This action is identical to the cause of action in the suit against the tavern owners, the subject matter of the two suits is identical, and all the parties in the second suit are bound by the judgment in the first suit.
FN13. We need not reach Pitcher's collateral estoppel argument. However, we note that collateral estoppel may not be applicable. Collateral estoppel prevents a relitigation of a particular issue in a later proceeding involving the same parties, even though the later proceedings involve a different claim or cause of action. *King v. City of Seattle*, 84 Wash.2d 239, 243, 525 P.2d 228 (1974).

Here, the claim or cause of action is identical: negligent overservice.

II. *Ensley's Motion for Discretionary Review*

¶ 27 Ensley contends that the trial court committed obvious error rendering further proceedings useless under *RAP 2.3(b)(1)*, and/or committed probable error substantially altering the status quo or limiting his freedom to act under *RAP 2.3(b)(2)*, when it **107 denied his motion to amend the complaint to add Red Onion as a defendant.*FN14*

FN14. A commissioner referred Ensley's motion for discretionary review to the panel considering Pitcher's appeal on the merits and consolidated the two cases.

¶ 28 We deny Ensley's motion for discretionary review on this issue. Because Ensley's suit against Pitcher is barred by res judicata with or without Red Onion as a named defendant, the trial court's ruling was not error. Ensley's motion for discretionary review is moot.

¶ 29 We remand for dismissal of Ensley's suit against Pitcher with prejudice.

WE CONCUR: *LAU* and *AGID*, JJ.
Ensley v. Pitcher
152 Wash.App. 891, 222 P.3d 99

END OF DOCUMENT
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICHOLAS ENSLEY,
    Plaintiff,

v.

CLIFFORD PITCHER and “JANE DOE”
PITCHER, husband and wife, and the marital
community composed thereof,
    Defendants.

Cause No.: 07-2-39823-6 SEA

MOTION TO CERTIFY CR 12(B)(6)
AND SUMMARY JUDGMENT ORDERS
FOR IMMEDIATE APPEAL

I. RELIEF REQUESTED

COMES NOW Defendant Cliff Pitcher (“Defendant” or “Pitcher”) respectfully requests that the Court certify for immediate appeal the orders denying Defendant’s 12(b)(6) Motion to Dismiss and Motion for Summary Judgment, and denying Defendant’s Motion for Reconsideration. Defendant’s request is made on the basis that the Court’s decisions involve controlling questions of law as to which there are substantial grounds for differences of opinion and that immediate review of the legal questions may materially advance the ultimate termination of this action. See RAP 2.3(b)(4).

The controlling questions relate to whether a plaintiff is permitted to commence a new lawsuit against a defendant, after having received an order that dismissed those same claims on
the merits in a separate lawsuit. The potential application of res judicata and/or collateral
estoppel where the scope of evidence presented in each action may potentially differ is an issue
of first impression in Washington. At issue are significant public policy issues critical to a
defendant’s right to finality following a dismissal and a plaintiff’s right to present a case.
Reflected in the arguments submitted by the parties are substantial grounds for differences of
opinion on these important issues. As the Court observed during oral argument, appellate
guidance is needed. Therefore, Defendant requests that the Court (1) amend its previous orders
to add express findings to support certification of these issues for immediate appeal under RAP
2.3(b)(4), and (2) stay this underlying action until the appellate proceedings have concluded.

II. STATEMENT OF FACTS

This matter arises out of a motor vehicle accident which occurred in the early hours of
suffered injury when a motor vehicle driven by Rebecca Humphries (“Humphries”) collided
with two parked cars. Plaintiff and Humphries patronized the Impromptu Wine & Art Bar, the
Red Onion, and the Twilight Exit earlier that night.¹

On December 18, 2007, after failing to establish vicarious liability against Red Onion,
Defendant’s employer, Plaintiff filed the present suit against Defendant.² Plaintiff served
Defendant with the Summons and Complaint the day after Christmas.³

On January 15, 2008, Defendant filed his Motion to Dismiss/Motion for Summary
Judgment with the Court, arguing Plaintiff’s claims against him are barred by res judicata and

¹ See Plaintiff’s Complaint.
² See Plaintiff’s Complaint.
³ See Id.
collateral estoppel. On February 13, 2008, the Court denied said motion. On February 22, 2008, Defendant’s Motion for Reconsideration was filed with the Court. Defendant’s Motion for Reconsideration was denied by the Court without explanation via Order dated March 13, 2008.

Defendant filed his Answer and Affirmative Defenses on February 25, 2008. On February 28, 2008, Plaintiff filed a Motion to Strike Certain Affirmative Defenses. On March 25, 2008, Plaintiff’s motion was granted as to the affirmative defenses of res judicata, collateral estoppel and pre-existing injury, and denied as to the remaining affirmative defenses.

On March 20, 2008, Plaintiff filed a Motion to Amend the Complaint to add Red Onion owner Timothy Johnson and “Jane Doe” Johnson as defendants to the present suit. That motion was denied on the basis of res judicata and collateral estoppel via order dated March 31, 2008.

II. ISSUE PRESENTED

Should the Court certify the orders denying Defendant’s Motion to Dismiss Pursuant to 12(b)(6)/Motion for Summary Judgment, and denying Defendant’s Motion for Reconsideration, where the orders involve controlling questions of law as to which there are substantial grounds for differences of opinion, and where immediate review may materially advance the ultimate termination of this action?

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4 See Defendant’s Motion to Dismiss/Motion for Summary Judgment.
5 See Order Denying Defendant’s Motion to Dismiss/Motion for Summary Judgment.
6 See Defendant’s Motion for Reconsideration.
7 See Defendant’s Answer and Affirmative Defenses.
8 See Plaintiff’s Motion to Strike Affirmative Defenses.
9 See Order granting/denying Plaintiff’s Motion to Strike Affirmative Defenses.
10 See Plaintiff’s Motion to Amend Complaint.
11 See Order Denying Plaintiff’s Motion to Amend Complaint.
III. EVIDENCE RELIED UPON

This motion is supported by the pleadings and other documents on file, including those filed in Ensley v. Red Onion et al.

IV. LEGAL ANALYSIS AND ARGUMENT

A. The Court Should Certify the Orders Because They Involve Controlling Questions of Law as to Which There are Substantial Grounds for Differences of Opinion and Certification is Likely to Lead to the Ultimate Resolution of this Case.

1. This Court Has the Authority to Certify Its Orders for Immediate Appeal.

As the Court has not yet entered a final judgment in this case, the orders denying Defendants Motion to Dismiss Pursuant to 12(b)(6)/Motion for Summary Judgment, and denying Defendant’s Motion for Reconsideration are not subject to appellate review as a matter of right. See RAP 2.2(a). Therefore, the appropriate means for the parties to obtain appellate review is by discretionary review. See RAP 2.3(a). Rule of Appellate Procedure 2.3(b)(4) authorizes trial courts to certify an order for immediate appeal. That rule states in relevant part as follows:

DECISIONS OF THE TRIAL COURT WHICH MAY BE REVIEWED BY DISCRETIONARY REVIEW

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Discretionary review may be accepted only in the following circumstances:

***

The superior court has certified . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4). Certification of an order under this rule assists the Court of Appeals in providing a unique mid-case assessment of whether interlocutory determination would be of assistance to the Court and to the parties. Commentators have observed that this provision is
most effective where (as here) there is no binding precedent to guide the trial court.\(^{12}\)

2. **The Subject Court Orders Involve Controlling Questions of Law as to Which There are Substantial Grounds for Differences of Opinion.**

This Court’s orders involve controlling questions of law; namely, whether Plaintiff’s claims against Pitcher are barred by res judicata and/or are barred by collateral estoppel. As reflected in the parties’ briefing and the cases cited therein, these controlling legal issues are ones over which substantial room for difference of opinion exists.

First, in denying Defendant’s Motion to Dismiss, the Court concluded that the application of res judicata was improper, because Defendant failed to establish that the proceedings involve the “same evidence,” since evidence deemed inadmissible against Red Onion in the first proceeding may be admissible in the second proceeding against Pitcher.

Defendant argued that this interpretation misapplies the “same evidence” element of res judicata, because it does not require that the evidence ultimately deemed admissible in each action be identical, and because binding precedent does not state that courts should consider the identity of admissible evidence when determining whether res judicata applies.

Secondly, in denying Defendant’s Motion to Dismiss on the basis of collateral estoppel, the Court concluded that Pitcher failed to establish “identity of issue” between the first and second proceedings. The Court did not explain how the issue of whether Humphries was apparently intoxicated at the time of Pitcher’s service differs from that issue, which was previously decided in *Ensley v. Red Onion*, except to suggest that the issue in the present action has not been fully litigated, since certain evidence was deemed inadmissible in the first action.

Defendant argued that controlling case law does not support the Court’s position and

\(^{12}\) See, e.g., **WASHINGTON APPELLATE PRACTICE DESKBOOK** § 10.8(1), at 10-12 (Wash. State Bar Assoc. 2005).
that the Court improperly applied the res judicata “same evidence” requirement to its collateral estoppel analysis.

As demonstrated by the parties’ arguments and cited authorities, there are substantial grounds for differences of opinion on these threshold questions. No Washington case has addressed the potential application of res judicata and/or collateral estoppel where the scope of evidence presented in each action may potentially differ. Defendant has urged dismissal in accordance with the dismissal order he obtained in the prior litigation. By contrast, Plaintiff has argued that he has a right to re-litigate his claims if there is a chance that different evidence will ultimately be admitted. These issues highlight vital public policy issues on both sides, and, as the Court observed during oral argument, appellate guidance is needed.

3. Certification of the Subject Court Orders will Advance the Ultimate Resolution of this Case.

Certification of these issues under RAP 2.3(b)(4) will promote judicial economy and expediency, and is likely to advance the ultimate resolution of this case. The legal issues of whether Plaintiff’s claims are barred by res judicata and/or collateral estoppel should be fully addressed before the Court and the parties are forced to expend substantial time, fees, and costs litigating this case. Immediate review by the Court of Appeals will allow the parties, if necessary, to focus any remaining discovery efforts and potentially resolve this case short of trial.

The legal issues before the Court are threshold questions, the resolution of which dictates whether dismissal is appropriate. If the issues are determined in Defendant’s favor, then this case will be resolved. No further trial proceedings will be appropriate and the parties and the Court will not have wasted resources developing this case. If the issues are determined
in Plaintiff’s favor, then the parties can proceed with discovery, motions practice, and trial (if necessary) at the conclusion of the appellate proceedings. Plaintiff will not be significantly prejudiced by delay necessary to complete an appeal. Considering that Plaintiff did not even commence this lawsuit until after litigating the previous one and only recently sought to amend the complaint, this case has only just begun. By contrast, if the Court does not endorse an early appellate ruling, Defendant will lose his ability to rely on the previous court’s dismissal of Plaintiff’s claims on the merits and be forced to litigate this case to its conclusion. Under these circumstances, Defendant will suffer unfair prejudice. It is therefore appropriate for this Court to amend its prior orders to certify the important issues for immediate appeal.

B. The Court Should Enter a Stay Until Appellate Proceedings Have Concluded.

Should this Court agree with the above analysis and determine that certification of these issues is appropriate, Defendant requests that all trial court proceedings be stayed pending resolution of this matter on appeal. “The court has inherent power to stay its proceedings where the interest of justice so requires.” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350, 16 P.3d 45 (2000) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). Pending Defendant’s efforts to obtain discretionary review and thereafter (if appropriate) appellate rulings on the merits, the Court should enter a stay of all proceedings at the trial level. Plaintiff will not be prejudiced by a stay for the same reasons articulated above. No discovery or motions practice should be permitted to take place until after the appellate proceedings have concluded and the parties know for certain whether Plaintiff’s claims against

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13 Plaintiff’s Complaint was filed on December 18, 2007, after his claims against Pitcher were dismissed in the prior action, and Defendant answered on February 25, 2008 following resolution of the CR 12(b)(6) motion.

14 Plaintiff’s Motion to Amend the Complaint was filed on March 20, 2008.
Defendant can proceed in this action.

V. CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that this Court certify, pursuant to RAP 2.3(b)(4), the orders denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment and denying Defendant’s Motion for Reconsideration.

A Proposed order is attached hereto that (1) amends the previous orders to add certification findings under RAP 2.3(b)(4), and (2) stays this underlying action until the appellate proceedings have concluded.
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NICHOLAS ENSLEY,

Plaintiff,

v.

CLIFFORD PITCHER and "JANE DOE"
PITCHER, husband and wife, and the marital
community composed thereof,

Defendants.

Cause No.: 07-2-39823-6 SEA

[PROPOSED] AMENDED ORDER (1)
DENYING DEFENDANT’S MOTION TO
DISMISS, (2) CERTIFYING ISSUES FOR
APPEAL AND (3) STAYING CASE
PENDING RESOLUTION OF
APPELLATE PROCEEDINGS

THIS MATTER having come on duly and regularly before the undersigned Judge of
the above entitled Court upon Defendant’s Motion for Certification of the Court’s Order
Denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary
Judgment and the Court having considered the following:

1. Defendant’s Motion for Certification of the Court’s Order Denying Defendant’s
Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;

2. Plaintiff’s Opposition to Motion for Certification of the Court’s Order Denying
Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary Judgment;

3. Defendant’s Reply in Support of Motion for Certification of the Court’s Order
Denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary

Judgment;

[PROPOSED] AMENDED ORDER DENYING DEFENDANT’S MOTION TO
DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 1
4. and the Court’s file and records therein,

and the Court otherwise deeming itself fully advised; concludes that Defendant’s

Motion for Certification of the Court’s Order Denying Defendant’s Motion to Dismiss

Pursuant to CR 12(b)(6)/Motion for Summary Judgment must be GRANTED. The Court

hereby makes the following written findings, which confirm that this Order involves

controlling questions of law as to which there is substantial ground for a difference of opinion

and that immediate review of the order may materially advance the ultimate termination of the

litigation, and is therefore appropriate for immediate appeal under RAP 2.3(b)(4).

The threshold issue in this case is the potential application of res judicata and/or

collateral estoppel where the scope of evidence presented in successive lawsuits may

potentially differ. At issue are significant public policy issues critical to a defendant’s right to

finality following a dismissal and a plaintiff’s right to present a case. There are substantial

grounds for differences of opinion on these important issues, as reflected in the arguments and

case law submitted by the parties in this case. This is an issue of first impression in

Washington. Immediate interlocutory review by the Court of Appeals will allow for

immediate dismissal of this action, without the need for potentially unnecessary development

of this case.

On February 13, 2008, this Court denied Defendant’s Motion to Dismiss Pursuant to

CR 12(b)(6)/Motion for Summary Judgment, and on March 13, 2008, this Court denied

Defendant’s Motion for Reconsideration. Attached hereto as Exhibits A and B are true and

correct copies of those Orders, the contents of which are hereby expressly incorporated into

this Amended Order.

IT IS HEREBY ORDERED that Defendant’s Motion for Certification of the Court’s

Order Denying Defendant’s Motion to Dismiss Pursuant to CR 12(b)(6)/Motion for Summary

Judgment is GRANTED; Defendant’s Motion to Dismiss is DENIED; this Order is hereby

CERTIFIED for immediate appeal under RAP2.3(b)(4); and all trial court proceedings are

[PROPOSED] AMENDED ORDER DENYING DEFENDANT’S MOTION TO DISMISS, CERTIFYING ISSUES FOR APPEAL, AND STAYING CASE - 2
hereby STAYED until appellate proceedings have concluded.

DONE IN OPEN COURT this 21 day of April, 2008.

LAURA C. INVEEN
Honorable Laura Inveen

Presented by:
COZEN O’CONNOR

By: Jennifer L. Brown, WSBA No. 27952
Maggie Peterson, WSBA No. 31176
Attorneys for Defendant Clifford Pitcher,
an employee of Red Onion

Approved as to Form:
THE ADEE LAW FIRM

By:
Aaron L. Adee, WSBA No. 27409
Attorney for Plaintiff Nicholas Ensley

SEATTLE6997541 180108.000
RULE 2.3
DECISIONS OF THE TRIAL COURT WHICH MAY BE
REVIEWED BY DISCRETIONARY REVIEW

(a) Decision of Superior Court. Unless otherwise prohibited by statute or
court rule, a party may seek discretionary review of any act of the superior
court not appealable as a matter of right.

(b) Considerations Governing Acceptance of Review. Except as provided in
section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render
further proceedings useless;

(2) The superior court has committed probable error and the decision of the
superior court substantially alters the status quo or substantially limits the
freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual
course of judicial proceedings, or so far sanctioned such a departure by an
inferior court or administrative agency, as to call for review by the appellate
court; or

(4) The superior court has certified, or that all parties to the litigation
have stipulated, that the order involves a controlling question of law as to
which there is substantial ground for a difference of opinion and that immediate
review of the order may materially advance the ultimate termination of the litigation.

(c) Effect of Denial of Discretionary Review. Except with regard to a
decision of a superior court entered in a proceeding to review a decision of a
court of limited jurisdiction, the denial of discretionary review of a superior
court decision does not affect the right of a party to obtain later review of
the trial court decision or the issues pertaining to that decision.

(d) Considerations Governing Acceptance of Review of Superior Court Decision
on Review of Decision of Court of Limited Jurisdiction. Discretionary review of
a superior court decision entered in a proceeding to review a decision of a
court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of
the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of
Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be
determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual
course of judicial proceedings, or so far sanctioned such a departure by the
court of limited jurisdiction, as to call for review by the appellate court.

(e) Acceptance of Review. Upon accepting discretionary review, the
appealate court may specify the issue or issues as to which review is granted.

[Amended December 24, 2002]
November
Amicus Curiae Practice

This paper provides a brief overview of amicus curiae practice in the Washington appellate courts. It discusses the rules governing such practice, and provides some suggestions based on the author's experience, as well as some thoughts on the role of amicus curiae. For additional materials on amicus curiae practice in Washington, see the WSBA Washington Appellate Practice Deskbook (2005), Chapter 28 of which covers amicus curiae practice.

The Washington Court Rules

The Washington Rules of Appellate Procedure (RAP) provide the framework for amicus curiae practice in the appellate courts. Generally, the rules governing amicus curiae briefs are set forth in Title 10 RAP. However, the rule for amicus curiae memorandums on reconsideration is RAP 12.4(i). The rule governing amicus curiae memorandums regarding petitions for review in the Supreme Court is RAP 13.4(h). The rules governing participation of amicus curiae in oral argument are set forth in Title 11 RAP. The principal types of amicus curiae submissions, and the rules governing them, are discussed here.

1. Amicus Curiae Brief on the Merits:

The most common submission by amicus curiae is an amicus curiae brief on the merits. RAP 10.1(e). A person seeking permission to file an amicus curiae brief in an appellate court must do so by motion. RAP 10.6(a). The appellate court may grant the motion if all parties consent, or if the court finds that the filing of the brief "would assist the appellate court." RAP 10.6(a). Any party has 5 business days to object to a motion to file an amicus curiae brief. RAP 10.6(d). The motion may be filed in advance of the brief, or contemporaneous with it. No motion is necessary if the court requests an amicus brief, or invites a person or entity to submit a brief. A motion to file an amicus curiae brief must include the following information: (1) the applicant's interest and background information about the applicant; (2) the applicant's familiarity with the issue or issues before the appellate court and the scope of the argument presented or to be presented by the parties; (3) the specific issue or issues to which the amicus curiae brief will be directed; and (4) the applicant's reason for believing that additional argument is necessary on the specific issue or issues. RAP 10.6(b). It has been our experience that a "motion" can be made in the Washington Supreme Court via a letter request addressed to the Clerk, setting out the information that would otherwise be contained in a motion.

The content of an amicus curiae brief is outlined in RAP 10.3. For the most part, the brief should conform to the content requirements for parties' briefs, with two exceptions. An amicus brief need not set out assignments of error, and it must contain a statement of the identity and interest of amicus curiae. RAP 10.3 recognizes that an amicus brief may not address all issues in a case, but rather be limited to those issues "of concern to amicus."
10.3(e). An amicus brief should only address issues also raised and preserved by the parties, as the court will not generally address an issue raised solely by amicus. See Long v. O'Dell, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). However, the appellate court may, in its discretion, reach an issue or theory first raised in an amicus curiae brief if the court determines it is necessary to do so for a proper disposition of the case. See Harris v. Dept. of Labor & Industries, 120 Wn.2d 461, 467-68 (1993).

An amicus brief may not exceed 20 pages, unless permission is sought and granted by the court, based on compelling reasons. RAP 10.4(b).

RAP 10.2(f) requires that an amicus brief be received by the appellate court 30 days before argument. This is different from the generally applicable rules for filing and service, and counsel must assure that an amicus brief actually reaches the court by the due date.

Parties have an opportunity to file an answer to an amicus curiae brief, which is limited to 20 pages. RAP 10.2(g); RAP 10.3(f); RAP 10.4(b).

2. Amicus Curiae Memorandum

The rules allow for two types of amicus curiae memorandums (ACM): (1) in support of or opposition to a petition for review. RAP 13.4(h); and (2) in support of or opposition to a motion for reconsideration. RAP 12.4(i).

Permission to file an ACM is made by motion to the Supreme Court. RAP 13.4(h). The same rules apply in this context as in the context of a motion to file a brief on the merits, in terms of the information that must be included in the motion. RAP 10.6(b). An ACM regarding a petition for review must be received by the court no later than 60 days after the filing of the petition. RAP 13.4(h). The time may be extended upon a showing of “particular justification.” Id. Note that the date the petition is filed is measured by the date it is filed in the court of appeals, not the later date it is forwarded to the Supreme Court. Parties have an opportunity to object to an ACM, under the same rule governing objections to amicus briefs on the merits. RAP 10.6(d). We generally file a motion and proposed ACM contemporaneously.

An ACM regarding a petition for review should be limited to the issue of why the case does or does not meet the criteria for review in RAP 13.4(b). While this analysis may incidentally address the merits of the case, an ACM should not be a brief on the merits. If review is accepted, amicus may later seek permission to file a brief on the merits. For this reason ACMs regarding petitions for review are limited to 10 pages in length. Compare RAP 10.4(b), setting a 20 page limit for amicus curiae briefs

An ACM in support of or opposition to a motion for reconsideration should address the court “regarding the soundness of legal principles announced in the course of the opinion.” RAP 12.4(i). The focus is not on the disposition of the particular case, but rather the validity of the legal analysis supporting the result. ACMs on reconsideration are limited to 10 pages in length. RAP 12.4(i).
An ACM regarding reconsideration of an appellate court decision is required to be received by the appellate court and counsel of record for the parties and any other amicus curiae not later than 5 days after the motion for reconsideration is filed. RAP 12.4(i); Given the short timeline in RAP 12.4(i), the proposed ACM should accompany the motion to file an ACM.

3. Oral Argument By Amicus Curiae

The rules do not provide for separate oral argument time to be given to amicus curiae. RAP 11.2(b). A party supported by amicus may cede a portion of argument time, and on rare occasions the court may grant additional time.

4. Additional Authorities

Once a person or entity has appeared as amicus curiae in a case, it is permitted to thereafter file a statement of additional authorities, under RAP 10.8. This is appropriate to bring new case law, statutory changes or other relevant authorities to the court’s attention. No argument is permitted in an additional authority, and a document that contains argument is subject to being rejected. There is no page limit on this submission.

5. Other Issues

Generally, a person or entity filing an amicus curiae brief or ACM is only considered an “amicus curiae” in the court in which the submission is made, and only for the purpose of that submission. For example, an appearance at the Court of Appeals does not automatically result in amicus curiae status in the same case in the Supreme Court.

Separate application for amicus curiae status should be made at each level.

Finally, the courts permit submission of briefs and appendices on compact disc, read-only memory (CD-ROM). See RAP 10.9. The language of the rule appears to contemplate that only parties may make such submissions, but in a proper case, an amicus curiae may seek a waiver of this apparent limitation, pursuant to RAP 1.2(c).

The Federal Court Rules
The federal court rules are less elaborate, and less accommodating to amicus curiae.

Generally, leave of the court is required to submit an amicus curiae brief, unless the brief recites that the parties all consent to the amicus intervention. An amicus brief must be filed within 7 days of the parties’ brief that the amicus brief supports (or the appellant’s brief, if the amicus brief does not support either party). An amicus brief may be no longer than half the length of the brief of the supported party. Participation in oral argument is allowed only by permission of the court. See FRAP 29 (Appendix).

Miscellaneous References


Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062 (7th Cir.1977) (Judge Posner’s oft-quoted criticism of mercenary amicus briefs)


APPENDIX OF SELECT COURT RULES

Washington Rules of Appellate Procedure:

RAP 10.1 BRIEFS THAT MAY BE FILED

(...)
(e) Amicus Curiae Brief. An amicus curiae brief may be filed only if permission is obtained as provided in rule 10.6. If an amicus curiae brief is filed, a brief in answer to the brief of amicus curiae may be filed by a party.

RAP 10.2 TIME FOR FILING BRIEFS

(...)
(f) Brief of Amicus Curiae. A brief of amicus curiae not requested by the appellate court should be received by the appellate court and counsel of record for the parties and any other amicus curiae not later than 30 days before oral argument in the appellate court, unless the court sets a later date or allows a later date upon a showing of particular justification by the applicant.

(g) Answer to Brief of Amicus Curiae. A brief in answer to the brief of amicus curiae may be filed with the appellate court not later than the date fixed by the appellate court.

RAP 10.3 CONTENT OF BRIEF

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

RAP 10.4 PREPARATION AND FILING OF BRIEF BY PARTY

(b) (...) An amicus curiae brief, or answer thereto, should not
exceed 20 pages. (...)

RAP 10.6 AMICUS CURIAE BRIEF
(a) When Allowed by Motion. The appellate court may, on motion, grant permission to file an amicus curiae brief only if all parties consent or if the filing of the brief would assist the appellate court. An amicus curiae brief may be filed only by an attorney authorized to practice law in this state, or by a member in good standing of the Bar of another state in association with an attorney authorized to practice law in this state.

(b) Motion. A motion to file an amicus curiae brief must include a statement of (1) applicants interest and the person or group applicant represents, (2) applicants familiarity with the issues involved in the review and with the scope of the argument presented or to be presented by the parties, (3) specific issues to which the amicus curiae brief will be directed, and (4) applicants reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion.

(c) On Request of the Appellate Court. The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timelines for the filing of the amicus brief and answer thereto.

(d) Objection to Motion. An objection to a motion to file an amicus curiae brief must be received by the appellate court and counsel of record for the parties and the applicant not later than 5 business days after receipt of the motion.

(e) Disposition of Motions. The Supreme Court and each division of the Court of Appeals shall establish by general order the manner of disposition of a motion to file an amicus curiae brief, including whether such disposition is reviewable or subject to reconsideration by the particular court.

RAP 10.8 ADDITIONAL AUTHORITIES
A party or amicus curiae may file a statement of additional authorities. The statement should not contain argument, but should identify the issue for which each authority is offered. The statement must be served and filed prior to the filing of the decision on the merits or, if there is a motion for
reconsideration, prior to the filing of the decision on the motion.

RAP 11.2 WHO MAY PRESENT ORAL ARGUMENT
(a) Party. A party of record may present oral argument only if the party has filed a brief.
(b) Amicus Curiae. Amicus curiae may present oral argument only if time is made available for the argument by a party, or if the appellate court grants additional time for argument by amicus curiae.

RAP 12.4 MOTION FOR RECONSIDERATION
(i) Amicus Curiae Memoranda. When a motion for reconsideration has been filed, the appellate court may grant permission to file an amicus curiae memorandum for the purpose of addressing the court regarding the soundness of legal principles announced in the course of the opinion. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and any other amicus curiae not later than 5 days after the motion for reconsideration has been filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum, except that no answer to an amicus curiae memorandum should be filed unless requested by the court. An amicus curiae memorandum or answer should not exceed 10 pages.

RAP 13.4 DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW
(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.
GENERAL ORDERS OF DIVISION I

GENERAL ORDER RE MOTIONS TO FILE AMICUS CURIAE BRIEFS

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

GENERAL ORDER ESTABLISHING MANNER OF DISPOSITION OF

MOTIONS TO FILE AMICUS CURIAE BRIEFS

In accord with RAP 10.6(e), effective immediately, IT IS HEREBY ORDERED:

(1) RAP 10.2, 10.4, 10.6, 12.4, 18.5 and 18.6 generally govern the disposition of motions to file amicus curiae briefs and memoranda. An applicant who wishes to file an amicus curiae brief not requested by the appellate court must file a motion seeking permission to file the brief not later than 30 days before oral argument, unless the court allows a later date upon a showing of particular justification by the applicant. An applicant who wishes to file an amicus curiae memorandum as provided by RAP 12.4(l) must file a motion seeking permission to file the memorandum not later than 5 days after the motion for reconsideration has been filed by a party to the appeal, unless the court allows a later date upon a showing of particular justification by the applicant. In all cases, the amicus curiae brief or memorandum, together with proof of service as required by RAP 10.2, 18.5 and 18.6, must accompany the motion.

(2) When the case has been set for oral argument before a panel of the court when a motion to file an amicus curiae brief is filed, that panel will rule on the motion. Neither a party nor the applicant may file a motion for reconsideration of the panel’s ruling on the motion. Similarly, a motion to file an amicus curiae memorandum will be decided by the panel that issued the opinion for which reconsideration is being sought. Neither a party nor the applicant may file a motion for reconsideration of the panel’s ruling on the motion.

(3) When the case has not yet been set for oral argument before a panel of the court when the motion to file amicus curiae brief is filed, the motion will initially be decided by a commissioner of the court under the rules governing motion practice in Title 17 of the Rules of Appellate Procedure. The commissioner’s ruling is subject to modification only as provided in RAP 17.7.

(4) Motions to file amicus curiae briefs will not ordinarily be granted for cases that have been referred to a panel of judges for decision without oral argument, unless the court, on its own motion or the motion of a party, also directs the clerk/court administrator to transfer the case to an oral argument calendar.

Dated this 4th day of February, 2000.

www.wambac.org
GENERAL ORDERS OF DIVISION II
2003-4 DISPOSITION OF A MOTION TO FILE AN AMICUS CURIAE BRIEF

GENERAL ORDER 2003-04
DISPOSITION OF A MOTION TO FILE AN AMICUS CURIAE BRIEF
Rule of Appellate Procedure 10.6(e) provides that each division of the Court of Appeals shall establish by general order the manner of disposition of a motion to file an amicus curiae brief.

IT IS ORDERED:

(1) A motion to file an amicus curiae brief shall be filed no later than 30 days before the date set for oral argument.
(2) If the court has not set a date for oral argument before a panel of judges, the motion to file an amicus curiae brief shall be decided by a commissioner of this court in a written ruling. The commissioner's ruling is subject to a motion to modify in accordance with Rule of Appellate Procedure 17.7.
(3) If the court has set a date for oral argument before a panel of judges, the motion to file an amicus curiae brief shall be decided by that panel of judges. The panel shall issue a written order. The panel's order is not subject to a motion for reconsideration.

GENERAL ORDERS OF DIVISION III
IN RE THE MATTER OF COURT ADMINISTRATION ORDER; RE DISPOSITION OF A MOTION TO FILE AN AMICUS CURIAE BRIEF
IN RE THE MATTER OF COURT )
ADMINISTRATION ORDER )
RE DISPOSITION OF A MOTION ) GENERAL COURT ORDER
TO FILE AN AMICUS CURIAE BRIEF )

Rule of Appellate Procedure 10.6(e) provides that each division of the Court of Appeals shall establish by general order the manner of disposition of a motion to file an amicus curiae brief.

IT IS ORDERED:

A motion to file an amicus curiae brief shall be decided by the Clerk of Court in a written ruling. The Clerk's ruling is subject to a motion to modify in accordance with Rule of Appellate Procedure 17.7.

DATED: April 27, 2000
Federal Rules of Appellate Procedure:

FRAP 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and
(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;
(2) a table of authorities—cases (alphabetically arranged), statutes and other authorities—with references to the pages of the brief where they are cited;
(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
(5) a certificate of compliance, if required by Rule 32(a)(7).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may
answer.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.
December
Gunwall is Dead.
(Long Live Gunwall!)

Hugh Spitzer, Affiliate Professor
University of Washington
School of Law

The History of Gunwall

- Ancient History
- Modern History
- Contemporary History

Ancient History
(1788 and All That)
Modern History

• Progressives and Woodrow Wilson
• The New Deal and FDR’s New Court
• Earl Warren, Civil Rights and the Great Society
• Richard Nixon Ronald Regan and a Changing U.S. Supreme Court

Post-Modernism

• Justice Brennan: State’s Rights Advocate?
• Dolliver and Utter: *Ringer and Coe*
• New Jersey’s *State v. Hunt*: Opinions All Over the Map
• Judicial Elections Make a Difference
• A Surprising Outcome in *Gunwall*

Justice Brennan: State’s Rights Advocate?
Dolliver and Utter: 
*Ringer and Coe*

---

*State v. Ringer*
100 Wn.2d 686, 699, 674 P. 2d 1240 (1983)

“We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings.”

--Justice James Dolliver

---

*State v. Ringer*
100 Wn.2d 686, 703, 674 P. 2d 1240 (1983)

“Once again we confound the constabulary and, by picking and choosing between state and federal constitutions, change the rules after the game has been played in good faith. I respectfully dissent from these tactics.”

--Justice Carolyn Dimmick
[The issue of prior restraint] “should be treated first under our state constitution…”
“First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts.”

“Second, the histories [of the two constitutions] clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be…[an] important function of our state constitution. By turning to our own constitution first we grant proper respect…and fulfill our sovereign duties.”

“Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar…in understanding how that constitution will be applied.”
State v. Coe

“Fourth, we will be able to assist other states…develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment.”

State v. Coe

“Finally, to apply the federal constitution [first] would be as improper and premature as deciding a case on statutory grounds when statutory grounds would have sufficed, and for essentially the same reasons.”

-- Justice Robert Utter

New Jersey’s State v. Hunt,

Schreiber (lead): New Jersey’s different!
Pashman: New Jersey’s first!

Handler: Slow Down: State Constitutions Supplement the Federal Constitution—Criteria Needed for Applying a State Constitution
## Handler’s Criteria in *Hunt*

- Textual Language
- Legislative History
- Preexisting State Law
- Structural Differences Between Constitutions
- Matters of Particular State/Local Concern
- State Traditions
- Public Attitudes

## Competing Theories

- Primacy
- Interstitial
- Utter’s “Dual Sovereignty”
- Lock-step

## The *Gunwall* Surprise
Andersen’s *Gunwall* Criteria

- Textual Language
- Significant Differences in Texts
- State Constitutional and Common Law History
- Preexisting State Law
- Structural Differences
- Matters of State/Local Concern

*Gunwall’s Weaknesses*

- No such thing as “U.S. Supreme Court precedent” here (see *Michigan v. Long*)
- *Gunwall* a strange mix of comparative and interpretive factors (Talbot’s critique)
- Leads to judicial laziness

Andersen’s *Gunwall* Criteria

- Textual Language - interpretive
- Significant Differences in Texts - comparative
- State Constitutional and Common Law History - interpretive
- Preexisting State Law - interpretive
- Structural Differences - comparative
- Matters of State/Local Concern - interpretive
State v. Wethered
110 Wn.2d 466, 755 P.2d 797 (1988)
Utter’s Tactical Play Stalls Development of Washington State Constitutional Jurisprudence

Contemporary History

• 11 Years in the Wilderness (Gunwall to Gocken)
• As the World Turns
• Where the WA Supreme Court is Today
• Where the Court of Appeals Isn’t Today

Utter Tries to Redirect the Court Back to Coe

• In Wethered, Utter says the Court would “normally first consider [a rights violations claim] under the provisions of the Washington State Constitution”
• Utter labels Gunwall as merely “a further aid to developing a sound basis for our state constitutional law.”
• Calls Gunwall “interpretive principles” only
State v. Gocken
127 Wn.2d 95, 896 P.2d 1267 (1995)
• Justice Guy Avoids All that Extra Work
• Justice Madsen on the Attack: Quotes Talbot, and Labels Gunwall a “Talisman”

As the World Turns
• Guy and Durham Retire
• We’re all Utterites Now!
• Ferrier, White, and the Victory of I, 7.

Gunwall and the Court Today
Justice Jim Johnson’s Crystal Clear Restatement of Gunwall:
• Needn’t “re-Gunwall” old ground
• Needn’t cover every Gunwall factor
• Gunwall doesn’t prevent the Court from deciding on state constitutional grounds whenever and however it wants
City of Woodinville v. Northshore UCC

- "The Court of Appeals did not decide whether this guaranty of our constitution is broader than the federal constitutional protection for religious freedom because the Church did not offer a complete analysis of the difference between the state and federal constitutions.

- "State v. Gunwall...articulates standards to determine when and how Washington's constitution provides different protection of rights than the United States Constitution.... Litigants brief the differences when we are faced with deciding whether a parallel constitutional provision affords differing protections.... But where we have already determined in a particular context the appropriate state constitutional analysis under a provision of the Washington State Constitution, it is unnecessary to provide a threshold Gunwall analysis.

City of Woodinville v. Northshore UCC

- "A strict rule that courts will not consider state constitutional claims without a complete Gunwall analysis could return briefing into an antiquated writ system where parties may lose their constitutional rights by failing to incant correctly. Gunwall is better understood to prescribe appropriate arguments if the parties provide argument on state constitutional provisions and citation, a court may consider the issue. This is especially true where, as in many areas, the special protections of our state constitution have been previously recognized by this court. Listing the Gunwall factors is a helpful approach when arguing how Washington's constitution provides greater rights than its federal counterpart. But failing to subhead a brief with each factor does not foreclose constitutional argument."

Slipping Back into Old Ways


- "Whether" as well as "When"
- Madsen (of all people) hides behind the Federal Equal Protection Clause rather than relying on Washington's Art. I, §12
- Fairhurst applies a "two step inquiry" that sounds like Guy's old approach
How Should Gunwall Be Understood and Used?

• Should the Court Dump Gunwall?
• How Gunwall Can Continue to Be Useful
• Gunwall as an Interpretive Tool - Utter’s Approach, Consistent with Philip Bobbitt’s “Modalities of Constitutional Argument”
• The risks of retaining Gunwall

The Court of Appeals Is Far Behind

• The Court of Appeals in Northshore.
• Division 1: Notices I, 7, But Not Much More
• Division 2 & 3: Wethered Lives. (Gunwall still the “Key to the Magic Kingdom”)

Tips for Practitioners

• Can You Believe What the Supreme Court Says? (No)
• Do you Have to Do a Full Gunwall Brief on Everything? (No…but…)
### APPENDIX I

**COMPARING THE HUNT AND GUNWALL CRITERIA TO BOBBITT’S INTERPRETIVE MODALITIES**

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<th>State v. Hunt</th>
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<td>2. Significant Differences in Texts</td>
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January
December 2003

The 9th Circuit Pro Bono Program: Public Service and Personal Satisfaction

by Leonard J. Feldman

For over seven years now, I have been serving as a district coordinator for the 9th Circuit Pro Bono Program. About three years ago, I wrote an article (published locally) in which I described the program and asked that other attorneys get involved as well. Although the response to that article was extremely positive, the time has come to repeat the process and ask—once more—that readers become involved in this extremely rewarding program by filling out the 9th Circuit Pro Bono Program Sign-up Form that is reproduced below.

The 9th Circuit Pro Bono Program

Most lawyers who have not had judicial clerkships are surprised to learn that one of three appeals in the 9th Circuit involves a pro se litigant—someone who is not represented by counsel. Many (although certainly not all) of these litigants produce incomplete, inarticulate, and sometimes unintelligible briefs.

The 9th Circuit addressed this problem in 1993 by creating the 9th Circuit Pro Bono Program. Today, all pro se appeals are reviewed at the outset by court staff. If an appeal is considered complex, it is reviewed to determine whether pro bono counsel should be appointed. This typically occurs in appeals that involve complex issues of fact or law, or important questions of first impression.

The 9th Circuit's commitment to the program is substantial. In addition to the screening process described above, the 9th Circuit has agreed to hear oral argument in all appeals handled by pro bono counsel. The program also reimburses various expenses, enters an order scheduling briefing and oral argument at counsel's convenience (within reason of course), and provides a complete copy of the district court and 9th Circuit record.

9th Circuit Pro Bono Appeals—Two Examples

Over the years, I have participated personally in nine pro bono appeals. One of those cases settled on appeal. In the other eight, the 9th Circuit reversed the district court's ruling—a success rate of 100 percent! In the paragraphs that follow, I provide a brief summary of two of those cases.
Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002)

Emmanuel Senyo Agyeman was a detainee in an Immigration and Naturalization Service (INS) detention facility in Florence, Arizona, who alleged that the INS had violated his due-process rights in the manner in which it handled his deportation proceeding. Specifically, Mr. Agyeman claimed that the immigration judge (a) prevented Mr. Agyeman from gathering and presenting evidence and testimony; (b) erred in his instructions to Mr. Agyeman about applying for adjustment of status during deportation hearings; (c) erroneously imposed a heightened evidentiary burden on Mr. Agyeman; and (d) unlawfully required Mr. Agyeman to produce evidence that he knew could not possibly be produced. The Board of Immigration Appeals sided with the immigration judge, after which Mr. Agyeman filed a petition for review in the 9th Circuit.

The 9th Circuit reversed in a published opinion. The court recognized, at the outset, that "[t]he Fifth Amendment guarantees individuals who are subject to deportation due process in INS proceedings." The court then noted that the immigration judge had instructed Mr. Agyeman that his wife must appear and testify at the hearing in support of Mr. Agyeman's request to remain in the United States. The court described that demand as "fundamentally unfair" because both the immigration judge and the Board of Immigration Appeals should have recognized that Mr. Agyeman's wife suffered from bipolar disorder and therefore could not attend the hearing. The court therefore granted Mr. Agyeman's petition and remanded the matter for a new hearing. Besides being favorable to Mr. Agyeman, the court's opinion is often cited in cases involving important due-process principles.


Laurence Woods is a Muslim inmate at the Multnomah County Inverness Jail in Portland, Oregon, who filed suit against various jail officials who, he alleged, had violated his rights under the First and Fourteenth Amendments to the Constitution by limiting his ability to exercise and practice his religion. Mr. Woods claimed, among other things, that the defendants had violated federal law by (a) desecrating copies of the holy Qur'an; (b) preventing him from performing his early-morning and evening prayers; (c) preventing him from eating until sunrise during the Ramadan fast; and (d) denying him the Feast of Eid al-Fitr to celebrate the end of Ramadan. The district court held that none of these claims had merit and granted summary judgment in favor of the defendants.
The 9th Circuit disagreed with the district court’s ruling and reversed. It held in relevant part as follows:

The District Court did not give adequate consideration to the factors that the Supreme Court applied in O’Lone v. Estate of Shabazz, 482 U.S. 342, 107 S. Ct. 2400 (1987). Its analysis of many of Woods’ claims was very limited or non-existent. Furthermore, the District Court made no reference whatsoever to Woods’ claim under the Religious Freedom Restoration Act in its order. In addition, the District Court accepted as uncontradicted a number of facts which were, in fact, controverted by Woods’ deposition testimony. Thus, the District Court erroneously granted summary judgment in favor of defendants.

The 9th Circuit therefore reversed the district court’s grant of summary judgment in favor of the defendants and remanded the case for reconsideration of Woods’s claims and, in addition, directed the district court to appoint counsel for Woods.

Although unpublished, the Woods case is significant because it shows what the 9th Circuit Pro Bono Program and pro bono counsel can accomplish. Shortly after the 9th Circuit had remanded the matter for additional proceedings, we contacted the defendants’ counsel and asked if they were interested in pursuing settlement. They agreed to do so, and the case settled shortly thereafter on the following terms:

- Prayer would be permitted in a designated area of the prison dorms after time for bunking-in (rather than requiring Muslims to pray in their bunks);
- A dinner feast would be created to celebrate the end of Ramadan (referred to as the Feast of Eid al-Fitr);
- Dietary rules would be modified to allow inmates to resume religious diet after changing their diet for medical reasons;
- Authorized personnel would be appointed to inspect the preparation of Halal meals;
- A Muslim chaplain would be permitted to provide Kufi caps to be worn during congregational prayer;
- Muslim inmates would be permitted to bring their personal prayer rugs into jail;
- $15,000 would be paid to Mr. Woods; and
- $7,000 would be paid to Heller, Ehrman, White & McAuliffe (which we agreed to contribute to charity).

As one would expect, Mr. Woods was extremely happy with the result of the case and—like many other previously pro se litigants—wrote a letter expressing his gratitude. In that letter, he described how his rights had been
violated, how he felt when the district court dismissed his claims on summary judgment, and how the 9th Circuit Pro Bono Program had made a difference:

During all of Ramadan, jail officials violated our rights from worshipping God to praying by our bunks. I documented everything they did to us, including denying us a simple sack lunch that was to be our feast at the conclusion of Ramadan. . . . But when I filed the case Judge Hogan, dismissed my case. I felt as if I had been socked in the stomach. I felt no one cared what happen to us in jail. I felt a feeling of hopelessness. I appealed to the 9th Circuit Court. . . . They appointed a lawyer by the name of Leonard Feldman, three college students by the names of K.M., Cecily, and Devin, and Professor Schnapper. They read my case and understood my rights had been violated. They saw where Judge Hogan had made a mistake. They worked with me and filed the briefs. We won, I can't believe it! There are people out there that really do care. Thank God for the 9th Circuit.

—Laurence Woods, 7-20-03

Results like these are why I continue to accept cases (nine and counting) from the 9th Circuit Pro Bono Program and continue to act as a district coordinator. It's also why you should participate as well, which is the subject addressed below.

**Take a Pro Bono Appeal—Please**

The 9th Circuit Pro Bono Program presents numerous opportunities, including:

(a) *Pro bono* publico service, as required by Washington Rule of Professional Conduct 6.1;
(b) A chance to enhance the lives of those in need, as described above;
(c) Substantive briefing and oral argument without much, if any, supervision (especially attractive for newer attorneys at large law firms); and
(d) A chance to become known and respected by 9th Circuit judges and staff.

Perhaps for these reasons, the Seattle area has been blessed with a large group of attorneys who are willing to accept *pro bono* appeals from the 9th Circuit. As a district coordinator, I am responsible for letting attorneys know when an appeal is available and then persuading someone to accept the appeal. I have never had to twist anyone's arm—someone is always willing and able to help.
The procedure for getting involved is easy and does not require a firm commitment. If you are interested, the first step is to fill out the 9th Circuit Pro Bono Program Sign-up Form. You need only provide your name, e-mail address (or physical address), and telephone number, and indicate what types of appeals you would find most interesting. When a pro bono appeal becomes available, I circulate a memorandum describing the appeal and asking for volunteers. Appeals are assigned on a first-come, first-served basis.

Scores of attorneys have participated in the 9th Circuit Pro Bono Program in the Seattle area. The overall success record, as best I can tell, is approximately 50 percent, and I have received favorable comments from several attorneys, many of whom—like me—continue to accept new appeals year after year. If you take a moment to fill out the form, you can be one of those attorneys as well.

Mr. Feldman is a shareholder in the Seattle office of Heller, Ehrman, White & McAuliffe LLP. His practice focuses on commercial litigation, appellate practice, and pro bono service.
February
1. Clerk’s Papers
   a. Tips
   b. Turnaround time

2. E-Filing
   a. FAQ’s
   b. Tips & Tricks

3. Working Copies
   a. General Information
   b. FAQ’s
   c. CLE

4. Questions
March
I. Supreme Court Processes
   A. State court system
      - Motion for discretionary review
      - Notice of Appeal
      - Motions in the Supreme Court
   B. Case types
      - Trial court
      - Court of Appeals
      - Original actions
      - Federal courts
      - Washington State Bar Association
      - Commission on Judicial Conduct

II. Brief Writing Tips

III. Oral Argument Tips
   A. Ten “Don’ts” for Oral Argument
   B. Ten “Dos” for Oral Argument

IV. Public Legal Education
   A. How to get involved

V. Supreme Court Website - http://www.courts.wa.gov
   A. Washington Courts home page
      - Directories, rules, forms, WPI
   B. Supreme Court quick links
      - Cases accepted for review
      - Briefs: Copies of all briefs filed in accepted cases available
      - Court calendar, docket, and issues
      - Recent opinions
WASHINGTON STATE COURT SYSTEM

SUPREME COURT
9 members
Discretionary appellate review of all lower courts
Final rule making body for all state courts
Final authority on admissions and discipline of attorneys
Final authority on discipline of judges

COURT OF APPEALS
Division One - Seattle
Division Two - Tacoma
Division Three - Spokane
Appeals from all lower courts

SUPERIOR COURTS
31 districts
Courts of general jurisdiction
Civil disputes, criminal matters, juvenile, family law
Orders of protection from domestic violence
Appellate review of lower courts and administrative boards

DISTRICT COURTS
Created by Legislature in all counties
Courts of Limited Jurisdiction
Civil disputes of less than $50,000
Misdemeanor criminal cases
Traffic, non-traffic and parking infractions
Orders for protection from domestic violence
Preliminary hearings of felonies (district court only)
Small claims up to $4,000

MUNICIPAL COURTS
Created by cities and towns by statute
SUPREME COURT CASE TYPES
BY SOURCE
(ANNOTATED)

I  TRIAL COURT

1 Direct appeal from final order (RAP 2.2 and RAP 4.2)
   • Decision on review – transfer/retain decision by a Department (RAP 4.2)
   • Decision on the merits – appeal heard by En Banc Court with oral argument
   • Motions – Heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

2 Direct discretionary review of an interlocutory order (RAP 2.3 and RAP 4.2)
   • Decision on review – motion for discretionary review heard by Commissioner (RAP 1.1(f) and RAP 17.2)
   • Decision on the merits – heard by En Banc Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

3 Death penalty review (RCW 10.95.100 and RAP 4.2(a)(6))
   • Mandatory Appeal - heard by En Banc Court with oral argument
   • Routine motions – decided by Chief Justice and Assignment Justice
   • All other motions – heard by En Banc Court without oral argument

4 Motions for expenditure of public funds (RAP 15.2(b)(3))
   • Decision on the merits – heard by a Department (RAP 15.2(c))
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

5 Recall appeal (RCW 29.82.160)
   • Mandatory appeal – heard by the En Banc Court without oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

6 Appeal from Court of Limited Jurisdiction (RAP 4.3)
   • Transfer/retain decision – heard by Clerk or Commissioner (RAP 4.3(e))
   • Decision on the merits – En Ban Court with oral argument
   • Motions - heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)
COURT OF APPEALS

1 Petition for review of decision terminating review (RAP 13.4)
   • Petition for review – heard by Department without oral argument
   • Decision on the merits – En Ban Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

2 Motion for discretionary review of interlocutory order (RAP 13.5)
   • Motion for discretionary review – heard by Commissioner (13.5(c))
   • Decision on the Merits – heard by En Banc Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

3 Certification by Court of Appeals (RAP 4.4)
   • Decision on review – heard by Commissioner
   • Decision on the Merits – heard by En Banc Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

4 Transfer by Supreme Court (RAP 4.4)
   • Motion to transfer – heard by Commissioner
   • Decision on the Merits – heard by En Banc Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

III ORIGINAL ACTIONS (RAP 16)

1 Writ against state officer (RAP 16.2)
   • Decision on review – heard by Clerk or Commissioner (RAP 16.2(d))
   • Decision on the merits – heard by En Banc Court with oral argument
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)

2 Personal restrain petition – (RAP 16.3)
   • Decision on review – heard by Clerk or Commissioner (16.3(c))
   • Decision on the merits – heard by En Banc Court
   • Motions – heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2)
3 Death penalty personal restrain petition (RAP 16.3, RAP 16.26 and RAP 16.27)
   - Decision on the merits – heard by En Banc Court without oral argument
   - Routine motions – decided by Chief Justice and Assignment Justice
   - All other motions – heard by En Banc Court without oral argument

IV FEDERAL COURTS

1 Certified issue (RAP 16.16 and RCW 2.60)
   - Decision on review – heard by Clerk or Commissioner (RAP 16.16)
   - Decision on the merits – heard by En Banc Court with oral argument
   - Motions - heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2))

2 Remand from U.S. Supreme Court
   - Decision on the merits – heard by the En Banc Court with oral argument
   - Motions - heard by Clerk or Commissioner (RAP 1.1(f) and RAP 17.2))

V WASHINGTON STATE BAR ASSOCIATION

1 Admissions (APR)
   - CLE appeals – heard by a Department as a motion (APR 11.6(d))
   - Petition to waive admission requirement – heard by En Banc Court without oral argument

2 Discipline
   - Appeal of suspension or disbarment – heard by En Banc Court with oral argument. (RLD 7.2)
   - Discretionary Review of other discipline – heard by En Banc Court without oral argument (RLD 7.3)
   - Petition for reinstatement – heard by En Banc Court without oral argument (RLD 9.7)
   - Emergency suspension – show cause hearing before En Banc Court without oral argument (RLD 3.2)
   - Reciprocal discipline – show cause hearing before En Banc Court (RLD 12.6)
VI  COMMISSION ON JUDICIAL CONDUCT

1  Appeal of discipline or retirement

   •  Appeal - heard by En Banc Court with oral argument. (DRJ 9(a))
   •  Motions heard by Department (DRJ 8(c)).

2  Discretionary Review of discipline or retirement

   •  Decision on review – heard by Commissioner (RAP 1.1(f) and RAP 17.2))
   •  Decision on merits – heard by En Banc Court without oral argument.
   •  Motions heard by a Department. (DRJ 8(c)).

3  Petition for Reinstatement – heard by En Banc Court with oral argument (DRJ 11 (c)).
SUPREME COURT - TEN “DON’TS” AND “DOS” FOR ORAL ARGUMENT
(Based on true stories from the Washington Supreme Court)

DON’T . . .

10. Open the argument by apologizing for your inexperience.

9. Try to impress by using “big” words.

8. Get sidetracked on issues that don’t matter.

7. Read directly from notes.

6. Say you don’t know the record. Evidenced by statements like: “I wasn’t counsel below” and “I haven’t looked at the record in a long time.”

5. Talk or yell over the justices while they are asking questions. Make sure to answer the question – especially a yes or no question.

4. Fail to recognize and the softball question (don’t ignore an invitation from a justice to really hammer home a winning point).

3. Misrepresent the facts or the law.

2. State that if the court isn’t willing to accept your first argument, you “really don’t have anything else.”

1. Concede the case in response to a tough question

Other “Don’ts” -- showing up late to your own discipline appeal, blaming traffic, refusing to apologize, jumping into your argument without an introduction, and then letting your cell phone ring.
DO . . .

10. Look relaxed at the podium, regardless of the strength of your argument.

9. As respondent, use a question asked during the petitioner’s argument as a hook to lead off your argument.

8. Tell us what you want us to do.

7. Use a conversational speaking style and language that is easy to understand.


5. Focus only on the most important or confusing issues and relying on the briefing for the rest.

4. Answer directly and honestly every question posed.

3. Know the record really well.

2. Listen to the justice’s question before answering.

1. Give the impression that you are here to help us make the right decision.
Current Events in Washington Courts

Court Closures
Click above for a list of courts with upcoming closures...

Disaster Recovery Testing to begin March 18, 2011
On March 18, 2011 the AOC will begin conducting a 48- hour semi-annual Disaster Recovery Test of the JIS applications.

Washington Supreme Court Order Regarding Recall of Dale Washam
Click above to read the Supreme Court's March 3, 2011 order regarding the recall of Pierce County Assessor Dale Washam...

A recent study found that the Washington State Parents Representation Program, which provides legal representation for parents in dependency and termination hearings, speeds reunification of children with parents. When children cannot reunify with their parents, they are adopted or enter guardianships more quickly...

Washington Supreme Court Chief Justice Barbara Madsen appears on TVW's “Inside Olympia”
In a one-hour interview on TVW, Washington Supreme Court Chief Justice Barbara Madsen details the state of Washington's judiciary, the funding crisis facing Washington's trial courts, diversity in the courts, elections of municipal court judges and more...

Search Washington Courts Website

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The State Supreme Court administers the Judicial branch of the Washington State Government. For other information on Washington State, visit Access Washington. If you are looking for
Washington State laws, you will find the Revised Code of Washington (RCW) and the Washington Administrative Code (WAC) at the website for the Washington State Legislature.

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http://www.courts.wa.gov/index.cfm

3/4/2011
Welcome to the Washington Supreme Court

The mission of the Washington Supreme Court is to protect the liberties guaranteed by the constitution and laws of the state of Washington and the United States; impartially uphold and interpret the law; and provide open, just, and timely resolution of all matters.

As the highest level of court in Washington State, we also strive to provide open access to our proceedings. As a court, we travel several times a year to hear cases in local jurisdictions across Washington. In 1995, we also became one of the first courts in the world to allow gavel-to-gavel coverage of all our cases, which are televised year-round on TVW, Washington State’s Public Affairs Network.

This is one of the many ways we connect directly with the public, and we hope it provides an easy way for you to learn more about your judicial system. On behalf of the nine justices on our court, we welcome you to see the Washington Supreme Court up close and in action.

Sincerely, Chief Justice Barbara A. Madsen

Photo Gallery

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April
DO'S AND DON'TS OF APPELLATE ADVOCACY

An outline of a presentation made to the King County Bar Association

Section on Appellate Law by

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Introduction: Why David Letterman can't always count correctly

Some Don’ts in our business

1. Don’t forget to lean on the trial attorney
2. Don’t trust the trial attorney
3. Don’t start any brief at the last minute
4. Don’t get a reputation for asking for extensions
5. Don’t take your client to oral argument
6. Don’t fail to scout out your venue (location, facilities)
7. Don’t fail to get a briefing on the panel or court you will face
8. Don’t plan on giving a major address
9. Don’t interrupt
10. Don’t try to answer a question to which you don’t know the answer

Some Do’s in our business

1. Do limit your brief to your best arguments
2. Do highlight your best points
3. Do file your brief on time
4. Do know where you’re going
5. Do review and practice your presentation
6. Do go to the podium with the least amount of material possible
7. Do rejoice in questions
8. Do expect to have one of the judges identify your weak point
9. Do listen and answer the question asked
10. Do be prepared to say, “I don’t know”

AND THE MOST IMPORTANT “DO”: DO HAVE FUN
May
BEHIND THE SCENES AT DIVISION II
STATE OF WASHINGTON COURT OF APPEALS
May 2, 2011
King County Bar Association Appellate Practice Attorneys

I. ABOUT OUR COURT

We have seven judges and two court commissioners right now. As budget cuts occur, we may reduce the number of Commissioners. Among our judges, we have four former prosecutors, four trial judges, one insurance defense attorney, one land use expert and former hearing officer, two former larger firm lawyers, and one former family law attorney. One of our commissioners is the former chief administrative law judge for the medical licensing division, a former staff attorney in Division One, a former law clerk, and a former attorney at a large firm.

We write around 80 opinions a year, which does not include our dissents or motion on the merits opinions. Our division handles essentially the same number of filings a year as does Division I.

II. ORAL ARGUMENT

A. Issues

Focus on your issues. Do not spend time on the facts or issues if they are undisputed (don’t be afraid to concede facts both in your brief and at oral argument if they don’t hurt you—it saves time and adds to your credibility. On the other hand, if the panel brings up facts, pay attention because the panel member probably thinks those facts are important.

B. The Panels

Our panels tend to be very involved in oral arguments, especially our former trial judges, who like attorneys and are used to interacting with them. We will probe for the implications and applications of your arguments—some via hypotheticals and some of us just asking you if your argument would lead to a particular result. Some of us will confront counsel with a restatement of the issues or raise new issues for you. Others are very focused on the particular facts of a case and whether those facts dictate a result. It is generally good for the panel to be “hot” during an argument. Be aware that our opinion may include reference to what counsel said during oral argument.

Spend your time responding to the panel, even if you do not get to your prepared argument. Brushing off a question to return to your prepared materials leaves the panel feeling unimportant.

Answer the questions, don’t evade them. If you don’t know the answer, better to say so than bunt unless you are a very good bunter.
C. Time

Ask before the day of argument for more time in oral argument via motion or request. We liberally grant additional time. It helps us especially in multi-party cases to hear from all parties. Taking three minutes to make an oral argument after the case has come on appeal normally is not helpful. But if oral argument will not be of assistance to your case, you may waive oral argument.

Also, reserve rebuttal time from the bailiff or from the panel (if court is not already in session). The burden is on you to make the request (although the panel sometimes asks of its own accord), and the bailiff will not set any rebuttal time on the clock without a request. Do not find yourself in the position of being surprised that all your time has expired, as has happened lately.

III. Briefs

A. Standard of Review

Start with the Standard of Review—if you don’t, we will, and if you don’t, you may make an entire argument on abuse of discretion or legal error when the standard of review is the opposite. Make sure your starting standard of review is what you finish with.

B. Remedy

State your requested remedy and the authority for that remedy, even if such authority is difficult to find. It is far better to have some input in the issue than to have it entirely dictated by others.

C. Procedural Posture of the Case

The posture of the case is important. It can be the basis of our decision and will certainly set the standard of review and what remedies are available. We are not eager to go beyond where we must and we do not give advisory opinions.

D. Is the Case Unique or One of First Impression?

If you believe your case addresses issues that have not been developed, tell us why and discuss why deciding the case as you suggest fits into the existing body of law.

IV. Miscellaneous Matters

A. Publication
If you think your or another case (where you are a nonparty) should be published, file a motion requesting publication. Give us your reasons. We will ask for a response if we are considering publishing.

B. Stays

Ask for a stay if there is a pending determination at the Supreme Court that will resolve you case’s issues.

C. Dissents

Division II has a large number of dissents and we publish cases with dissents. On a related note, our Division is open to some extent to reexamining prior cases.

V. THE ELECTRONIC WORLD AND DIVISION II (THE FOLLOWING DIRECTLY FROM DAVE PONZOA, OUR COURT CLERK)

A. ATTORNEYS

- We are encouraging attorneys to file all documents and motions electronically.
  - OPD and PAO attorneys file primarily through the newly established attorney portal - http://www.courts.wa.gov/jis/?fa=jis.coaFilingForm&div=2. We are not limiting portal filing to criminal appellate attorneys but in order to use the portal, an attorney or office must have a JIS userid and most all OPD and PAO attorneys have one whereas most civil appellate attorneys do not. If you’d like to discuss this further, let me know.
  - all other attorneys are encouraged to file through coa2filings@courts.wa.gov.

- We will begin accepting briefs through the portal beginning the first part of May. We’ll work out the bugs and then decide whether to accept briefs through coa2filings – doing so is more time consuming for the case managers.

- We are receiving over 90% of all filings, including pro se filings, electronically. Nearly everything the court produces is transmitted to the parties electronically. This has resulted in a tremendous savings in time and expense for the parties and the court.

B. TRIAL COURT CLERKS

- We encourage transmittal of notices of appeal/discretionary review via the trial court portal. Most all the larger counties in our division are transmitting via the portal. Cowlitz County is the largest county not transmitting through the portal. I’ve contacted the newly elected clerk as well as her predecessor but no luck so far.

- We started accepting e-CPs from Clark County several months ago. None of the e-CP cases have made it to a panel yet. Once they do and we work out any bugs in the
process, I trust we’ll begin to accept e-CP from all the counties. I have full confidence we’ll get there soon – D3 has been accepting e-CPs for several years now.

C. Court Reporters

- We have a pilot going with Pierce County court reporters to upload the electronic “copy” of the RP via the attorney portal. See RAP 9.5(b). We encountered a few problems and AOC is working on a fix for court reporters only that will allow them to upload multiple copies at one time, which should resolve the problem. Once we work out these bugs, we’ll allow/encourage other court reporters and transcriptionists to upload RP through the portal.

- With any luck, we’ll begin allowing the filing of the original RP via the portal directly to this court in the next year. A subcommittee of the statewide court management council is proposing a rule change to allow for the filing of the RP directly with the appellate courts rather than through the trial courts.

D. Other Divisions and the Supreme Court:

- All the divisions are storing most all records electronically on their various systems. D2 is allowing the most e-filing, both through coa2filings and the portal, than the other two. D2 is doing more e-transmittal of decisions and other communications to parties than the other two divisions.

- D2 and 3 are accepting trial court transmittals through the trial court portal. The last I heard D1 was not. As I stated above, D3 is ahead of the other two divisions with respect to e-CPs.

- D2 is the only division experimenting with e-RP through the attorney portal.

- The Supreme Court accepts some e-filings but not much else electronically…