NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRED BAMONTE; JAVIER COTA; RICARDO PERINE; and other similarly situated employees,	1 CA-CV 09-0114
	DEPARTMENT E
Plaintiffs/Appellants,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
CITY OF MESA,	
Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-002845

The Honorable Robert H. Oberbillig, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 Appellants (collectively "Bamonte") appeal the

dismissal of their claims against the City of Mesa (the "City"). The claims were dismissed on the basis of res judicata and collateral estoppel related to a suit filed earlier in the U.S. District Court for the District of Arizona and subsequently dismissed by that court on the basis of Bamonte's non-compliance with the notice of claim requirements of Arizona Revised Statutes ("A.R.S.") section 12-821.01(A) (2003). For the following reasons, we affirm the judgment of the superior court.

FACTUAL AND PROCEDURAL HISTORY

¶2 On July 31, 2006, Fred Bamonte, Javier Cota, and Ricardo Perine, on behalf of themselves and similarly situated employees of the Mesa Police Department, submitted a notice of claim to the City pursuant to A.R.S. § 12-821.01. *See Bamonte v. City of Mesa*, 2007 WL 2022011, at *1 (D. Ariz. July 10, 2007). The notice of claim alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq. ("FLSA") and the Arizona wage and hour laws by the City for its failure to compensate employees for the time that they spent maintaining, donning and doffing protective equipment and unique clothing necessary to the performance of their jobs with the City. *Id.* Subsequently, Bamonte filed a suit against the City in the federal district court. The second amended complaint filed in the district court cited the City's alleged failure to compensate the plaintiffs for the time spent donning and doffing required uniforms and

equipment. No mention was made of the time spent maintaining the equipment and uniforms.

¶3 On July 10, 2007, the district court dismissed Bamonte's state law claims. *See id.* On April 14, 2008, the district court granted the City summary judgment on Bamonte's FLSA claim. *See Bamonte v. City of Mesa*, 2008 WL 1746168, at *7 (D. Ariz. April 14, 2008), *aff'd*, 598 F.3d 1217, 1233 (9th Cir. 2010).

¶4 On July 30, 2007, the same claimants filed a second notice of claim with the City. The second notice alleged essentially the same facts and violation of the Arizona wage and hour laws. On February 5, 2008, Bamonte filed the present suit in the superior court based on this notice of claim. The primary differences between the federal and state suits were the addition of the "maintenance" claim to the state suit and the omission of the federal FLSA claim from that suit.

¶5 The City moved to dismiss Bamonte's claims on the basis of res judicata and collateral estoppel, asserting that the dismissal and judgment in the federal suit precluded the filing of the action. In response, Bamonte argued that dismissal on the pleadings was improper because the City had attached the notice of claim to its motion to dismiss. In addition, Bamonte argued that the "maintenance" claim was a separate and distinct claim from the donning and doffing claims

and was thus not precluded by the federal court judgment. Bamonte conceded that the donning and doffing claims were litigated to preclusive effect in the federal court. Bamonte also sought to raise issues of material fact through the submission of affidavits along with his response to the motion to dismiss.

¶6 After the briefing and oral argument, the superior court dismissed Bamonte's claims. Upon the City's motion, the court awarded the City costs and attorneys' fees. In so doing, the court found that the action arose out of contract making attorneys' fees available pursuant to A.R.S. § 12-341.01(a) (2003) and that the donning and doffing claims (but not the maintenance claim) were pursued without substantial justification making costs and fees available pursuant to A.R.S. § 12-349 (2003). The court signed a form of judgment submitted by the City and Bamonte timely appealed.

¶7 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ANALYSIS

A. Standard of Review

¶8 Because the federal district court rendered the prior rulings that gave rise to the affirmative defenses of res judicata and collateral estoppel, federal law governs whether the district court's rulings have a preclusive effect. *Corbett*

v. ManorCare of Am., Inc., 213 Ariz. 618, 624, ¶ 12, 146 P.3d 1027, 1033 (App. 2006). However, under both federal and state law, dismissals based on res judicata and collateral estoppel are questions of law that this court reviews de novo. *See Better Homes Const., Inc. v. Goldwater*, 203 Ariz. 295, 298, ¶ 10, 53 P.3d 1139, 1142 (App. 2002) (res judicata); *Campbell v. SZL Properties, Ltd.*, 204 Ariz. 221, 223, ¶ 8, 62 P.3d 966, 968 (App. 2003) (collateral estoppel); *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (federal law).

¶9 In conducting our appellate review, we consider whether we are reviewing the granting of a motion to dismiss, a motion for judgment on the pleadings, or a motion for summary judgment. Bamonte argues that the case was improperly dismissed on the pleadings because the City's motion to dismiss referenced information outside of the pleadings and the court took into consideration matters outside of the pleadings in arriving at its decision. In its motion to dismiss, the City attached Bamonte's July 30, 2007 notice of claim. And the superior court reviewed at least part of the federal court record related to Bamonte's case in the district court and may have taken into consideration other issues -- extrinsic to the complaint -- presented by both parties in oral argument.

¶10 We agree that *Backus v. State*, 220 Ariz. 141, 204 P.3d 399 (App. 2008), *vacated on other grounds by* 220 Ariz. 101, 203

P.3d 499 (2009), upon which Bamonte relies, may be distinguished from this case by the fact that the respective complaints in *Backus* made no reference to the notice of claim, whereas the notice of claim was specifically referred to in the complaint in this case. Additionally, consideration of the prior rulings of another court in order to determine the validity of a res judicata or collateral estoppel defense does not necessarily require that a motion to dismiss be considered as a motion for summary judgment. *See Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776 (1999) (affirming a dismissal on the pleadings based on res judicata). However, strict application of the rule regarding motions to dismiss stated in *Frey v. Stoneman*, 150 Ariz. 106, 108-09, 722 P.2d 274, 276-77 (1986), suggests that the motion should have been treated as one for summary judgment. Resolving any doubt on this issue in favor of Bamonte, we will determine de novo whether there are genuine issues of material fact and whether the trial court erred in its application of the law. *See Backus* at 145, ¶ 14, 204 P.3d at 403.

B. Res Judicata

¶11 This appeal is resolved under the essentially identical federal and state rules regarding the doctrine and application of res judicata. "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Corbett*, 213 Ariz.

at 624, ¶ 13, 146 P.3d at 1033 (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). The parties do not dispute that the judgment by the district court was final or that the parties are the same for the purposes of res judicata. In fact, Bamonte does not dispute, in this appeal, that the donning and doffing claims are precluded by the federal court decision. Only the maintenance claim is at issue here.

¶12 We have recently observed that "Ninth Circuit jurisprudence emphasizes that differences in the specific legal theory pled in the subsequent suit are irrelevant so long as the claim *could have been raised* in the prior action." *Howell v. Hodap*, 221 Ariz. 543, 547, ¶ 20, 212 P.3d 881, 885 (App. 2009) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (citation omitted)) (emphasis added). The applicable res judicata rule (both state and federal) is as follows:

> Res judicata bars relitigation of all grounds of recovery that were asserted, or *could have been asserted*, in a previous action between the parties, where the previous action was resolved on the merits. *It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather the relevant inquiry is whether they could have been brought.*

Id. (emphasis in original) (quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 909 (9th Cir. 1998));

see also Hall, 194 Ariz. at 57, ¶ 7, 977 P.2d at 779 ("The doctrine of res judicata will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same parties or their privities *was, or might have been, determined in the former action.*") (emphasis added). The key, as we have further explained, "is whether the subsequent claims arise out of the same nucleus of facts." *Howell*, 221 Ariz. at 547, ¶ 20, 212 P.3d at 885.

¶13 On the basis of the res judicata rule, the superior court needed only determine that the maintenance claims arose out of the same nucleus of facts and could have been brought in the federal court along with the donning and doffing claims. We agree with the City and the superior court that the maintenance claim arises out of the same nucleus of facts and could have been asserted in the federal court action.[1]

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[1] We note that Bamonte's notice of claim states:

> This is a claim letter pursuant to Ariz. Rev. Stat. § 12-821.01. The claimants are affected employees of the City of Mesa. . . . The City requires its police officers to *maintain, don and doff* protective equipment and unique clothing necessary to the performance of their jobs with the City. The City pays no compensation to employees for the time spent *maintaining, donning, and doffing* protective equipment and unique clothing. As a result, the time spent by employees on such activities occurs outside

¶**14** We are unaware of any reason why these claims could not have been brought together in the federal court case. On this record, the superior court could, and properly did, dismiss the suit on the basis of res judicata.

C. Collateral Estoppel

¶**15** In addition to the preclusion of Bamonte's claims under the doctrine of res judicata, Bamonte is also precluded from relitigating the primary issue which resulted in the dismissal of his federal suit, i.e., failure of his notice of claim to comply with A.R.S. § 12-821.01(A). *See Bamonte,* 2007 WL 2022011, at *5. As with res judicata, the federal and state doctrines of collateral estoppel are virtually identical. *See Garcia v. General Motors Corp.*, 195 Ariz. 510, 514, ¶ 9, 990 P.2d 1069, 1073 (App. 1999) (noting state elements of collateral

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> the employees' regularly scheduled shifts and is not compensated by the City. (Emphasis added).

The notice of claim seeks compensation for the time spent on all three activities together without any differentiation even though it may be that the different activities require different amounts of time and levels of effort. Also, Bamonte's state court complaint states simply that "[a]t no time relevant to this Complaint did the City compensate its officers for *donning, doffing or maintaining* their equipment". (Emphasis added.) In addition, while one substantive paragraph of the three-page complaint mentions only donning and doffing, the three following substantive paragraphs include "maintenance" along with donning and doffing.

estoppel virtually identical to federal). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits." *Corbett,* 213 Ariz. at 624, ¶ 16, 146 P.3d at 1033 (quoting *Montana*, 440 U.S. at 153). "Collateral estoppel applies when the issue sought to be precluded is the same as that involved in the prior proceeding, the issue was actually litigated in the prior proceeding, the issue was determined by a valid and final judgment on the merits, and the determination was essential to the final judgment." *Id.* The district court clearly considered and ruled in detail on the lack of compliance of Bamonte's notice of claim with A.R.S. § 12-821.01(A). *See Bamonte*, 2007 WL 2022011, at *6. As such, Bamonte may not now relitigate that issue in order to revive any claims covered by his notice of claim including both the maintenance and donning/doffing claims.

D. Costs and Attorneys' Fees

¶16 Costs in a civil action are provided to the successful party under A.R.S. § 12-341 (2003). Since there is no question that the City was the successful party here, we need not address this issue further.

¶17 In addition, we affirm the court's award of attorneys' fees on the basis of A.R.S. § 12-349. This statute mandates an award of fees in any civil action in which a lawyer or party (1)

brings or defends a claim without substantial justification (defined by § 12-349(F) to mean one that "constitutes harassment, is groundless and is not made in good faith"), (2) brings or defends a claim solely or primarily for delay or harassment, (3) unreasonably expands or delays the proceeding, or (4) engages in abusive discovery. Section 12-350 requires a court to set forth the specific reasons for an award under § 12-349.

¶18 Here, the superior court awarded the City a portion of its attorneys' fees pursuant to A.R.S. § 12-349.[2] The court found that Bamonte's "donning and doffing claims (not the maintenance claim) were pursued in State Court without substantial justification per A.R.S. § 12-349" and the record supports this finding. As conceded by Bamonte, the donning and doffing claims were previously litigated to preclusive effect in the federal court. Moreover, while it does not appear to us that the superior court made the required findings in support of the fees award, Bamonte failed to make an objection at the superior court and is therefore precluded from raising the absence of findings as error on appeal. *See Trantor v.*

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[2] The court also awarded the City its attorneys' fees pursuant to A.R.S. § 12-341.01(a). However, because we are affirming the attorneys' fees award on the basis of A.R.S. § 12-349, we choose to not address whether attorneys' fees were also proper pursuant to A.R.S. § 12-341.01(a).

Fredrikson, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) ("We therefore conclude that the failure of a party to object to the lack of findings of fact and conclusions of law in making awards of attorneys' fees under . . . § 12-349 precludes that party from raising the absence of findings as error on appeal.").

CONCLUSION

¶19 On the basis of the above, we affirm the superior court's dismissal of Bamonte's case and award of attorneys' fees.

¶20 The City requests an award of fees on appeal pursuant to A.R.S. §§ 12-341, -341.01(A)&(C), and -349. Assuming without deciding that one or more of these fee-authorizing statutes is applicable, we decline in the exercise of our discretion to award the City its fees on appeal. The City is, however, entitled to its taxable costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
PHILIP HALL, Judge