IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID PATRICK WHITE, Appellant, v. LARRY PLETCHER and DIANE PLETCHER, husband and wife and their marital community composed thereof; and FIFE RV & AUTO CENTER, INC., Respondents.	No. 41570-4-II UNPUBLISHED OPINION

Penoyar, J. — A jury found David Patrick White guilty of second degree assault, a felony. The assault victim, Larry Pletcher, brought a civil lawsuit against White. In his answer, White counterclaimed against Pletcher and also brought a claim against Pletcher's employer, Fife RV & Auto Center (Fife RV), alleging several torts.

Pletcher and Fife RV moved for summary judgment, and White now appeals the trial court's order granting their motions. We affirm because (1) the jury's verdict in White's criminal proceeding precludes White from alleging that he was not the aggressor and (2) the felony tort statute bars White's claims for injuries he suffered during his commission of second degree assault.

FACTS

In 2009, a jury convicted White of second degree assault for striking Pletcher with a tire iron and attempting to elude a pursuing police vehicle. The incident leading to White's conviction occurred in July 2008, when Pletcher was working as a salesman at Fife RV. White visited Fife RV as a potential customer and asked to see two motor home models. The incident began inside

one of the motor homes.

During his criminal trial, White testified that he was walking behind Pletcher when White was hit and "immediately started bleeding." Clerk's Papers (CP) at 48. White testified that he did not see who had hit him but assumed that, because only he and Pletcher were inside the motor home, it was Pletcher who had hit him. White repeatedly testified that he "defended" himself when he struck Pletcher with the tire iron. CP at 57. According to Pletcher's testimony, he felt three strikes on the back of his head. He saw White holding a tire iron; when White continued to swing the tire iron at him, Pletcher swung a fire extinguisher at White. White then fled the scene.

Before White was convicted, Pletcher and his wife filed a civil lawsuit against White, bringing claims of assault, battery, and negligent and intentional infliction of emotional distress. In his answer, White counterclaimed, arguing that Pletcher and Fife RV, by respondeat superior, committed assault, battery, false imprisonment, and intentional and negligent infliction of distress against White. White alleges that he had told Pletcher he did not intend to do business with Fife RV and, as a result, Pletcher had become angry. According to the complaint, Pletcher then pushed White in the chest, grabbed the tire iron, and used it to hit White on the forehead; White allegedly attempted to wrestle the tire iron from Pletcher and a struggle between the two ensued.

Fife RV moved for summary judgment and the Pletchers joined the motion. White's counsel's response was untimely; accordingly, the trial court granted the Pletchers and Fife RV's motion to strike White's brief. On November 12, 2010, the trial court granted the summary judgment motions and dismissed White's claims with prejudice. White appeals.

ANALYSIS

I. Summary Judgment

The only issue on appeal is whether the trial court properly granted the Pletchers' and Fife RV's motions for summary judgment. Because White presents no genuine issue as to any material fact, we conclude that the trial court properly granted the Pletchers' and Fife RV's motions for summary judgment.

We review an order for summary judgment de novo, performing the same inquiry as the trial court. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain*, 159 Wn.2d at 708.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The nonmoving party cannot merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value. *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). We may affirm summary judgment on any ground the record supports. *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008); *see* RAP 2.5(a).

II. Collateral Estoppel

First, White argues that the doctrine of collateral estoppel does not preclude his claims. Because the jury decided the issue of who struck the first blow in the criminal trial, collateral estoppel precludes White from retrying this issue.

The collateral estoppel doctrine precludes relitigation of the same issue in a subsequent action between the same parties. *Regan v. McLachlan*, 163 Wn. App. 171, 181, 257 P.3d 1122 (2011). The purpose of the doctrine is to promote judicial economy by avoiding relitigation of the same issue, afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to the litigants. *Regan*, 163 Wn. App. at 181. We review issues of collateral estoppel de novo. *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008).

Collateral estoppel may be applied in a civil action in which a party seeks to retry issues resolved against a defendant in a previous criminal case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). In order to prevail on a claim of collateral estoppel, the party seeking the doctrine's application must show:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

The collateral estoppel doctrine applies in

> situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." Further, issue preclusion is appropriate only if the issue raised in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment," even if the facts and the issue are identical.

LeMond, 143 Wn. App. at 805 (citations omitted) (quoting *Standlee v. Smith*, 83 Wn.2d 405, 408, 518 P.2d 721 (1974)).

White contends that the parties are not identical because Fife RV and Pletcher were not parties to the criminal suit and there is no final decision on the merits of White's claims. But White was a party to a criminal proceeding ending in a final judgment on the merits and the issues necessarily decided in the criminal action are subject to collateral estoppel. *See Christensen*, 152 Wn.2d at 307.

Accordingly, the critical question is whether the issue decided in the criminal proceeding was identical to the issue presented in the civil proceeding. Because the jury reached a guilty verdict, the State necessarily proved beyond a reasonable doubt at trial that (1) White had committed assault against Pletcher and (2) White had not acted in self defense.

In support of their motions for summary judgment, the Pletchers and Fife RV submitted excerpts of Pletcher's and White's testimony from the criminal trial, a photograph of Pletcher taken after the assault, a copy of White's judgment and sentence, a copy of the Pletchers' complaint, and a copy of White's answer and counter claim. At the summary judgment hearing, the Pletchers and Fife RV cited to White's testimony, in which he stated that he swung a tire iron at Pletcher to defend himself. The Pletchers and Fife RV contend that because the jury rejected

White's assertion that he had acted in self defense, the State necessarily negated the self-defense claim beyond a reasonable doubt and the jury necessarily disbelieved White's account that Pletcher was the aggressor. We agree.

White's argument fails because he cannot create a genuine issue of fact for trial. White presented no credible evidence to dispute the Pletchers' and Fife RV's arguments. In fact, he failed to submit a timely response to the Pletchers' and Fife RV's motions for summary judgment. White cites to his own testimony from the criminal trial,[1] arguing that there is a genuine issue of material fact as to who struck the first blow. Given White's and Pletcher's contradictory testimony and the jury's resulting guilty verdict, it is apparent that the jury did not find White's testimony to be credible. We conclude that collateral estoppel precludes White from bringing a claim based on his allegation that Pletcher was the aggressor.

III. Felony Tort Statute

Pletcher and Fife RV also assert that White's claims are barred by the felony tort statute, RCW 4.24.420. We agree that White may not bring the remainder of his claims because he is precluded from doing so under the felony tort statute.

Under RCW 4.24.420,

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

[1] Even White's complaint alleges a different incident than that testified to by White at trial; in the complaint, White alleges that Pletcher became angry during their interaction, pushed White in the chest, grabbed the tire iron, and used it to hit White on the forehead. White then allegedly attempted to wrestle the tire iron from Pletcher and a struggle between the two ensued. White's complaint, a document prepared for the self-serving purpose of supporting his lawsuit, does not create a genuine issue of material fact.

While proximate cause is generally a question for the jury, it is a question of law for the court "when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion." *Graham v. Pub. Emps. Mut. Ins. Co.*, 98 Wn.2d 533, 539, 656 P.2d 1077 (1983).

The jury in the criminal trial concluded that White did not act in self defense. Thus, any injuries suffered after White began his assault of Pletcher were incurred while he was engaged in the commission of a felony. Accordingly, RCW 4.24.420 bars all actions for damages that resulted during his commission of second degree assault.

We affirm.

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

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.