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No: 72614-5-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON, SEATTLE

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STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife

Plaintiff/Appellant

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. *RES JUDICATA* CANNOT APPLY WHERE DIFFERENT CAUSES OF ACTION AND DIFFERENT SUBJECT MATTER ARE INVOLVED.

The Claim Splitting prohibition is a doctrine of *res judicata*. If the requirements of *res judicata* are not met, the claim splitting prohibition does not apply.

Lake Stevens describes claim splitting as a “variation of *res judicata*.” It is not. It is a subset within *res judicata*. As such, it must meet the requirements of *res judicata* to apply.

*Res judicata* has five requirements. The threshold requirement is a final judgment on the merits. Hisle v. Todd Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). If that threshold is crossed, there are four additional requirements. They are: (1) identical parties; (2) identical causes of action; (3) identical subject matter; (4) identical quality of the persons for or against whom the claim is made. Ensley v. Pitcher, 152 Wn.App. 891, 902, 222 P.3d 99 (2009). Application of *res judicata* requires that all five of the above listed requirements be met. Pederson v. Potter, 103 Wn.App. 62, 67, 11 P.3d 833 (2000). The party asserting *res judicata* has the burden of proving the five requirements are met. Richert v. Tacoma Power Utility, 179 Wn.App. 694, 704, 319 P.3d 882 (2014).

The cause of action involved in this lawsuit is not identical to the cause of action involved in the prior lawsuit. Further, the subject matter of this lawsuit is not identical to the subject matter of the prior lawsuit. Each of these is independently fatal to *res judicata* and by extension to Lake Stevens' claim splitting argument.

- A. Negligent tasing and negligent misrepresentation are different causes of action because in the prior lawsuit Lake Stevens said they were.

In the prior lawsuit for negligent tasing Lake Stevens successfully argued negligent misrepresentation was an independent cause of action which had not been pled. Lake Stevens argued the following in the prior lawsuit:

Hyde urges the Court to divine a negligent misrepresentation claim from his Complaint where no such cause of action was previously pled. . .

CP 79, Lines 8-9; CP 142, lines 8-9. Lake Stevens then said:

Hyde's argument based on a brand new cause of action should be rejected.

CP 80, line 2; CP 143, line 2.

Thus, in the prior lawsuit we have Lake Stevens successfully arguing "negligent misrepresentation" was a brand new cause of action in order to succeed in its statute of limitations defense. In the case at bar we have Lake Stevens arguing "negligent misrepresentation" is the same cause of action in

order to succeed with its *res judicata* defense. If this is not a classic circumstance where judicial estoppel ought to apply, then the doctrine no longer exists.

Lake Stevens in its briefing brings up a side issue which needs to be addressed. Lake Stevens states the first time Officer Hyde raised his claim for negligent misrepresentation was in his motion for reconsideration in the prior lawsuit. The statement is false and Lake Stevens should know it is false since this misconception was raised in a reconsideration motion to the Court of Appeals and since this misconception was also addressed in materials submitted to the superior court in this cause. CP 121; CP 134. In fact Officer Hyde specifically raised his negligent misrepresentation claim in his original opposition to summary judgment in the prior lawsuit in addition to raising the issue again on reconsideration following summary judgment. Specifically, Officer Hyde in his original opposition to the motion for summary judgment stated:

Additionally, the first time Steve [Hyde] learned that, contrary to what the training officer had said, he did not have to undergo tasing was June 30, 2011, when Chief Celori was deposed. This even later date is the earliest the statute of limitations began running if one accepts the premise that the method of taser application was not negligent.

CP 134, lines 15-19 [a readable copy is attached as Appendix A to Appellants' opening brief]. The Court of Appeals in its opinion in the prior



action apparently either accepted at face value Lake Stevens' false assertion that negligent misrepresentation had not been raised before Officer Hyde's motion for reconsideration or did not consider it material enough to change the opinion to accurately reflect this fact.

In the end the bottom line was unchanged by this erroneous assertion. Both the trial court and the Court of Appeals in the prior case ruled negligent misrepresentation had to have been separately pled in order to be in that case. Since it had not been separately pled, the Court of Appeals ruled the prior lawsuit was limited to the issue of whether the training officer had been negligent with respect to how he had tased Officer Hyde. It then found the statute of limitations had run on that claim. *Hyde v. City of Lake Stevens*, No. 69668-8-1 (January 21, 2014) at 7-8 and 9-10; CP 158-9, 160-1.

Returning to the central point, Lake Stevens cannot deny that in the prior litigation it successfully argued negligent misrepresentation was a "brand new cause of action" that had not been pled. It should be held to that representation, which is fatal to its *res judicata* defense in this lawsuit.

- B. If in fact negligent tasing and negligent misrepresentation are not different causes of action, why do they have to be separately pled?

The rule applicable to the separate pleading requirement is CR 10. It states:

Each claim founded upon a separate transaction or occurrence. . . shall be stated in a separate count. . . .

CR 10(b). By definition for the separate pleading requirement to apply, there has to be a separate transaction or occurrence. Lake Stevens argued in the prior case that negligent misrepresentation had to be separately pled; the superior court and the Court of Appeals agreed. This argument by Lake Stevens, which the trial court and the Court of Appeals in the prior case accepted, was in effect an argument that the negligent tasing and the negligent misrepresentation were separate transactions and occurrences, otherwise a separate pleading would not have been required.

- C. Even ignoring judicial estoppel and the separate pleading requirement, review of the analytical factors reveals the negligent tasing lawsuit and the negligent misrepresentation lawsuit involve different causes of action.

Causes of action must be identical for *res judicata* to apply. To analyze whether or not causes of action are identical, the courts have enumerated guidelines:

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 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 suits arose out of the same transactional nucleus of facts.

Ensley v. Pitcher, 152 Wn.App. 891, 903, 222 P.3d 99 (2009). Ensley points out that, unlike the requirements of *res judicata*, “[t]hese four factors are analytical tools; it is not necessary that all four factors be present to bar the claim.” Id.

Review of those analytical factors in the context of the current litigation reveals none of them point toward negligent tasing and negligent misrepresentation being the same cause of action. In fact the analytical factors underscore Lake Stevens’ contention in the prior litigation: negligent tasing and negligent misrepresentation of the tasing requirement are completely independent causes of action. Lake Stevens has not met its burden of proving the causes of action are the same.

Ensley v. Pitcher, 152 Wn.App. 891, 222 P.3d 99 (2009) involved *res judicata* in the context of a summary judgment motion granted in a prior action. The Ensley analysis reveals why *res judicata* was incorrectly applied by the superior court in the case at bar.

Ensley involved alleged overservice of a customer at the Red Onion. The customer, after an evening of drinking, crashed her car into a vehicle occupied by Ensley. Ensley suffered serious injuries. Pitcher was the bartender. In a prior lawsuit Ensley had made an identical negligence claim against Pitcher’s employer. The prior lawsuit had been dismissed on summary judgment.

Pitcher made a motion for summary judgment based on *res judicata* and collateral estoppel. The Court of Appeals found *res judicata* applied and remanded the case for dismissal. The court's analysis is instructive.

The court's analysis of *res judicata* in Ensley began by pointing out that filing two separate lawsuits based on the same event is precluded claim splitting. Id. at 898. Ensley, further, pointed out that *res judicata* precludes matters which have been litigated or which could have been litigated. Id. at 899. However, it is important to keep the "could have been litigated" in context. First, "could have been litigated" only applies to lawsuits based on the same event. Second, Ensley makes it clear claim splitting does not apply to different causes of action, stating: "*Res judicata* bars such claim splitting if the claims are based on the same cause of action." Id. [emphasis added].

1. The negligent tasing lawsuit and the negligent misrepresentation lawsuit are not based on the same event.

Turning first to the question of whether the two lawsuits in the case at bar are based on the same event, it is clear that they are not. The first lawsuit was based on negligence with respect to how Officer Hyde was tased. This lawsuit is based on misrepresentation of Lake Stevens' tasing requirement. These are not the same event.

2. Negligent tasing and negligent misrepresentation do not involve presentation of substantially the same evidence.

Ensley states: “The ‘substantially the same evidence’ factor requires analysis of whether the evidence necessary to support each action is identical.” Id. Applying this to the case at bar, it becomes clear that the evidence necessary to support each action is not identical. In fact it is totally different. The evidence necessary to support the prior action for negligent tasing relates to the technique of tasing used. In contrast, to prove negligent misrepresentation Officer Hyde must prove he was told he had to be tased if he wanted the job and that this turned out to be untrue. The method of taser application is irrelevant. The only evidence the two lawsuits would have in common would be the evidence of injury.

3. Negligent tasing and negligent misrepresentation do not arise from the same transactional nucleus of facts.

Ensley, in determining that the two lawsuits it was considering arose from the same transactional nucleus of facts, stated:

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.

Id. at 904. In contrast in the case at bar, not only do the two complaints filed differ in their story but the superior court and Court of Appeals specifically found the story told in the complaint filed in this lawsuit (negligent

misrepresentation) had never been told in the complaint filed in the prior lawsuit, which was why it had to be separately pled.

It is important to underline that Ensley, in finding the same transactional nucleus in that case, does not mention that the injuries flowing from the wrongful conduct are identical, even though they were in fact identical. Ensley only focuses on the wrongful conduct despite the fact that the most obvious identity between the two cases related to the injuries suffered.

The injuries suffered are not part of the transactional nucleus. The transactional nucleus is the wrongful conduct, not the injuries flowing from the wrongful conduct, a principle that has been understood in Washington since at least 1926. Sprague v. Adams, 139 Wash. 510, 519, 247 P. 960 (1926).

The transactional nucleus is not the same as the result. It is more properly thought of as the transaction which gives rise to the claim. It refers to the wrongful conduct which led to the injury, not the injury itself.

4. No rights and interests from the negligent tasting lawsuit could be destroyed by prosecution of the negligent misrepresentation lawsuit.

Ensley found rights and interests in the first lawsuit could be destroyed by the prosecution of the second action. It found this because the claim against Red Onion in the first suit was based solely on vicarious

liability. Red Onion had prevailed in that action. A second action against Red Onion's employee could destroy the rights established on Red Onion's behalf in the first action.

In contrast in the case at bar the only right established in the first action was Lake Stevens' right to dismissal of the negligent tasing claim based on the statute of limitations. This second action will have no impact on that established right.

5. Negligent tasing and negligent misrepresentation do not involve infringement of the same right.

Ensley concluded its analysis of the four analytical factors for determining whether causes of action are the same by stating: "Lastly, the suits involved infringement of the same right: the right to be protected from bars providing alcohol to persons apparently under the influence." Id. at 904. The two lawsuits involved in the case at bar do not involve infringement of the same right. The prior lawsuit involved the right to be tased with care. This lawsuit involves the right to be truthfully informed of the tasing requirement.

From Ensley it is seen that none of the analytical factors, when applied to the case at bar, point toward negligent tasing and negligent misrepresentation being the same causes of action. If they are not the same cause of action *res judicata* and claim splitting cannot apply.

Lake Stevens has attempted to avoid the problem different causes of action presents to its *res judicata* defense by arguing that, although the causes of action may be different, Steve Hyde could have raised his negligent misrepresentation cause of action in his prior case and thus is prevented by *res judicata*/claim splitting from bringing it in this case. Lake Stevens cites language in various cases stating that, where the relief sought could have been determined in a prior action, there is claim splitting and *res judicata* applies.

Superficially, the argument might appear to have merit. However, the language is misunderstood if applied to different causes of action, and the Washington Supreme Court has so ruled.

The argument Lake Stevens attempts to make with respect to causes of action that could have been brought was attempted in Seattle-First Nat. Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978). In Kawachi the superior court had dismissed a case based on *res judicata* because it felt the involved cause of action could have been determined in a prior case which had been litigated. The Court of Appeals reversed, and the Supreme Court of Washington affirmed the reversal, in relevant part describing the losing party's argument as follows: "The respondents maintain, however, that the claims should be barred because they could have been decided in that [prior] suit." Kawachi at 226. The Washington Supreme Court then stated:



While it is often said that a judgment is *res judicata* of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims it does not require such joinder.

Id. at 226. The Washington Supreme Court then unequivocally stated:

And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause that was adjudicated.

Id. In the case at bar the negligent taser application was independent of the negligent misrepresentation that Steve Hyde had to be tased if he wanted the job.

A later Supreme Court case again unequivocally reaffirmed *res judicata* cannot apply to different causes of action even if those causes of action could have been raised in a prior action. The Washington Supreme Court in Fluke Capital & Management Services Co. v. Richmond, 106 Wn.2d 614, 724 P.2d 356 (1986) stated:

Richmond also argues that Fluke's suretyship claim is barred because the issue "could have and should have" been raised in the prior action. This argument is appropriate only under *res judicata* theory. Under the doctrine of *res judicata*, or claim preclusion, a claim decided in a prior action cannot be raised in a subsequent action.

Id. at 619-20. The Supreme Court noted that, not only could Fluke have raised its suretyship claim in the prior action, Fluke actually had raised the claim and then had abandoned it in its final set of pleadings. The Supreme Court then stated:

Because Fluke abandoned its claim the doctrine of *res judicata* is inappropriate in this action (and in fact Richmond purports to rely only on the theory of collateral estoppel). Richmond’s “could have and should have” argument, which is grounded in *res judicata* must fail.

Id. at 620.

In the case at bar negligent misrepresentation of the tasing requirement is a cause of action independent of the cause of action for negligent tasing, and Lake Stevens vigorously argued for that independence in the prior lawsuit. Its contention that *res judicata* now bars bringing the negligent misrepresentation cause of action because it could have been joined in the prior action represents a misunderstanding of claim splitting/*res judicata* that goes directly against existing Washington Supreme Court precedent. “We are not free to ignore binding Washington Supreme Court precedent and we err when we disregard it. See 1000 Virginia Ltd. P’ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (Washington Supreme Court decisions binding on all lower courts in the state.” In re Marriage of Larson and Calhoun, 313 P.3d 1228, 1230, 178 Wn.App. 133

(Div. 1, 2013).

Lake Stevens attempts to evade the same cause of action requirement by styling negligent misrepresentation as a “theory of recovery” or as a “different legal theory.” Presumably, it does this to try to match some of the language which appears in the case law. The fact that Lake Stevens uses these terms to describe negligent misrepresentation and negligent tasing does not make them the same cause of action. Negligent misrepresentation is not a different legal theory; it is a different wrongful act.

As for Lake Stevens’ argument that only cases related to personal injury are appropriate to the court’s analysis of *res judicata*, two points need to be made. First, Lake Stevens itself cites non personal injury cases as support for its position in its own briefing. Second, there does not seem to be any basis for believing *res judicata* doctrine does or should vary according to the type of case being considered.

*Res judicata* should not have been applied to dismiss this lawsuit.

D. *Res judicata* requires identity of subject matters. Since negligent tasing and negligent misrepresentation do not involve the same subject matter, *res judicata* cannot apply.

After determining identity of causes of action, Ensley v. Pitcher, 152 Wn.App. 891, 902, 222 P.3d 99 (2009) turned its attention to the second requirement of *res judicata*, a determination of whether the subject matter of

the two involved lawsuits was identical. Ensley found that the subject matter was identical, stating:

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.

Id. at 905.

Again it is worthwhile to pause here and underline what is not being considered. The fact that the two separate lawsuits resulted in the same injuries is not a consideration. Only the wrongful conduct is examined to see if the subject matter is identical.

Ensley continued stating:

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.

Id. Again, they concern the same subject matter because they involve the same wrongful conduct, not because they lead to the same damages. The subject matter considered to determine sameness is the wrongful conduct, not the damages.

In the case at bar the subject matter of the first lawsuit was negligence with respect to application of the taser. The subject matter of the

case at bar is the negligent misrepresentation of the tasing requirement. The fact that two separate acts of negligence led to the same harm does not mean identical subject matter is involved.

The failure to prove identity of subject matter is a separate independent basis fatal to the application of *res judicata* in this case.

E. A dismissal based on the statute of limitations is not a decision on the merits.

*Res judicata* requires dismissal on the merits. Statute of limitations dismissal is not a dismissal on the merits.

“Dismissal for want of jurisdiction is not the same as a final decision on the merits.” Richards v. City of Pullman, 134 Wn.App. 876, 884, 142

P.3d 1121 (2006). The Washington Supreme Court has stated:

In this case, the dismissal of respondent’s claims against the two construction companies was based on the statute of limitations rather than the merits. . . .

Vern J. Oja & Associates v. Washington Towers, Inc., 89 wn.2d 72, 77, 569

P.2d 1141 (1977).

Appellants contend that for purposes of *res judicata*, the statute of limitations dismissal in the prior lawsuit should not be considered a decision on the merits with respect to any issue other than the statute of limitations.

This is an additional reason why *res judicata* dismissal of this case was inappropriate.

II. APPEALED SUMMARY JUDGMENT RULINGS WHICH WERE NOT RULED ON BY THE COURT OF APPEALS IN THE PRIOR LAWSUIT ARE NOT BINDING ON THIS LAWSUIT.

The only ruling from the prior lawsuit binding on the current lawsuit is the finding that the statute of limitations with respect to the negligent tasing claim had run.

Lake Stevens has argued that all rulings on summary judgment in the prior lawsuit, whether or not in error, are binding on this lawsuit, including issues appealed but undecided by the Court of Appeals. This represents a misunderstanding of the law and, if adopted, would result in Officer Hyde being denied his right to appeal.

RAP 2.1 and 2.2 (a)(1) provide that a final judgment in any superior court action may be appealed as a matter of right. Every summary judgment ruling relevant to this lawsuit made by the superior court in the prior lawsuit was appealed. CP 146-50. The Court of Appeals elected to decide only one of the appealed issues; it ruled the statute of limitations had run on the negligent tasing issue before proper service was made on Lake Stevens.

With respect to the other issues appealed it stated:

Thus, the trial court properly dismissed the lawsuit on this basis alone. Accordingly, we need not reach the remaining arguments addressing the substance of the claims.

Hyde, No. 69668-8-1 at p. 10; CP 161.

Despite this, Lake Stevens seeks to make the superior court's prior summary judgment rulings that were not addressed by the Court of Appeals binding on this lawsuit. To do so Lake Stevens has the burden of proving some basis for a subsequent lawsuit in superior court being bound by the rulings of another superior court in a prior lawsuit. Appellants can think of only four possible bases for this – *res judicata*, collateral estoppel, law of the case, or *stare decisis*. None of them apply.

Since *res judicata*, and by extension claim splitting, cannot apply unless there is identity of subject matter and cause of action between the two lawsuits in addition to a final judgment on the merits, it cannot apply. It is clear that neither subject matter nor cause of action are identical. Since every requirement of *res judicata* must be met for it to apply, *res judicata* cannot be used by Lake Stevens to meet its burden of proof.

Law of the case cannot be used by Lake Stevens to meet its burden. “The law of the case applies only when an appellate court holding has issued in a prior appeal of the same case.” Fluke at 620.

First, this is not the same case. Second, the only holding by the Court of Appeals, besides finding the negligent misrepresentation cause of action was not in the case, was that the statute of limitations had run with respect to the cause of action for negligent taser application.

Law of the case doctrine, also, does not apply where there is

intervening controlling precedent. Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005). Application of the doctrine may also be avoided where the prior decision is clearly erroneous. Id. at 1152.

The superior court in the prior case entered a summary judgment which can be summarized in relevant part as determining that, under Washington's Industrial Insurance laws, Plaintiffs could not sue Lake Stevens for being tased. Since the date of that summary judgment, the Court of Appeals has held a police officer could bring suit under the Industrial Insurance statute for being tased. The case is Michelbrenk v. State, 180 Wn.App. 656, 323 P.3d 620 (2014). Thus, there has been intervening precedent in direct conflict with the summary judgment decision entered in the prior case. The Supreme Court states that common sense applies in this circumstance, and that the party is not bound to the prior decision. Roberson at 1152.

Collateral estoppel is different from *res judicata* in that, unlike *res judicata*, which prevents re-litigation of causes of action, collateral estoppel prevents re-litigation of issues already decided. Seattle-First National Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978). Collateral estoppel includes no requirement that issues that could have been raised be raised:

In addition, collateral estoppel precludes only those issues that have actually been litigated and determined; it does not operate as a bar to



matters which could have. . . been raised [in prior litigation] but were not.

McDaniels v. Carlson, 108 Wn.2d 299, 305, 738 P.2d 254 (1987). [ellipse and brackets in original text, quotation marks omitted].

Collateral estoppel requires:

(1) Identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. In addition, the issue to be precluded must have actually been litigated and necessarily determined in the prior action.

City of Arlington v. Central Puget Sound Growth Management Hearings Bd.  
164 Wn.2d 768, 792, 193 P.3d 1077 (2008).

Again, the burden is on the party asserting collateral estoppel to prove its application. Collateral estoppel, in contrast to res judicata, only bars those issues actually litigated. Fluke Capital & Management Services Co. v. Richmond, 106 Wn.2d 614, 620, 724 P.2d 356 (1986). The

Washington Supreme Court states:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Id. at 618.

Lake Stevens seeks collateral estoppel application to the superior court's rulings on summary judgment in the prior action. Collateral estoppel cannot apply for three reasons. First, Steve Hyde appealed the summary judgment rulings and the Court of Appeals chose not to make any determination with respect to those issues. Accordingly, there has been no final determination of those issues. Second, there has been intervening Court of Appeals precedent rendering the prior summary judgment rulings erroneous. Third, application of the doctrine would work an injustice, since it would defeat Hyde's right to appellate review of the superior court's rulings in the prior lawsuit.

The cases cited by Lake Stevens that make rulings on summary judgment binding relate to unappealed issues, not appealed issues which an appellate panel declined to address. Lake Stevens can point to no summary judgment decision from the prior lawsuit relevant to this lawsuit which went unappealed. "To invoke collateral estoppel the bound party must have had a full and fair opportunity to litigate the issue the first time around." Paradise Orchards General Partnership v. Fearing, 122 Wn.App. 507, 515, 94 P.3d 372 (2004).

Further, the unaddressed issues for which Lake Stevens seeks binding effect are interpretations of law. The Court of Appeals when asked by Puget Sound Power & Light to consider an earlier superior court decision

stated: “This trial court decision has no precedential value here nor do we have the entire record from that case to appreciate the underlying facts.” Puget Sound Energy v. State, Department of Energy, 158 Wn.App. 616, 623, 248 P.3d 1043 (2010).

Similarly, In re Estate of Jones, 170 Wn.App. 594, 287 P.3d 610 (2012) states: “*Stare decisis* is not applicable to a trial court decision because the findings of fact and conclusions of law of a superior court are not legal authority and have no precedential value. *Id.* at 606.

The Washington Supreme Court, after stating unpublished opinions have no value and should not be considered, further stated: “For the same reason, we also grant the parties’ motions to strike portions of the State’s amicus brief citing to and referencing an unpublished superior court decision.” Yousaufian v. Office of Ron Sims, 168 Wn.2d 444, 470, 229 P.3d 735 (2010).

Lake Stevens’ position that appealed summary judgment issues which are not decided by the appellate courts are binding on subsequent litigation means that even erroneous rulings would be binding with no chance of repair. As an example, in the prior litigation of this case evidence was improperly excluded on summary judgment; the exclusion, which formed part of the basis for summary judgment on issues not decided by the Court of Appeals, was appealed. Lake Stevens would have this court bind

Officer Hyde in this litigation to a summary judgment on issues based on clearly improper exclusion of evidence without appellate recourse. Another issue determined on summary judgment in the prior litigation was the rather surprising ruling that, while the spouse of a dead worker can make a consortium claim under the Industrial Insurance Act, the spouse of an injured worker cannot. Lake Stevens would give binding effect to obvious error without appellate recourse.

Summary judgment rulings that were appealed in a prior lawsuit but not ruled on by the Court of Appeals in that lawsuit should not be binding on this lawsuit. To hold otherwise would take away Officer Hyde's right to appeal.

### III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY AWARDING ATTORNEY FEES AND SANCTIONS.

Attorney fees and sanctions are not appropriate where legitimate legal issues are involved. In the case at bar Appellants had a reasonable basis for believing their interpretation of the law was correct and that Lake Stevens was mistaken with respect to its claim splitting theory.

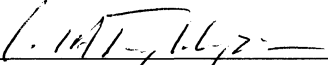
Appellants persist in their belief that Lake Stevens is incorrect in its analysis of claim splitting, however, if the Court disagrees with Appellants' analysis, Appellants' pursuit of what they believe to be their legitimate legal claim should not result in the imposition of attorney fees and sanctions.

IV. CONCLUSION

The orders entered September 5, 2014 and October 3, 2014 should be reversed in their entirety. This case should be remanded for trial.

Dated this 11<sup>th</sup> day of May, 2015.

LOPEZ & FANTEL, INC., P.S.

  
\_\_\_\_\_  
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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON, SEATTLE

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STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife

Plaintiff/Appellant

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

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CERTIFICATE OF SERVICE OF APPELLANTS' REPLY BRIEF

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2015 MAY 14: 29

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

ORIGINAL

I, Cynthia Ringo Palmer, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 11 day of May, 2015, I caused to be served the following document on counsel as follows:

**Original plus 2 copies to:**  
Court of Appeals, Division 1  
600 University Street  
Seattle, WA 98101


via Fax:  
 via ABC legal messenger  
 via U.S. regular mail

Brenda L. Bannon  
Keating, Bucklin and McCormack, Inc., PS  
800 5<sup>th</sup> Ave Suite 4141  
Seattle, WA 98104

via email BBannon@kbmlawyers.com  
 via Fax: 206-223-9423  
 via ABC legal messenger  
 via U.S. regular mail

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 11 day of May, 2015.

  
Cynthia Ringo Palmer