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No. 72614-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants,

vs.

CITY OF LAKE STEVENS,

Defendant/Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In June 2009, Appellant Hyde was provisionally hired as a police officer and received Taser training about a week later. After the practical portion of the training, Hyde claimed a debilitating back injury, underwent multiple surgeries, and later sued Respondent City of Lake Stevens for negligence based on the training officer's manner of performing of the June 11, 2009 Taser training. The Honorable George Appel dismissed this first lawsuit based on multiple alternative grounds. CP 173, 178-180; 182-185. Hyde appealed the Order. This Court affirmed the summary judgment order in an unpublished opinion. (Dkt. No. 69668-8-I, 179 Wn. App. 1007 (2014)). CP 174, 187-195. A motion for reconsideration was denied. The Washington Supreme Court subsequently denied Hyde's petition for review. (180 Wn.2d 1029 (2014)). CP 100; 174, 197-201. A mandate was issued in August 2014. CP 102.

In February 2014, Hyde filed a second lawsuit against the City of Lake Stevens for negligent misrepresentation based on statements allegedly made by the same training officer before and during the same June 11, 2009 Taser training. CP 174, 203-205. In his first lawsuit, Hyde had previously argued negligent misrepresentation in a motion for reconsideration in the trial court and again on appeal; however, Hyde's arguments were refused because he never amended his first complaint to

add this claim. CP 86; 192-193. In his second lawsuit, Hyde attempted to proceed piecemeal with this new claim based on this new legal theory that could have been pled in his first complaint. The original summary judgment dismissal Order that resolved the issues between the parties was based on several different alternative legal grounds that were equally applicable to this newly pled negligent misrepresentation claim. CP 182-185; 87. This Order was not modified by this Court during the first appeal, and remains a final judgment against Hyde.

Hyde's second lawsuit was dismissed on summary judgment by the Honorable Michael T. Downes. CP 69-70. The trial court denied Hyde's motion for reconsideration, entered findings that the second suit was frivolous and harassing, and awarded attorney fees and other CR 11 monetary sanctions. CP 11-12. Respondent City of Lake Stevens seeks an Order affirming the second summary judgment order, and the Order awarding attorney fees and sanctions.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR[1]

1. Where (i) the trial court previously dismissed Hyde's negligence lawsuit against the City of Lake Stevens and entered a final judgment against Hyde, and (ii) this Court affirmed the summary

[1] Though Hyde assigned error to the trial's court's order denying reconsideration CP 11-12, no argument has been provided to that issue and thus such is ordinarily deemed waived on appeal. *State v. Sims,* 171 Wn.2d 436, 441, 256 P.3d 285 (2011).

judgment order, should the second summary judgment order dismissing Hyde's subsequently filed negligent misrepresentation lawsuit against the City based on the same June 2009 training incident be affirmed as violating the claim-splitting doctrine?

2. Where Hyde had the opportunity to litigate the negligent misrepresentation claim in the first lawsuit, there is a final judgment, and there are identical (i) subject matter, (ii) claim or cause of action, (iii) persons and parties, and (iv) the quality of the persons for or against whom the claim is made, should the second summary judgment order dismissing Hyde's second lawsuit be affirmed based on res judicata?

3. Where (i) the trial court's first summary judgment order dismissing Hyde's lawsuit on multiple alternative grounds resolved the issues between the parties, (ii) the City's rights to enforcement of this final judgment would be destroyed by prosecution of this second suit, and (iii) the order is equally applicable to the current claim of negligent misrepresentation pled for the first time in this second lawsuit, should the second summary judgment order dismissing Hyde's second lawsuit be affirmed based on res judicata and/or collateral estoppel?

4. Where after failing to overturn the trial court's first summary judgment order on appeal and filing a second lawsuit against the City based on the same June 2009 training incident, (i) Hyde's counsel

was notified in writing several times that the second suit was legally barred by the rules of preclusion and nonetheless litigation continued, and (ii) the trial court entered findings that the second suit was frivolous and harassing, should the order awarding reasonable attorney fees and sanctions be affirmed based on violating CR 11?

III. SUPPLEMENTAL STATEMENT OF THE CASE

This case stems from Hyde's probationary employment with the City of Lake Stevens' Police Department ("LSPD") in June 2009. On the fourth day of his conditional employment, Hyde participated in a routine Taser training exercise; the Taser application consisted of a three-second burst with a metal clip on Hyde's right shirt sleeve cuff and left leg sock while Hyde was lying on a carpet. Afterwards, he complained of a muscle-contraction related back injury, never completed his training, and never received his police commission. CP 187-189.

In late 2010, Appellants filed a negligence suit against the City. CP 173; 178-180; 189. In late August 2012, the City filed a summary judgment motion because specific statutory designees had never been served, and the three-year statute of limitations had expired. CP 173; 182-185. Various other substantive defenses were also argued. *Id.* On October 17, 2012, the trial court granted the City's motion based on all argued defenses. CP 173; 182-185. A motion for reconsideration was

denied. CP 193; 86. During the motion for reconsideration, Hyde for the first time argued that he should be allowed to pursue a negligent misrepresentation claim. CP 86. This argument was refused by the trial court because Hyde did not plead this claim in his complaint. CP 193; 86.

This Court affirmed the first summary judgment order. CP 187-195. The only legal issue directly addressed by the Court on appeal was the insufficient process/statute of limitations defense. CP 194-195. The remaining legal conclusions regarding the City's defenses included a determination that under the LEOFF statute,[2] Hyde did not have a statutory right to sue his employer because he was a noncommissioned officer, and Hyde's spouse had no loss of consortium claim against her husband's employer. CP 87; 184-185. The 2012 summary judgment affirmed by this Court left intact all alternative legal grounds for dismissing Hyde's case with prejudice. Hyde erroneously represents that "...only one issue was litigated to a conclusion in a prior lawsuit – the statute of limitations applicable to Mr. Hyde's negligent tasing cause of action." App. Br. at 23 (*see also* App. Br. at 3, 9 and 22, variously stating that only one issue was decided in the first lawsuit).

Because Hyde never amended his first complaint to add a negligent misrepresentation claim, arguments based on that claim were rejected by

[2] RCW 41.26.281.

this Court during the first appeal. CP 86; 192-193. This Court rejected Hyde's previous arguments that the negligent misrepresentation claim should be allowed to proceed on appeal based on the theory that Hyde did not learn that the Taser training application was not an employment requirement until the June 20, 2011 police chief deposition.

> Hyde also asserts that he brought a claim of negligent misrepresentation based on his later discovery that being tased was not a requirement to become a police officer. He alleges that this was not what he was told at the time of the taser training and did not learn this until June 20, 2011. Thus, he contends that the statute of limitations for the claim did not expire before he served the city clerk. But as the City correctly points out, Hyde did not plead any claim of negligent misrepresentation. As noted above, his complaint simply alleged negligence resulting in an injury from the tasing on June 11, 2009 and he points to no amended complaint in the record that reflects the addition of this claim. The only mention of such a claim was raised in Hyde's motion for reconsideration, which was rejected by the trial court and to which he has not assigned error. Thus, this argument is without basis.

Hyde v. City of Lake Stevens, 179 Wn. App. 1007 (unpublished), *rev. den'd,* 180 Wn.2d 1029, 331 P.3d 1172 (2014).

After losing on appeal and while his petition for review to the Supreme Court was still pending, Hyde filed his second lawsuit seeking to litigate a negligent misrepresentation claim. CP 197; 203-205. The City's counsel provided serial notice of the preclusion rules violation and sought voluntary dismissal. CP 209-212; 259-261. The City's correspondence,

Answer, and briefing in support of its motion[3] for pre-assignment repeatedly apprised Hyde of the preclusion rules violation, intent to seek fees and sanctions, and provided Hyde with case citations to the controlling legal precedent. *Id;* CP 237-257; 228-232. Hyde proceeded to litigate.

This second suit was dismissed on summary judgment as violating the claim splitting doctrine, res judicata, and collateral estoppel. CP 69-70; 213-224. The trial court found that Hyde's second suit was frivolous and harassing, and awarded fees in the amount of $17,145.00 (Seventeen Thousand One Hundred and Forty-five) and sanctions in the amount of $5,000.00 (Five Thousand). CP 11-12. Hyde's second Notice of Appeal followed. CP 1. Additional factual statements may be supplied in the Argument below. *See generally,* CP 85-88; 173-212.[4]

IV. SUMMARY OF ARGUMENT

Hyde's "second bite at the apple" effort to file a second lawsuit pleading negligent misrepresentation as a separate claim, after his first negligence suit was dismissed on summary judgment and affirmed on appeal, violates the claim splitting doctrine, res judicata and collateral

[3] The Honorable Judge Downes denied the motion for pre-assignment after Hyde filed an affidavit of prejudice; the court subsequently decided the motion for summary judgment. CP 103-117; 226-268; 69-70.

[4] Appendices A-E are attached hereto (both complaints, both summary judgment orders and the trial court's CR 11 findings and conclusions).

estoppel; the trial court order should be affirmed. Because it was properly entered as a reasonable exercise of discretion, the attorney fee and sanctions award should likewise be affirmed.

Under Washington law, courts are loathe to allow a litigant to file legal claims piecemeal in serial lawsuits when one lawsuit would allow all legal claims to be tried and decided at the same time. Allowing serial lawsuits such as Appellant Hyde's strategy at bar, runs contrary to valued principles of judicial economy, finality of litigation, peace and repose to the party being sued, and the overarching respect for the justice system. The various applications of these concepts are found in the claim splitting doctrine, res judicata (claim preclusion), and collateral estoppel (issue preclusion).

Hyde's arguments ignore the well established rule that res judicata applies not only to bar legal claims previously filed, but also to bar the subsequent filing of legal claims that could have been brought against the same party in the earlier lawsuit. *The first final judgment serves to merge all claims and to bar subsequent assertion of such claims.* Moreover, since the first summary judgment order was premised on several alternative legal grounds that were not altered by this Court in the first appeal, both res judicata and collateral estoppel apply to preclude the City from having to re-litigate these factual and legal issues in a second suit.

This latter point is entirely misstated throughout Hyde's briefing, and its legal import is obfuscated by Hyde's statement of the case and arguments.

Hyde's arguments in this second appeal would only prevail if this Court were to overlook the record below, the well settled rules of preclusion and the policy behind them, and to also ignore this Court's precedent that is largely not mentioned in Hyde's briefing. The issues raised by Hyde are clearly controlled by well settled law.[5] The fallacious underpinning of Hyde's arguments provide for spurious conclusions throughout Hyde's opening brief. This appeal is frivolous.

V. ARGUMENT

A. The Rules of Preclusion are Well Settled.

The purpose of preclusion rules are well established in Washington law:

> Broadly stated, preclusion rules developed under the rubric of *res judicata* and collateral estoppel are designed to prevent repetitive litigation of the same matters.
>
> A number of factors support this goal, particularly as it relates to *res judicata* (claim preclusion). First, and most

[5] In different contexts, appellate courts have explained that ordinarily a party cannot file a new lawsuit while an appeal is pending in hopes of obtaining a better result. A party "is precluded by res judicata from starting a new action ... in hopes of obtaining a contrary result while the appeal is pending." *City of Des Moines v. Personal Prop. Identified as $81,231 in U.S. Currency,* 87 Wn. App. 689, 702–03, 943 P.2d 669 (1997); *Spokane Cnty. v. Miotke,* 158 Wn. App. 62, 67, 240 P.3d 811, 814 (2010) (same). By filing his second suit while his petition for review was still pending, Hyde was certainly result shopping.

> important, is the integrity of the legal system; a legal system that permits the litigation of the same claims again and again is hardly worthy of the name. There is no assurance that the second or third decision on a claim will be more reliable than the first. Second, is the element of finality and repose, both as a societal matter and as a matter affecting the successful litigant. Third parties, successors in interest, creditors, and other members of the commonality should be able to carry forward their affairs in reliance on a judgment duly entered. The successful party should not be subjected to the vexation and exhaustion of resources that repetitive litigation may entail. Third, judicial resources are finite. The courts should not be burdened by a party's desire for another chance, and perhaps yet another.
>
> The same policies support collateral estoppel (issue preclusion), albeit with perhaps slightly less intensity. By the application of issue preclusion, subsequent litigation can be shortened, or simplified—or, indeed, summarily disposed of, depending on the circumstances. Inconsistent determinations can be avoided. Occasionally, courts escape from *res judicata* or *res judicata*, using terms such as "public policy," an "important issue of law," or "injustice."

14A Wash. Prac., Civil Procedure § 35:21, K. Tegland (2d ed. 2014) (internal foot notes omitted). *See also,* 14A Wash. Prac., § 35:24, 35:26.

As a general rule, the *res judicata* and collateral estoppel preclusion rules apply to summary judgment orders. In the case at bar, the City's prior summary judgment order against Hyde was affirmed on appeal on insufficient process and statute of limitations grounds, and all other grounds for summary judgment likewise remained intact.

> As a general rule, and subject to the limitations discussed in later sections, *res judicata* and/or collateral estoppel effects

attach to … summary judgments…

14A Wash. Prac., Civil Procedure § 35:23, K. Tegland (2d ed. 2014) (internal footnotes omitted); *see also* 14A Wash. Prac., §§ 35.41 and 35.34. Such is not impacted by the fact of filing an appeal.

Ordinarily, the fact that a party has appealed an order does not by itself undermine the preclusive effect of a summary judgment as a final order.

> **Appeal, effect.** An appeal (or the fact that time remains for the taking of an appeal) does not destroy the finality of a judgment. If a judgment is appealed, the *res judicata* and collateral estoppel effects will not be suspended or denied during the pendency of the appeal. The judgment continues to have *res judicata* and collateral estoppel effects even of the appellant takes steps to stay enforcement of the judgment pending appeal.
>
> Of course, if the judgment is vacated or reversed on appeal, it loses its *res judicata* effect because it is no longer a valid judgment.
>
> If a party appeals only part of a judgment, and only part of the judgment is reversed, the part that is not appealed normally retains its *res judicata* effect.

14A Wash. Prac., Civil Procedure § 35:23, K. Tegland (2d ed 2014.) (internal footnotes omitted, bold in original). The fact that Hyde is changing legal theories after his first appeal similarly provides him no relief.

The *res judicata* preclusion rules apply equally to claims that were brought in a prior lawsuit and to claims that *could have been* brought in

the prior lawsuit where the four prongs of the rule are met.

> In addition, the courts have consistently said that *res judicata* effects flow from a final judgment only if the first and second proceedings were identical in four respects: (1) subject matter; (2) claim or cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.
>
> ***
>
> **Matters that could have been considered.** When these four requirements are satisfied, all matters that were considered *or could have been considered* in the prior action, if part of the same claim or cause of action, merge with the judgment and cannot be the basis of a later action…
>
> Likewise, a plaintiff cannot avoid the *res judicata* effect of an unfavorable judgment by refiling the same claim based upon a different theory of recovery.

14A Wash. Prac., Civil Procedure § 35:24, K. Tegland (2d ed. 2014) (bold in original).

Washington courts use a 4-prong analysis for determining identity of a cause of action, but not all four prongs need be established to bar a subsequent lawsuit. "It has been said that the claim is the same if the same primary right is violated by the same wrong in both actions, or if the evidence needed to support the second action would have sustained the first action, or if the operative facts would be the same in both actions." 14A Wash. Prac. § 35:26 (internal footnote omitted).

Since the turn of the 20th century, the concept that *res judicata*

applies to matters that should have been raised in the first action, but were not, has been the law in Washington and is consistent with the national viewpoint. 14A Wash. Prac., § 35:24, fn. 8.

> *Res judicata* applies, except in special cases, not only to points upon which court was actually required by parties to form opinion and pronounce judgment, but to every point which properly belonged to subject of litigation and which parties, exercising reasonable diligence, might have brought forward at that time.

14A Wash. Prac., Civil Procedure § 35:24, fn. 8, K. Tegland (2d ed. 2014) (citation omitted).

The purposes served by *res judicata* are also served by collateral estoppel. While this is true, collateral estoppel serves the same purposes from a different approach. Collateral estoppel will apply even where a different legal claim or cause of action is filed in the second suit.

> The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a relitigation of a particular issue in a later proceeding involving the same parties, even though the later proceeding involves a different claim or cause of action.

14A Wash. Prac., Civil Procedure § 35:32, K. Tegland (2d ed. 2014). Because slight permutations apply to differing legal claims, focusing the analysis at bar on cases evaluating tort claims is paramount. 14A Wash. Prac., § 35:26 (collection of examples). Hyde's contrary arguments inconsistent with well-established Washington law and policy should be

rejected by this Court.

B. *De Novo* is the Standard of Review.

Whether res judicata or collateral estoppel applies is reviewed by this Court on appeal as a question of law *de novo*. *Ensley v. Pitcher,* 152 Wn. App. 891, 899, 222 P.3d 99 (2009). *Accord, Christensen v. Grant Cnty. Hosp. Dist. No. 1,* 152 Wn.2d 299, 305, 96 P.3d 957, 960 (2004) (whether collateral estoppel applies to bar relitigation of an issue is reviewed *de novo*), *citing, State v. Vasquez,* 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), *aff'd,* 148 Wn.2d 303, 59 P.3d 648 (2002); *State v. Bryant,* 100 Wn. App. 232, 236–37, 237 n. 9, 996 P.2d 646 (2000), *rev'd on other grounds,* 146 Wn.2d 90, 42 P.3d 1278 (2002).

This Court reviews summary judgment orders *de novo. Moore v. Hagge, et al.,* 158 Wn. App. 137, 147, 241 P.3d 787 (2010), *rev. den'd,* 170 Wn.2d 1028 (2011). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving defendant may do so by showing that there is an absence of evidence to support the non-moving party's case. *Id.* at 225, n. 1 (citation omitted). If the non-moving party fails to respond with a showing sufficient to establish the existence of an element essential to that party's case, then the trial court should grant the motion to dismiss.

Id. at 225. The substantive issues presented by Hyde provide pure questions of law. App. Br. at 5-24.

C. The Claim-Splitting Prohibition Bars Hyde's Second Lawsuit.

Splitting causes of action is forbidden in Washington. *Sprague v. Adams,* 139 Wash 510, 515, 247 P. 960 (1926). The claim splitting doctrine is a variation of res judicata. This has been the rule of law for almost a hundred years. *Id.* Hyde's unabashed tactic of filing a second lawsuit derived from the same set of facts after losing on appeal, and failing to dismiss after being put on notice of the preclusion rules, requires affirming the second summary judgment order and the order awarding fees and sanctions. CR 11.

> A claimant may not split a single cause of action or claim. Such a practice would lead to duplicitous suits and force a defendant to incur the cost and effort of defending multiple suits. An injured party is limited to one lawsuit for property and/or personal injury damage resulting from a single tort alleged against the wrongdoer.

Landry v. Luscher, 95 Wn. App. 779, 782, 976 P.2d 1274, 1277 (1999), *citing Sprague,* 139 Wash. at 515; *Hardware Dealers v. Farmer's Ins.,* 4 Wn. App. 49, 50-51, 480 P.2d 226. Washington courts do not allow a plaintiff to bring multiple lawsuits as the result of a single occurrence -- a practice known as claim-splitting – a variation on res judicata. *Id.* When a single occurrence gives rise to multiple claims against a defendant, the plaintiff is required to assert all such claims in a single lawsuit. 14 Wash.

Prac., Civil Procedure § 12:4 (2d ed. 2013).

In *Landry,* plaintiffs filed a second lawsuit stemming from a car accident after obtaining a favorable judgment in small claims court based on the same accident. Plaintiffs argued that because the first complaint was based on property damage, and the second complaint filed in superior court was based on personal injury, the claim splitting doctrine was inapplicable. They also argued Ms. Landry was only a party to the second suit, and defendants waived assertion of the defense. These arguments were soundly rejected. *Landry* at 782-85. As in the case at bar, Landry's second suit was not pending at the same time the first lawsuit was litigated to judgment. *Id* at 786.

The holding in *Landry* "...is in accord with the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim." *Id* at 782, *citing Pretz v. Lamont,* 6 Kan.App.2d 31, 34-35, 626 P.2d 806, 24 A.L.R.4th 638 (1981) (*quoting* 46 Am.Jur.2d *Judgments* § 405, at 573-74) (concluding that the prohibition against claim splitting fulfills the four necessary conditions of *res judicata*); *et. al.*

This Court has made clear that this rule applies to efforts to bring a second suit based on allegedly later discovered evidence or against a different party with a slightly different legal theory. In Washington,

"[f]iling two separate lawsuits based on the same event—claim splitting—is precluded[.]" *Ensley v. Pitcher,* 152 Wn. App. 891, 899 (second negligence suit against bartender for over serving a drunk driver precluded by earlier negligence suit against the employer (providing summary of Washington state policy and case law analyzing res judicata and summary judgment as a final judgment on the merits)). *Sprague, Landry and Ensley* are the prominent Washington cases discussing claim splitting and res judicata in the context of tort based claims.

Hyde's unsupported arguments asserting that the negligent misrepresentation claim has a different statute of limitations -- merely because Hyde received deposition testimony in June 2011 regarding hiring and training requirements -- does not change the result on appeal. App. Br. 1, 3-4, 9, *passim.* A negligence claim has a three year statute of limitations. CP 191 (Opinion at 5). As with the first lawsuit, there is no reason grounded in law for any court to apply a discovery rule where there is no reason Hyde could not have inquired about a legal basis for this claim within three years of the June 2009 Taser training. CP 192 (Opinion at 7). As discussed below, because res judicata bars Hyde's second lawsuit, the summary judgment order should be affirmed.

D. *Res Judicata* Bars Hyde's Second Suit.

Hyde overlooks this Court's controlling authority admonishing that

because he had the opportunity to litigate the negligent misrepresentation claim in the first lawsuit, he is barred from bringing a second lawsuit merely because he lost on the claims actually pled[6] (App. Br. 7-22). In Hyde's first lawsuit, between the June 30, 2011 police chief's deposition and the September 2012 Motion for Summary Judgment, Hyde had the opportunity to, but never filed a motion to amend the Complaint to add any additional claims or causes of action, such as a negligent misrepresentation claim. CP 86; 192-193. His failure to do so does not afford him a second bite at the apple.

This Court's analysis of *res judicata* is premised on well settled law.

> 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'...

Ensley v. Pitcher, 152 Wn. App. 891, 899, *citing Marino Prop. Co. v. Port Comm'rs,* 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (*quoting Walsh v. Wolff,* 32 Wn.2d 285, 287, 201 P.2d 215 (1949)).

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[6] Hyde's opening brief fails to cite to this Court's 2009 decision in *Ensley,* which is dispositive of the issues at bar. Hyde also fails to cite this Court's 2012 *Karlberg* case, evaluating claim splitting and res judicata in an action to quiet title setting. Though Hyde cites to this Court's 2013 *Berschauer* decision (App. Br. 5), he largely overlooks the res judicata analysis and holding. *See*, discussion below.

> *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 the 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*.

Ensley, at 899, *citing Kuhlman v. Thomas,* 78 Wn. App. 115, 120, 897 P.2d 365 (1995); *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.,* 137 Wn. App. 296, 302, 153 P.3d 211 (2007).

A summary judgment order in a prior suit is a final judgment on the merits providing the threshold requirement for applying res judicata. This rule of law applies on all fours in Hyde's case.

> The threshold requirement of *res judicata* is a valid and final judgment on the merits in a prior suit. ... 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*.

Ensley v. Pitcher, 152 Wn. App. 891, 899, citing *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 865, 93 P.3d 108 (2004); *DeYoung v. Cenex Ltd.,* 100 Wn. App. 885, 892, 1 P.3d 587 (2000).

The four-prong formula for application of *res judicata* applies to bar Hyde's second lawsuit against the City here.

> 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."

Ensley v. Pitcher, 152 Wn. App. 891, 902, *quoting Landry* at 783. All four prongs militate against allowing Hyde's second suit to proceed. Because dismissal was mandatory, this Court should expeditiously affirm.

1. The Same Persons and Parties are Involved

In the first and second suits, Steve Hyde and Sandra Brooke, husband and wife, sued the City of Lake Stevens. CP 178; 203. Hyde concedes this issue. App. Br. at 7.

2. The Same Cause of Action Analysis Applies in the City's Favor.

It makes no difference that Hyde did not plead negligent misrepresentation in the first suit. "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." *Ensley* at 899 (emphasis added). **Because Hyde could have pled or amended his complaint to add negligent misrepresentation,** *res judicata* applies to bar this suit.

The flexible analysis of "same cause of action" mandates dismissal of Hyde's second complaint.

> 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.

Ensley at 903, *citing Pederson v. Potter,* 103 Wn. App. 62, 72, 11 P.3d 833 (2000); *Landry,* 95 Wn. App. at 784.

Contrary to Hyde's apparent assertions (App. Br. at 17), these four factors are analytical tools; this Court has made clear that "**it is not necessary that all four factors be present to bar the claim.**" *Id., citing Kuhlman,* 78 Wn. App. at 122, ("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) (bold added). Thus, "[a]ll issues which might have been raised and determined are precluded."[7]

Hyde's factually and legally unsupported arguments notwithstanding (App. Br. at 17), application of the same cause of action analytical factors overwhelmingly favors the City's position and the trial court's decision.

a. Lake Stevens' rights would be destroyed.

In the first suit, the City obtained a summary judgment order

[7] *Feminist Women's Health Ctr. v. Codispoti,* 63 F.3d 863, 868 (9th Cir.1995) (applying Washington law); *see Loveridge v. Fred Meyer, Inc.,* 125 Wn.2d 759, 887 P.2d 898, 900 (Wash.1995) (en banc).

dismissing the negligence claim on *several alternative legal grounds*. CP 182-185. Allowing a second suit to proceed based on negligent misrepresentation would destroy the City's right to enforce this final judgment and the additional defenses that equally apply to a negligent misrepresentation claim (no right to sue employer/no spousal loss of consortium claim).

b. Substantially the same evidence would be presented.

The evidence describing the June 11, 2009 Taser training and all statements made before and during that training, during the same 2-day window of time, would be part and parcel of both lawsuits. No new evidence is being presented in the second suit that was not already discovered and argued in the first suit, including the deposition testimony of the training officer and the police chief. *See discussion below.*

c. Both lawsuits involve allegations of infringement of the same rights during Taser training.

Both lawsuits' complaints about the manner of the training and statements made before and during the training are grounded in negligence. CP 178-180, 203-205. Neither suit can be tried independent of the same core nucleus of operative facts alleging the same basic violation of rights. In both suits, Hyde seeks money damages from injuries he alleges stem from his June 11, 2009 Taser training application,

to include the manner the training was conducted and the statements made to him by his training officer before the practical training application. Both suits seek to recover medical costs and expenses incurred to date stemming from the Taser training application. *Id.*

d. Both lawsuits arise out of the same transactional nucleus of facts.

Both lawsuits arise out of the same series of connected circumstances and chain of events, on the same dates, surrounding the training application and statements made to Hyde by the same training officer before and during the June 11, 2009 Taser training. The same basic connected operative facts are raised in both lawsuits. CP 178-180, 203-205.

Res judicata does not merely prohibit a party from raising identical legal theories; rather, parties may not raise **new legal theories** based upon the same transactional nucleus of facts that could have been raised in the original action. *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.* 118 Wn. App. 617, 72 P.3d 788, 796 (2003) (collection of cases and noting that the "Washington Supreme Court has applied [the transactional view] for decades"). This analysis includes a series of connected transactions. *Id*; *see also, Restatement (Second) of Judgments* § 24 cmt. a-c.

> In general, the expression ["transaction"] connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes....

Sound Built Homes, Inc., 630-31 (citation omitted).[8] As a matter of well established law, in Hyde's case, there is no avoiding that both suits arise from the same transactional nucleus of facts.

3. The Same Subject Matter is Being Litigated.

In the first and second suits, Hyde is raising the subject matter of the circumstances surrounding, manner of conducting, and statements

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[8] "Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." (internal quotations omitted) *Adams v. State of California DSHS et al.*, 487 F.3d 684, 687 (9th Cir. 2007), *cert denied* 522 U.S. 1076 (2007), *citing Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3rd Cir. 1977). The claim-splitting rule "prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action." *Coleman v. B.G. Sulzle, Inc.,* 402 F.Supp.2d 403, 419 (N.D.N.Y. 2005). The *Adams* case is directly on point with the case at bar. In *Adams*, the plaintiff had a case pending in district court in which she filed a motion to amend her complaint. *Adams*, 487 F.3d at 686. The plaintiff filed her motion well past the deadline to do so. *Id.* Plaintiff's motion was ultimately denied. *Id.* Plaintiff then tried to get a second bite at the apple, and filed the complaint in a second action – setting forth the four additional claims she had sought to add by her previously denied motion for leave to amend her complaint in the first case. *Id.* The Ninth Circuit affirmed the District Court's ruling that the newly filed complaint was duplicative of the complaint she had previously filed in the other case, and dismissed the new complaint with prejudice. *Id.* Similarly, in the case at bar, Hyde and Brooks failed to timely file a motion to amend their complaint to add a negligent misrepresentation claim. The Ninth Circuit stated as follows:

> The district court acted within its discretion in dismissing Adams' duplicative complaint with prejudice and preventing her from fragmenting a single cause of action and litigating piecemeal the issues which could have been resolved in one action.

Id. at 693. (internal quotations, citation omitted.) The facts in the case at bar warrant the same analysis and result.

made by the same training officer before and during the same June 11, 2009 Taser training. Hyde's contrary arguments are circular and unsupported. App. Br. at 7-10.

4. The Same Quality of Persons is Involved.

In both suits, the quality of the persons suing and being sued is identical (identity of interest). Hyde concedes this issue. App. Br. at 7.

By citing and heavily relying on the *Hayes* case, Hyde strays from negligence personal injury tort law and provides an inapposite example of res judicata analysis from commercial real estate law. App. Br. at 6-8, 13, 16-17. *Hayes v. City of Seattle,* 131 Wn.2d 706, 934 P.2d 1179 (1979) *opinion corrected*, 943 P.2d 265 (1997). In *Hayes,* the court did not evaluate whether a plaintiff could serially bring two separate lawsuits sounding in tort arising from the same training event that occurred on the same date, and an alleged wrong committed by the same employee; but instead, the court evaluated a writ action seeking judicial review followed by a civil lawsuit seeking money damages. *Id.,* at 710-711.

In *Hayes,* the Plaintiff initiated a writ action against the City for the City Council's unconstitutional size restrictions on the property under development and won. The Plaintiff subsequently filed a lawsuit for damages against the City. Under established law, the writ action was *required* to be initiated separately from the damages action; this

procedural anomaly combined with the differing forums, operative statutory schemes for each action, nature of the claims and parties, and evidence for proving each action, drove the result in *Hayes*. *Id.*, at 714.

The court properly analyzed the four flexible factors[9] for analyzing same causes of action under res judicata:

> After reviewing these factors, we are convinced that Hayes's action for judicial review and his subsequent action for damages are separate. In the action for judicial review, Hayes essentially sought to overturn a decision of the Seattle City Council. In order to succeed in that lawsuit, Hayes needed only to establish that the Seattle City Council's action met one of the five standards listed in the statutory writ of certiorari. RCW 7.16.120. The evidence he needed to maintain that action is far different than the type of evidence that he needed to muster to establish that he was entitled to an award of damages. Indeed, we have previously held that writ actions cannot be used to decide damages issues and must be brought separately. *Lutheran Day Care v. Snohomish County,* 119 Wn.2d 91, 114, 829 P.2d 746 (1992), *cert. denied,* 506 U.S. 1079, 113 S.Ct. 1044, 122 L.Ed.2d 353 (1993). Finally, nothing in the subsequent action for damages destroyed or impaired any right established in the action for judicial review.

Hayes, 131 Wn.2d 706, 713-14 (internal footnotes omitted). *Hayes* is factually and legally distinguishable and does not in any way further

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[9] In deciding whether two causes of action are the same we are to consider the following four factors:

> (1) [W]hether 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 two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Hayes, at 713, *citing, Rains v. State,* 100 Wn.2d 660, 664, et al.

Hyde's arguments.

Hyde's emphasis on the *Mellor* decision, likewise affords Hyde no benefits whatsoever. App. Br. at 7. *Mellor v. Chaimberlin,* 100 Wn.2d 643, 673 P. 2d 610 (1983). In *Mellor*, one lawsuit was brought for misrepresentation of a sale of property where in **1968** the real estate transaction occurred. The second lawsuit was filed for a breach of covenant where in **1976**, after the real estate contract was paid, and the warranty deed was transferred and included three covenants, the alleged breach of the covenant occurred. *Mellor,* at 644-645. The court determined as follows: "Although the general test as to the applicability of res judicata is sufficient in this case, we maintain our view that res judicata principles are less strictly adhered to in the case of covenants of title." *Mellor*, at 646.

Hyde's arguments overlook recent, applicable, well settled precedent from this court. App. Br. at 7-20. *Berschauer Phillips Const. Co. v. Mutual of Enumclaw Ins. Co.,* 175 Wn. App. 222, 308 P.3d 681 (2013). This Court held that the Plaintiff construction company could not file a second lawsuit against the insurer (MOE) alleging a new legal claim when it had previously obtained judgment against an insured of MOE. *Berschauner*, at 222-232. The case involved claims of negligence amongst other contract based claims. *Id.* "BP could have and should have

raised its direct action claim against MOE in its previous lawsuit, which involved the identical subject matter and claim, included the same parties acting in the same capacities, and resulted in a final judgment in favor of MOE." *Id* at 224-225.[10] The court applied the familiar four-part flexible formula discussed above for determining whether the same causes of action are present in each suit such that res judicata applies. *Id.* at 231, *citing Kuhlman*, 78 Wn. App. 115, 122; *Rains v. State,* 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

Contrary to Hyde's assertions (App. Br. at 17), the *Berschauer* Court cited the following authority to explain that not all four prongs of the same cause of action analysis need to be met in order to apply the claim splitting doctrine as a principal of res judicata:

> It is not necessary that all four be present to bar the claim. *Id.* ("there is no specific test for determining identity of causes of action"); *Rains*, 100 Wn.2d at 663–64, 674 P.2d 165; *Hadley v. Cowan*, 60 Wn. App. 433, 441, 804 P.2d 1271 (1991) ("In determining whether there is identity of causes of action, res judicata, unlike collateral estoppel, applies to what *might* or should have been litigated as well as what was litigated. In Washington a number of tests for the identity of causes of action have been used...'[I]dentity of causes of action cannot be determined precisely by mechanistic application of a simple test.'") (internal quotation marks omitted) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979)); *see also*

[10] *See, Schoeman v. New York Life Ins. Co.,* 106 Wn.2d 855, 859, 726 P.2d 1 (1986) ("If a matter has been litigated or there has been an opportunity to litigate on the matter in a former action, the party-plaintiff should not be permitted to relitigate that issue.").

> *Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 816 (1985) (citing *Rains*, 100 Wn.2d at 664, 674 P.2d 165).

Berschauer, f.n. 18.

This court further explained: "Res judicata applies both to points upon which the previous court was required to pronounce judgment, and to every point 'which the parties, exercising reasonable diligence, might have brought forward at the time.'" *Id* at 683-684, *citing, Sanwick v. Puget Sound Title Ins. Co.,* 70 Wn.2d 438, 441, 423 P.2d 624 (1967) (internal quotation marks omitted) (quoting *Currier v. Perry,* 181 Wash. 565, 569, 44 P.2d 184 (1935)).[11]

Here, Hyde is raising the same transactional nucleus of facts to try to address the same wrong as alleged in the first lawsuit, allegedly committed by the same employee on the same date, but under a new legal theory that could have been raised in the first suit. Hyde's second complaint was properly dismissed. As set forth above, belatedly Hyde attempted to argue a negligent misrepresentation claim on a motion for

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[11] Though in a property law context and not tort, a good example of the application of res judicata is found in *Karlberg v. Otten*, 167 Wn. App. 522, 535, 280 P. 3d 1123 (2012). In *Karlberg*, this Court rejected arguments similar to Hyde's arguments that res judicata did not apply because new legal theories were raised in the second lawsuit. The second action to quiet title arising from the same facts on new theories was barred by the prior summary judgment order in the first lawsuit. *Id.* This Court explained that res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. A party is barred from filing a second suit to add new theories that were denied on a motion to amend. *Karlberg* at 535.

reconsideration after his first complaint was dismissed on summary judgment. He was refused because he had never filed a motion to amend. Hyde simply desires a second bite at the apple. On *de novo* review, the second summary judgment order dismissing Hyde's second complaint, that asserted a legal claim against the City that should have been raised in the first lawsuit, should be affirmed by this Court as a matter of well established precedent.

E. Claim Preclusion and Issue Preclusion Bar Hyde's Second Suit Where the Prior Summary Judgment Order Resolved the Legal Issues Between the Parties on Multiple Grounds That Equally Apply to the Newly Pled Negligent Misrepresentation Claim.

Under both res judicata and collateral estoppel, the trial court's original Summary Judgment Order controls the litigation issues between Hyde and the City, and bars this second lawsuit. Hyde erroneously argues he is entitled to a belated second opportunity to litigate the negligent misrepresentation claim even though the 2012 Summary Judgment Order is a valid final judgment on the merits. In addition to the ruling on the insufficient process and statute of limitations issues, this 2012 judgment has determined that Hyde does not have a statutory right to sue his employer, and Hyde's spouse has no loss of consortium claim against her husband's employer. CP 87; 184-185.

Hyde had a full and fair opportunity to present facts and law

opposing these issues, and these defenses are of substantial import to the City. Throughout his briefing, on this issue Hyde erroneously represents to the court: "In the case at bar only one issue was litigated to a conclusion in a prior lawsuit – the statute of limitations applicable to Mr. Hyde's negligent tasing cause of action." App. Br. at 23; see also additional inaccurate representations: App. Br. at 3 (issue related to assignment of error E (same)); 9 ("the only issue decided in Hyde's prior lawsuit was that the statute of limitations had run..."); and 22 (argument heading B (same), *passim*.

> Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, Washington Practice, *Civil Procedure* § 35.32, at 475 (1st ed.2003) (hereafter Tegland, *Civil Procedure*). It is distinguished from claim preclusion "in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of *issues* between the parties, even though a different claim or cause of action is asserted."

Christensen v. Grant Cnty. Hosp. Dist. No. 1, 152 Wn.2d 299, 306.[12]

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[12] *Quoting, Rains v. State,* 100 Wn.2d 660, 665 (emphasis added) (quoting *Seattle–First Nat'l Bank v. Kawachi,* 91 Wn.2d 223, 225–26, 588 P.2d 725 (1978)); *Kyreacos v. Smith,* 89 Wn.2d 425, 427, 572 P.2d 723 (1977); *see Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash. L. Rev. 805, 805, 813–14, 829 (1985) (hereafter Trautman, *Claim and Issue Preclusion*); Tegland, *Civil Procedure* § 35.32, at 475. Claim preclusion, also called res judicata, "is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation." *Christensen* at 306, *quoting, Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n,* 72 Wn.2d 887, 894, 435 P.2d 654 (1967).

> For collateral estoppel to apply, the party seeking application of the doctrine must establish that (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.

Id., at 307, *citing, Reninge v. State DOC,* 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *State v. Williams,* 132 Wn.2d 248, 254, 937 P.2d 1052 (1997); *Claim and Issue Preclusion,* 60 Wash. L. Rev. at 831. These factors apply to provide collateral estoppel here.

In Hyde's first lawsuit, the court's Summary Judgment Order provided several alternative grounds for dismissing the negligence lawsuit. These grounds are equally applicable here. CP 87; 182-185. The City should not, as a matter of well-established law, be required to relitigate these defenses, to include the insufficient process/statute of limitations issues, Hyde's lack of a right to sue as a non-commissioned police officer (LEOFF statute), and Hyde's spouse's lack of a right to bring a loss of consortium claim in a second lawsuit (LEOFF statute).

Claim preclusion and issue preclusion bar Hyde's second suit. The summary judgment order is a final judgment on the merits. It is axiomatic that the City will lose the rights it established to obtain the 2012 summary judgment against Hyde in the first suit if the second suit is allowed to go

forward. The same defenses apply to the negligent misrepresentation claim. The same core operative facts from the same date are involved on both suits. No new evidence is being presented that was not already discovered and argued in the first suit. The parties are identical. And Hyde continues to seek money damages from injuries he alleges stem from his June 11, 2009 Taser training application. If the second lawsuit were allowed to proceed, the City will be forced to relitigate the issues already resolved between the parties in the original summary judgment order. As a matter of well-established law, the summary judgment order must be affirmed.

F. Hyde's Arguments Based on Transactional Law and Not Tort Law Should be Summarily Rejected.

The additional cases cited by Hyde on appeal and only brought to the court's attention on reconsideration (CP 57-62; 66), are contextually inapposite, set in commercial transactions and not personal injury tort law, and do not change the result in this case (App. Br. 6-8, 16-17, 21-22): *Seattle-First Nat. Bank v. Kawachi,* 91 Wn.2d 223, 588 P.2d 725 (1978); *Fluke Capital & Management Services Co. v. Richmond,* 106 Wn.2d 614, 724 P.2d 356 (1986); *Hayes v. City of Seattle,* 131 Wn.2d 706, 934 P.2d 1179 (1979) *opinion corrected*, 943 P.2d 265 (Wash. 1997).[13]

In the *Seattle-First* case, the lawsuit claims arose from a

[13] *See discussion of Hayes above.*

complicated series of legal instruments with different dates. Because the instruments previously litigated were issued in completely different years – and in fact over five years apart – the claim-splitting prohibition under res judicata analysis did not apply.

> This action was brought for an accounting under two instruments executed by the respondent George Y. Kawachi in 1961 and 1962. Upon motion of the respondent, the action was dismissed, the court finding that the claims were barred by the judgment rendered in King County Superior Court Cause No. 729191. In that action the appellant, as executor, had pursued an action instituted by Shizu Kato against the respondents and one Wada for the sum of $100,000, which she claimed her husband had placed in the hands of Mr. Kawachi and Wada, in 1967, for safekeeping. The jury returned a verdict against the defendant Wada, who had by deposition admitted receipt of the sum of $89,000, and who had then defaulted and disappeared. The verdict exonerated the respondents of liability in that transaction

Seattle-First Nat. Bank, 91 Wn.2d 223, 224. After analyzing several different fact patterns, the court stated that the key to the court's res judicata analysis was as follows:

> In each of these cases, those claims which were found to be barred were matters which were included in the controversy adjudicated in the prior action or proceeding. None of them held that independent claims, arising out of separate transactions, are barred because they could have been asserted in an earlier action.

Id. at 227.

In the *Fluke Capital* case, the lawsuit claims arose out of complex string of commercial real estate transactions transpiring over more than a decade

to include defaults, judicial and non-judicial foreclosures, an action on a note, related financial instruments with different issue dates and operative effects, and venue changes during the complex litigation. *Fluke Capital & Mgmt. Servs. Co.*, 106 Wn.2d 614, 615-18. (internal footnotes omitted). Following foreclosure actions, the court allowed a new suretyship theory based on a new financial instrument to be litigated in a second lawsuit.[14]

The Court of Appeals reversed based on collateral estoppel grounds (not res judicata) reasoning that *denials* of a summary judgment motion do not create conclusive final judgments such that the issue has previously been litigated:

> Here, contrary to Richmond's assertions, no conclusive decision was rendered on Fluke's initial suretyship cross claim. The trial court heard two pretrial motions on the claim; the court denied Fluke's motion for summary judgment and denied Richmond's motion for dismissal on summary judgment. Neither ruling can be characterized as a decision on the merits of Fluke's claim.

Id. at 618. Moreover, the "could have and should have" argument was inapplicable because the litigant was only arguing a theory of collateral estoppel and not res judicata. *Id.* at 620.[15]

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[14] A detailed statement of these complex facts are found at *Fluke*, 615-18.

[15] Addressing res judicata in passing, the court highlighted the following that applies conclusively to Hyde's case:

> Under the doctrine of res judicata, or claim preclusion, a claim decided in a prior action cannot be raised in a subsequent action. Restatement, *supra,* § 17. A claim includes "**all rights of the [claimant] to remedies against the defendant with respect to all or any part of the**

Hyde's effort to bootstrap inapposite commercial transaction fact patterns and legal analysis into the current personal injury tort action, without at all distinguishing the controlling law previously briefed by the City, demonstrates the spurious nature of Plaintiffs' current appeal.

1. There is No Judicial Estoppel Impediment Here.

Hyde's argument of judicial estoppel is at best a red herring. App. Br. at 11-14.

> Broadly stated, the rule of preclusion of inconsistent positions prevents a person from making assertions of fact inconsistent with a position that person previously took in litigation. The rule applies only to inconsistent assertions of fact; it is not applicable to inconsistent positions taken on points of law.

14A Wash. Prac., Civil Procedure § 35:57 (2d ed. 2014). This rule of law is most commonly applied to proceedings where a pending civil suit is not disclosed in a bankruptcy proceeding. *Id.* "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147, 148

> **transaction, or series of connected transactions, out of which the action arose", without regard to whether the issues actually were raised or litigated.** Restatement, *supra,* § 24(1), at 196. *See Sanwick v. Puget Sound Title Ins. Co.,* 70 Wn.2d 438, 423 P.2d 624 (1967). *See also* Trautman, 60 Wash. L. Rev. at 813–19.

Fluke, at 620 (emph. added).

(2005).

In the case at bar, the City has consistently and correctly highlighted that the negligent misrepresentation legal theory was *not actually pled* as a legal claim in an amended complaint, so it could not be pursued in the first lawsuit. Nonetheless, using the flexible principles of analysis for res judicata for determining the "same cause of action", the City has also consistently and correctly argued that (a) allowing the second lawsuit to go forward would eviscerate the City's rights to enforce the first summary judgment order to include the various defenses already adjudicated, (b) substantially the same evidence would be presented in the second suit, (c) violation of the same rights are being alleged, and (d) the claim was a part of a series of connected transactions and common grouping of operational facts; overall, as a part of the res judicata legal principles of merger and bar, the negligent misrepresentation theory is a part of the same cause of action that could and should have been pled if in fact Hyde wished to recover from that theory. Judicial estoppel has no applicability here.

2. The Collateral Estoppel Doctrine Would Be Eviscerated by Hyde's Unsupported Legal Analysis.

Hyde argues that because this Court did not rule on any of the summary judgment issues except the sufficiency of process and statute of

limitations issues, the trial court's summary judgment order no longer has legal affect. App. Br at 23-24, *passim*. The repeated bold assertion of this argument, while ignoring contrary controlling authority, belies its foundation. *See,* e.g., 14A Wash. Prac., Civil Procedure § 35:23, K. Tegland (2d ed 2014); *Ensley* at 899; *Karlberg* at 535. The first summary judgment order remains in full force and effect precisely because it was not reversed by the appellate court. Hyde's unsupported postulations notwithstanding, there has been no court action at the trial court or on appeal that adversely impacts the trial court's final and binding summary judgment order.

G. The Court Should Affirm the Trial Court's Reasonable Exercise of Discretion to Award CR 11 Attorney Fees and Sanctions.

1. The Sanctions are Supported by the Court's Findings.

"A trial court's decision to grant or deny attorney fees will not be disturbed in the absence of an abuse of discretion. Discretion may be abused, however, if based on untenable grounds." *Deja Vu-Everett-Fed. Way, Inc. v. City Of Fed. Way,* 96 Wn. App. 255, 263-64, 979 P.2d 464, 468 (1999), *citing, Layne v. Hyde,* 54 Wn. App. 125, 135, 773 P.2d 83 (1989). After "considering the entire record and resolving all doubts in favor of [the non-moving party]," where the action "is not supported by any rational argument based on the law or the facts," attorney fees are

properly ordered. *Id.* (reversing order denying attorney fees based on an independent review of the record and remanding for imposition of fees) Blatant violations of res judicata and collateral estoppel warrant imposition of attorney fees under CR 11 and RCW 4.84.185. *Id.*

Washington courts likewise review an award of CR 11 sanctions for abuse of discretion. *Biggs v. Vail,* 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. *State v. Neal,* 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).[16]

CR 11(a) provides in relevant part:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law...

CR 11.

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[16] *See also, N. Coast Elec. Co. v. Selig,* 136 Wn. App. 636, 642-43, 151 P.3d 211, 215 (2007):

When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable. Whether a party is entitled to attorney fees is an issue of law, which is reviewed *de novo*. Whether the amount of fees awarded was reasonable is reviewed for an abuse of discretion. A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion.

In Hyde's case, the trial court's order awarding fees and monetary sanctions found that the lawsuit was frivolous and harassing, and concluded: "This second lawsuit was brought in blatant violation of the claim splitting prohibition, res judicata, collateral estoppel, was frivolous, and has harassed the City and caused it to incur unnecessary legal bills and expenses." Before awarding fees and sanctions, the court provided Hyde with an additional opportunity to brief the issue. CP 70-71. The Order was based on the pleadings and declarations of record. CP 1-268, to include the affidavit in support of fees. CP 28-50.

Judge Downes is the same judge who considered the record in support of the motion for pre-assignment to the original trial court (Judge Appel). CP 72-81; 103-117; 226-268. He then kept the file and decided the summary judgment order currently at issue. CP 69-70. Hyde pursued his second case even though the City thoroughly briefed Division One precedent on preclusion rules in its motion for pre-assignment and reply brief. CP 228-232; 237-257. CR 11 sanctions properly flow from a trial court's findings that "either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose." *Biggs*, at 201. The trial court's conclusions, fees and sanctions award should be affirmed as a resasonable exercise of discretion.

As emphasized repeatedly, the claim splitting prohibition, res judicata, and collateral estoppel, promote judicial economy and serve to prevent inconvenience or harassment of parties; such also implicate principles of repose and concerns about the resources entailed in repetitive litigation; these rules provide for finality in adjudications and respect for the judicial process. *Id.* Tegland, *Civil Procedure* § 35.21, at 446. Trautman, *Claim and Issue Preclusion,* 60 Wash. L. Rev., at 806; *Christensen* at 306-307. This clearly established policy was blatantly violated by Hyde.

After being thrice advised via defense counsel's letters and the City's Answer that the second lawsuit violates the preclusion rules -- with case citations to applicable law -- and after receiving the City's briefing on controlling legal and Treatise provisions (to include the *Ensley* rule that a motion for summary judgment order is a final judgment providing a necessary threshold for res judicata (CP 209-212; 259-261)), Hyde's counsel ignored the rules of preclusion and continued to litigate -- completely ignoring well settled law. As outlined above, Hyde's second lawsuit is not supported by any rational argument based on the law or facts; in fact, Hyde ignored and disregarded this Court's clear contrary authority in order to make the arguments below, and he continues to do so on appeal. Such is undoubtedly considered a blatant CR 11 violation

deserving of a sanction and award of reasonable attorney fees as described herein.

On review of an order awarding CR 11 sanctions, Washington courts explain, "we must keep in mind that '[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the justice system.'" *Biggs,* 124 Wn.2d at 197, quoting *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Sanctions may be imposed under this rule if a complaint lacks a factual or legal basis and the attorney or party who signed it failed to conduct a reasonable inquiry into the factual or legal basis of the action. *Bryant,* 119 Wn.2d at 220. *See also,* 9 Wash. Prac., Civil Procedure Forms § 11.1 (3d ed.); 3 Wash. Prac., Rules Practice CR 11 (7th ed.) (collection of cases and analysis for awarding CR 11 fees and sanctions).

Appellate Courts employ an objective standard to determine whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified at the time the pleading was submitted. *Id.* A frivolous action is one that cannot be supported by any rational argument on the law or the facts. *Ahmad v. Town of Springdale,* 178 Wn. App. 333, 344, 314 P.3d 729 *(2013) (rev. gr., 180 Wn.2d 1013 (2014)), citing, Goldmark v. McKenna,* 172 Wn.2d 568, 582, 259 P.3d 1095 (2011) .

2. The Sanctions are Supported by Alternative Grounds.

The court can award CR 11 attorney fees for either (1) filing a frivolous lawsuit (without factual or legal basis and lack of reasonable inquiry), or (2) filing a lawsuit for an improper purpose. *See, e.g., Bryant*, 119 Wn.2d 210, 217. These are considered alternative violations, and either can result in an award of attorney fees. *Id; See also Harrington v. Pailthorp,* 67 Wn. App. 901, 912, 841 P.2d 1258 (1992). In this case, Hyde both filed a frivolous lawsuit and did so for an improper harassing purpose after being repeatedly advised by defense counsel of the controlling law. As a matter of well settled law, the Order awarding CR 11 attorney fees and sanctions should be affirmed on both alternative grounds as a reasonable exercise of discretion.

Alternatively, if the appellate court is unsatisfied with the trial court's findings, "instead of remanding a matter to the trial court for a factual finding, an appellate court may independently review evidence consisting of written documents and make the required findings." *Bryant, at* 222. In Hyde's case, defense counsel's correspondence and motion for pre-assignment briefing clearly apprised Hyde of the controlling case-law and Hyde nonetheless proceeded while ignoring established precedent. CP 103-117; 226-268. The trial court record squarely supports a finding of "lack of reasonable inquiry."

If the court were persuaded that the trial court's findings are insufficient, the court may also affirm on the alternative grounds that the lawsuit was frivolous under RCW 4.84.185. A trial court judgment may be affirmed by any basis supported by the record. *Clipse v. State of Washington, et. al.,* 61 Wn. App. 94, 98, 808 P.2d 777 (1991), *citing*, *Wendle v. Farrow,* 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (CR 11 sanctions affirmed on CR 26 grounds); *see also,* 15A Wash. Prac., Handbook Civil Procedure § 8.10 (2014-2015 ed.) (collection of cases and analysis supporting the court's discretion to impose sanctions for factually and legally baseless suits). RCW 4.84.185 provides an alternative basis for an award of attorney fees and costs when the action as a whole is found to be frivolous. *Bert Kuty Revocable Living Trust ex rel. Nakano v. Mullen*, 175 Wn. App. 292, 306 P.3d 994 (2013); *Deja vu-Everett-Fed. Way, at 203-04*. No formal findings regarding reasonable inquiry are called for under RCW 4.84.185. On multiple grounds, the trial court's reasonable exercise of discretion should be affirmed.

VI. CONCLUSION

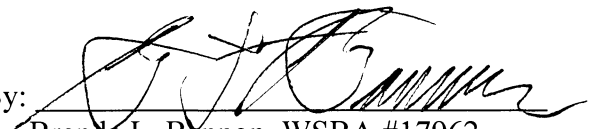
The City of Lake Stevens respectfully urges the court to affirm this second summary judgment order dismissing Hyde's second suit that is based on the same June 2009 Taser training incident that was previously dismissed on summary judgment and affirmed on appeal. The 2012

summary judgment order is a final judgment against Hyde, and the trial court's alternative grounds for dismissing the first negligence suit are equally applicable to Hyde's second suit based on a new negligent misrepresentation claim. The following legal doctrines require dismissal of this second lawsuit: the claim splitting prohibition; res judicata; and collateral estoppel.

Due to the immediate notice the City provided to opposing counsel regarding the preclusion rules barring this second frivolous suit that was repeatedly ignored, coupled with the harassing nature of bringing and continuing this second suit -- and perpetuating the same baseless arguments on appeal -- the Rule 11 attorney fee and monetary sanctions award should likewise be affirmed.

Respectfully submitted this 8th day of April, 2015.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: 

Brenda L. Bannon, WSBA #17962
Attorneys for Respondent City of Lake Stevens

DECLARATION OF SERVICE

I declare that on April 8, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

Attorneys for Plaintiffs

Carl A. Taylor Lopez
Lopez & Fantel
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Email: clopez@lopezfantel.com

☑ E-mail ☐ United States Mail ☑ Legal Messenger

DATED this 8th day of April, 2015.

Staci Black, Legal Assistant
sblack@kbmlawyers.com

APPENDIX A

APPENDIX A

RECEIVED

DEC 15 2010

LOPEZ & FANTEL

FILED

DEC 13 2010

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

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

Plaintiffs,

vs.

CITY OF LAKE STEVENS,

Defendant.

NO. 10 2 10516 4

COMPLAINT FOR INJURY

Plaintiffs state:

1. The above-entitled court has jurisdiction over the above-captioned cause.
2. Defendant City of Lake Stevens is an optional municipal non-charter code city located in Snohomish County. It is subject to the jurisdiction of the above-entitled court.
3. Defendant City of Lake Stevens has been properly served with administrative claims related to the accident that is the subject of this complaint. The applicable administrative claim waiting period has expired.
4. Steven W. Hyde and Sandra D. Brooke are husband and wife and were at the time of the incident that is the subject of this complaint.

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Seattle, WA 98122
206.322.5200

5. At all time relevant to the subject of this complaint Plaintiff Steven W. Hyde was employed by the City of Lake Stevens Police Department. LEOFF II applies to his employ.

6. On or about June 11, 2009 Plaintiff Steven W. Hyde in the course of his employ by Defendant was tased. As a result of said tasing Plaintiffs suffered injury.

7. The injury described above was directly and proximately caused by the negligence of Defendant City of Lake Stevens.

8. The tasing described above was an inherently and abnormally dangerous activity rendering Defendant liable for any resulting harm to Plaintiffs.

9. As a direct and proximate result of the negligence and inherently dangerous activity described above, Plaintiffs have suffered, and will in the future suffer, medical costs and expenses, financial loss, physical injury, pain and suffering, emotional distress, mental anguish, loss of consortium and other damages to be identified and proved at the time of trial.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. For general damages sustained to date and in the future;
2. For medical costs and expenses incurred to date and in the future;
3. For financial loss suffered to date and in the future;
4. For additional foreseeable costs and expenses incurred to date and in the future;
5. For costs and disbursements herein to be taxed; and
6. For such other and further relief as the court may deem appropriate.

LOPEZ & FANTEL
1510 14th Ave
Seattle, WA 98122
206.322.5200

Dated this 2 day of November, 2010.

LOPEZ & FANTEL, INC., P.S.

CARL A. TAYLOR LOPEZ
WSBA No. 6215
Of Attorneys for Plaintiffs

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1510 14th Ave
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APPENDIX B

APPENDIX B

Judge's Civil Motion Calendar
Hearing Date: 9/20/12
Hearing Time: 9:30 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife, Plaintiffs, v. CITY OF LAKE STEVENS, Defendant.	NO. 10-2-10516-4 ~~[PROPOSED]~~ **ORDER GRANTING DEFENDANT CITY OF LAKE STEVENS' MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came on for hearing before the undersigned Court on Defendant City of Lake Stevens' Motion for Summary Judgment. The Court has reviewed the argument, briefing, declarations and exhibits submitted by the parties, including:

(1) Defendant City of Lake Stevens' Motion for Summary Judgment;

(2) Declaration of Officer Wayne Aukerman in Support of Defendant's Motion for Summary Judgment and Exhibits Thereto:

Exhibit A: Volunteer Warnings, Risks, Liability Release and Covenant Not to Sue Signed by Steven Hyde on June 10, 2009

Exhibit B: Volunteer Exposure Report filled out by Steven Hyde

Exhibit C: Steven Hyde's Taser Certification Test

Exhibit D: Employee Report of an Accident filled out by Steven Hyde on June 11, 2009

Exhibit E: Excerpts from Deposition of Wayne Aukerman taken on August 11, 2011;

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
[illegible]
SEATTLE, WASHINGTON [illegible]
PHONE: [illegible]
FAX: [illegible]

(3) Declaration of Brenda L. Bannon in Support of Defendant's Motion for Summary Judgment and Exhibits Thereto:

Exhibit A: Answer to Plaintiffs' Complaint for Injury

Exhibit B: Plaintiffs' First Set of [Requests for] Admission to Defendant and Responses Thereto

Exhibit C: Plaintiffs' First Set of Interrogatories and Requests for Production to Defendant and the City of Lake Stevens' Objections and Responses (excerpts) and Interrogatory No. 1 attachment

Exhibit D: Defendant's First Requests for Admissions to Plaintiff Steven W. Hyde and Responses Thereto (excerpts) and Exhibit F Thereto

Exhibit E: Defendant's Second Requests for Admissions to Plaintiff Steven W. Hyde and Responses Thereto and Exhibit H-H4 Thereto

Exhibit F: Complaint for Injury

Exhibit G: Excerpts from Deposition of Steven Hyde taken on June 28, 2012;

(4) Declaration of Rex Caldwell in Support of Defendant's Motion for Summary Judgment and Exhibits Thereto:

Exhibit A: Email from Rex Caldwell to Dan Lorentzen (August 26, 2009)

Exhibit B: Letter from Rex Caldwell to Chief Randy Celori (August 26, 2009);

(5) Declaration of Chief Randy Celori in Support of Defendant's Motion for Summary Judgment and Exhibits Thereto:

Exhibit A: Conditional Offer of Employment dated June 2, 2009 and Job Description

Exhibit B: WAC 139-05-200 and 139-05-210

Exhibit C: WAC 415-104-011

Exhibit D: 415-104-225

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ATTORNEYS AT LAW
[illegible]
SEATTLE, WASHINGTON [illegible]
PHONE: [illegible]
FAX: [illegible]

Exhibit E: Excerpts from Deposition of Randy Celori taken on June 30, 2011

Exhibit F: Excerpt from Lake Stevens Police Department policy (Policy 1.3.4);

(6) Declaration of Commander Dan Lorentzen in Support of Defendant's Motion for Summary Judgment and Exhibits Thereto:

Exhibit A: Letter from Rex Caldwell to Chief Celori (August 26, 2009)

Exhibit B: Email from Rex Caldwell to Dan Lorentzen and Email from Dan Lorentzen to Rex Caldwell (August 26, 2009);

(7) Declaration of N. Scott in Support of Defendant's Motion for Summary Judgment;

(8) Plaintiffs' Response [Reply (sic)] in Opposition to Defendant's Motion for Summary Judgment;

(9) Declaration of Steve Hyde in Support of Plaintiffs' Reply (sic) in Opposition to Defendants' Motion for Summary Judgment, with supporting Exhibits;

(10) Declaration of Carl A. Taylor Lopez in Support of Plaintiffs' Reply (sic) in Opposition to Defendant's Motion for Summary Judgment, with supporting Exhibits;

(11) Proposed Order Denying Defendant's Motion for Summary Judgment;

(12) Defendant City of Lake Stevens' Reply in Support of Motion for Summary Judgment on the Merits;

(13) Declaration of Human Resources Director Steven Edin in Support of Defendant City of Lake Stevens' Motion for Summary Judgment;

(14) Supplemental Declaration of Brenda L. Bannon, with supporting Exhibit A;

(15) Evidentiary Objection to Inadmissible Evidence;

and now finds itself fully advised.

The Court hereby **GRANTS** Defendant City of Lake Stevens' Motion for Summary Judgment.

☒ Service of Process is Defective; the statute of limitations began to accrue on June 11, 2009;

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☒ Pursuant to Title 41.26 RCW, as of June 11, 2009Plaintiff Hyde was not a defined fully commissioned law enforcement officer; Hyde was not entitled to the right to sue under RCW 41.26.281;

☒ Plaintiff Brooke has no cognizable spousal consortium claim pursuant to RCW 41.26.281;

☒ The written Release signed by Hyde in June 2009 before the Taser training application bars this negligence suit;

☒ Hyde's negligence claim is barred by the doctrine of express assumption of risk. Plaintiffs' Complaint and all claims therein are hereby dismissed with prejudice as a matter of law.

DONE IN OPEN COURT this 17th day of ~~September~~ October, 2012.

Hon. George F. Appel
Snohomish County Superior Court Judge

Presented by:

KEATING BUCKLIN & MCCORMACK, INC. P.S.

Brenda L. Bannon, WSBA #17962
Amanda G. Butler, WSBA #40473
Of Attorneys for Defendant

Approved as to form;
Notice of presentation waived

LOPEZ & FANTEL

Carl A. Taylor Lopez, WSBA #6215
Of Attorneys for Plaintiffs

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
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FAX: (206) 223-9423

APPENDIX C

APPENDIX C

APR 07 2014

FILED

FEB 20 2014

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

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

Plaintiffs,

vs.

CITY OF LAKE STEVENS,

Defendant.

NO. 14 2 02556 2

COMPLAINT FOR INJURY

Plaintiffs state:

1. The above-entitled court has jurisdiction over the above-captioned cause.
2. Defendant City of Lake Stevens is an optional municipal non-charter code city located in Snohomish County. It is subject to the jurisdiction of the above-entitled court.
3. Defendant City of Lake Stevens has been properly served with administrative claims related to the accident that is the subject of this complaint. The applicable administrative claim waiting period has expired.
4. Steven W. Hyde and Sandra D. Brooke are husband and wife and were at the time of the incident that is the subject of this complaint.

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Seattle, WA 98199
206.322.5200

5. At all times relevant to the subject of this complaint Plaintiff Steven W. Hyde was employed by the City of Lake Stevens Police Department.

6. On or about June 11, 2009 Plaintiff Steven Hyde was informed that he had to be tased as part of his training. Steve Hyde did not want to be tased and so stated. Steve Hyde was informed he had to be tased if he wanted the job. Plaintiff Steven Hyde acquiesced and was subsequently tased.

7. June 30, 2011 Plaintiffs learned for the first time that the tasing Plaintiff Steven Hyde was told was mandatory was in fact not mandatory. Plaintiff Steven Hyde would not have undergone tasing had he been informed it was voluntary.

8. The representation that tasing was a requirement of the job was a negligent misrepresentation.

9. As a direct and proximate result of the negligent misrepresentation of the tasing requirement by Lake Stevens, Plaintiffs suffered injury, including, but not limited to physical injury, financial loss, pain and suffering, mental anguish, loss of consortium, emotional distress and other damages to be proved at the time of trial.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. For general damages sustained to date and in the future;
2. For medical costs and expenses incurred to date and in the future;
3. For financial loss suffered to date and in the future;
4. For additional foreseeable costs and expenses incurred to date and in the future;
5. For costs and disbursements herein to be taxed; and
6. For such other and further relief as the court may deem appropriate.

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206.322.5200

Dated this 19 day of February, 2014.

LOPEZ & FANTEL, INC., P.S.

CARL A. TAYLOR LOPEZ
WSBA No. 6215
Of Attorneys for Plaintiffs

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Seattle, WA 98199
206.322.5200

APPENDIX D

APPENDIX D

FILED

2014 SEP -5 AM 10:40

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

Civil Motions Calendar
Hearing Date: September 5, 2014
Hearing Time: 9:30 a.m.

CL16952567

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

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

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

No. 14-2-02556-2

~~[PROPOSED]~~ **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, ATTORNEY FEES AND CR 11 SANCTIONS**

COMES NOW THE COURT ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; a Motion Hearing was heard before the Honorable Michael T. Downes on September 5, 2014, and both parties were represented by the undersigned counsel.

The Court has considered the arguments on both sides of the issues, the City's Motion, Response by Plaintiff and the City's Reply.

The Court has also considered,

- the Declaration of Brenda Bannon and attached Exhibits A through H; and
- the Declaration of Carl Lopez and Exhibits A through F;

There are no genuine issues of material fact in dispute. As a matter of law, the summary judgment motion is granted pursuant to CR 56.

THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendant's Motion For Summary Judgment dismissal is GRANTED. The Complaint and all causes of action are hereby dismissed with prejudice.

2. Additionally, the court awards Defendant City of Lake Stevens all of its attorney fees necessary to defend this current action and to bring this motion. reserved

3. CR 11 sanctions in the amount of $5,000.00 (five thousand dollars) are hereby ordered against Plaintiff's counsel. This second lawsuit was brought in blatant violation of the claim splitting prohibition, *res judicata*, collateral estoppel, was frivolous, and has harassed the City and caused it to incur unnecessary legal bills and expenses. Defense counsel will submit to the court its declaration in support of the City's reasonable attorney fees within 30 days of the entry of this Order. reserved

DONE IN OPEN COURT this 5th day of September, 2014.

Snohomish County Superior Court Judge

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By:
Brenda L. Bannon, WSBA #17962
Attorneys for Defendant City of Lake Stevens

Approved as to Form; Notice of Presentation Waived:

LOPEZ & FANTEL, INC., P.S.

By:
Carl Lopez, WSBA #6215
Attorney for Plaintiffs

Plaintiff will submit brief on attorney fees within two weeks of today: 9/19/14 by 4:00 p.m.

Any response by the City is due by 9/20/14 by 4:00 p.m.

APPENDIX E

APPENDIX E

2. Additionally, the Court awards Defendant City of Lake Stevens all of its attorney fees necessary to defend this current action, to bring the summary judgment motion, and to defend the instant motion. The Court determines that reasonable attorney fees amount to $ 17,145.00

3. CR 11 sanctions in the amount of $5,000.00 (five thousand dollars) are hereby ordered against Plaintiffs' counsel. This second lawsuit was brought in blatant violation of the claim splitting prohibition, *res judicata*, collateral estoppel, was frivolous, and has harassed the City and caused it to incur unnecessary legal bills and expenses.

DONE IN OPEN COURT this 3 day of October, 2014.

THE HONORABLE MICHAEL T. DOWNES
Snohomish County Superior Court Judge

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: Mary Ann McCormack
Brenda L. Bannon, WSBA #17962
Attorneys for Defendant City of Lake Stevens

Approved as to Form; Notice of Presentation Waived:

LOPEZ & FANTEL, INC., P.S.

By: _____
Carl Lopez, WSBA #6215
Attorney for Plaintiffs

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