No. 48098-1-II

**IN THE COURT OF APPEALS**
**OF THE STATE OF WASHINGTON**
**DIVISION II**

MICHAEL NOEL and DIANA NOEL,

Appellants,

v.

CITY OF LAKEWOOD, a Washington municipal corporation, and CITY OF LAKEWOOD POLICE DEPARTMENT, a political subdivision, and BRET FARRAR, individually and as Chief of Police,

Respondents.

# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Respondents the City of Lakewood, the Lakewood Police Department, and retired Chief of Police Bret Farrar (collectively, "the City defendants") request the Court affirm the trial court order granting their motion for summary judgment and dismissing all claims asserted by appellants Michael and Diana Noel[1] with prejudice.

Noel was employed as a sergeant with the Lakewood Police Department until his termination in March of 2012. Noel was terminated after committing a series of policy violations, including the failure to attend a mandatory debriefing after an officer-involved shooting, improperly communicating with witnesses during a subsequent disciplinary investigation, and failing to cooperate with respect to a psychological fitness for duty examination.

The lawsuit from which this appeal is taken represents Noel's fourth attempt at recovery in connection with his termination from the Lakewood Police Department. The litigation history involves four different lawsuits against the City defendants, spanning half a decade. While the background facts may be interesting, the issues on appeal relate

[1] All claims stem from Michael Noel's employment with the Lakewood Police Department. It is unclear why Diana Noel was originally identified as a plaintiff because there are no claims asserted by her (*e.g.* loss of consortium). For the sake of simplicity, only Mr. Noel ("Noel") is referred to in this brief.

almost exclusively to procedural objections and violations of the Civil Rules.

Beginning in 2011, Noel filed his first lawsuit in Pierce County Superior Court, seeking injunctive relief and asserting a variety of claims after refusing to attend a fitness for duty examination. The trial court denied Noel's request for injunctive relief and the remaining claims were dismissed after Noel failed to appear at a court hearing.

In 2012, after his termination from the Lakewood Police Department, Noel filed his second lawsuit in Pierce County Superior Court, later removed by the City defendants to federal district court on the basis of federal question jurisdiction. In response to the City defendants' first motion for summary judgment, Noel voluntarily dismissed most of his claims, including all federal claims, and the lawsuit was remanded to Pierce County Superior Court. In response to the City defendants' second motion for summary judgment, Noel voluntarily dismissed his remaining claims, resulting in dismissal of the second lawsuit.

In 2013, while his second lawsuit was still pending in federal court, Noel filed his third lawsuit in Pierce County Superior Court. Noel's third lawsuit identified the same defendants and same factual allegations as his second lawsuit, and included many of the same legal claims. The City defendants notified Noel of their intention to seek dismissal of the

third lawsuit on the basis of duplicity, judicial economy, res judicata, collateral estoppel, comity, and priority jurisdiction. In response, Noel voluntarily dismissed all claims, resulting in dismissal of the third lawsuit.

In 2014, Noel filed the current lawsuit, his fourth lawsuit. This lawsuit involves the same factual allegations and many of the same legal claims as his 2012 and 2013 lawsuits. All claims asserted by Noel in this lawsuit were dismissed by the trial court at summary judgment. While Noel devotes a significant portion of his opening brief arguing the merits of his claims, including alleged questions of material facts, all of his claims are procedurally barred.

Noel originally alleged a total of seven claims: (1) disability discrimination and retaliation in violation of RCW 49.60[2]; (2) defamation; (3) fraud; (4) wrongful termination in violation of public policy; (5) civil conspiracy; (6) misrepresentation; and (7) abuse of process. However, in his opening brief, Noel discusses only the first three of these claims. The claims not briefed, or even mentioned, are properly deemed waived on appeal.

As additional procedural objections, Noel's claims of defamation, fraud, civil conspiracy, misrepresentation, and abuse of process are barred

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[2] Although Noel claims disability discrimination and retaliation under RCW 49.60, he adamantly denies suffering from any type of disability or mental health issues. Instead, he argues the City defendants perceived him as disabled.

by expiration of the statute of limitations and judicial estoppel. The defamation and fraud claims are barred by the statute of limitations (two years for defamation claims and three years for fraud claims). Noel admitted these claims were untimely during oral argument before the trial court. Noel also admitted his claims of civil conspiracy, misrepresentation, and abuse of process were properly dismissed. Noel has taken an inconsistent position by challenging the dismissal of his defamation and fraud claims on appeal. He should be judicially estopped from now contesting these claims.

Noel's remaining claim is disability discrimination and retaliation in violation of Washington's Law Against Discrimination, RCW 49.60. This claim is procedurally barred by the "two dismissal rule" of CR 41(a) because Noel voluntarily dismissed this claim in connection with both his 2012 and 2013 lawsuits. The voluntarily nature of these dismissals is clearly reflected in the language of the trial court orders and hearing transcripts. On appeal, Noel argues the trial court presiding over his 2012 and 2013 lawsuits did not have subject matter jurisdiction over his claims because he failed to comply with the procedural prerequisites of RCW 4.96 prior to filing these lawsuits. RCW 4.96 governs legal actions against local governmental entities, and requires a plaintiff to first file a tort claim form with such an entity before filing lawsuits. Noel argues his

failure to comply with RCW 4.96 somehow deprived the trial court of subject matter jurisdiction, negating application of the "two dismissal rule" of CR 41(a). This argument lacks merit and has been expressly rejected by Washington courts.

Finally, to the extent the Court is willing to entertain any of Noel's other claims, they too are procedurally barred by CR 41(a). Noel's defamation claim was voluntarily dismissed twice and is therefore barred by CR 41(a). His other claims were dismissed once, but not twice, in his earlier lawsuits. However, federal courts in the Ninth Circuit, interpreting the federal counterpart to CR 41(a), have held the "two dismissal rule" bars any claims in a third lawsuit, including new claims, so long as they stem from "the same transactional nucleus of facts" as lawsuits previously voluntarily dismissed by a plaintiff. Noel's lawsuits share the same "transactional nucleus of facts" because they all stem from his discipline and termination from the Lakewood Police Department. Noel's allegations in his 2012, 2013, and 2014 lawsuits are virtually identical. Because Noel already had at least two bites at the apple, all claims asserted in this lawsuit should be dismissed with prejudice by operation of CR 41(a).

## II. ASSIGNMENT OF ERROR (NONE)

There are no errors on appeal. The trial court properly granted the City defendants' motion for summary judgment, dismissing all claims asserted by Noel with prejudice.

## III. STATEMENT OF THE CASE

### A. Factual Background.

The issues on appeal relate almost exclusively to procedural objections, including the statute of limitations and the "two dismissal rule" of CR 41(a). Regardless, provided below is a brief summary of the factual background.

#### 1. Noel's Employment with the Lakewood Police Department.

Noel was hired as a sergeant by the Lakewood Police Department in 2004. CP 78. Noel responded to emergency calls, enforced traffic rules, and patrolled the City's streets. *Id.* Noel also supervised a squad of patrol officers. *Id.* As a supervisor, Noel was expected to model exemplar performance for his subordinates. *Id.*

#### 2. Noel Misses a Mandatory Debriefing Following a Shooting and Improperly Communicates with Witnesses During a Disciplinary Investigation.

In February of 2011, Noel and two other officers were involved in the shooting death of a woman who pointed a gun at them. CP 79-80.

The shooting was reviewed by the City and determined to be a lawful use of deadly force. *Id.* Because shootings can result in severe emotional distress, officers involved in a shooting are placed on paid administrative leave and required to attend psychological fitness for duty examinations before returning to work. *Id.* Noel attended and passed his examination and was cleared to return to work. *Id.*

Officers involved in a shooting are also required to attend a mandatory meeting called a critical incident group debriefing:

> Group Debriefing: A critical incident group debriefing for all persons involved in the incident shall also be provided when determined necessary by the Chief of Police. Attendance at a group debriefing is mandatory.

CP 174. Chief Bret Farrar (now retired) determined such a debriefing was necessary and scheduled a meeting. CP 80. The debriefing was later rescheduled so every officer involved in the shooting, including Noel, could attend. *Id.* Noel was provided timely notice of the debriefing but failed to attend or provide an explanation for his absence. *Id.* During his deposition, Noel stated that he "didn't put any thought to" attending the meeting. CP 235-247. Instead, Noel stated his belief that attendance was optional, and offered a variety of excuses for failing to attend: "we had a busy day with our house, the weather was a factor, I had—I have a Jeep

that the wipers don't work on...I needed to go home and watch the kids." *Id.* Noel never notified anyone of his decision to skip the debriefing. *Id.*

Chief Farrar initiated an investigation to determine why Noel ignored instructions and missed the debriefing. CP 80. Noel was notified of the investigation and ordered to refrain from discussing the investigation with any witnesses. CP 176. The written notice provided to Noel, and signed by him, contained an admonition against communicating with witnesses:

> You are hereby ordered not to discuss this incident or investigation with any employee or persons involved in this internal investigation **until the investigation is finally adjudicated**. You may not disclose the existence of this complaint or discuss any facts of the complaint with anyone except those persons with designated departmental authorization **until the investigation is finally adjudicated.** Designated departmental authority is extended to those with a legally recognized privilege or union representative. Failure on your part to adhere to these admonishments will subject you to discipline **up to and including termination**.

*Id.* (emphasis in original). As part of the investigation, Chief Farrar scheduled a pre-disciplinary meeting with Noel to hear Noel's side of the story. CP 80. During the meeting, Chief Farrar observed Noel acting emotionally unstable, oscillating between crying, fits of rage, and calmness. CP 80-81. In addition, Noel admitted he had communicated with witnesses during the investigation, in violation of the directive.

CP 235-247. Noel stated his belief the investigation against him was complete, but admitted never checking with his superiors:

> Q: Did you seek any guidance from the command staff at the Lakewood Police Department whether they would consider this investigation you were doing in violation of the document you signed?
>
> A: No.

*Id.* Chief Farrar placed Noel on paid administrative leave, effective April 8, 2011, and initiated another investigation into potential insubordination with respect to the directive not to communicate with witnesses. CP 80-81. The allegations of insubordination were later found to be sustained. CP 178-187. In a tort claim later served on the City pursuant to RCW 4.96, Noel claimed he attempted to contact witnesses only after being informed by the City that the investigation was complete, and that his only purpose was to "gather mitigating evidence supporting his position." CP 189-192.

### 3. Noel is Disciplined for Missing the Debriefing and Improperly Communicating with Witnesses.

Chief Farrar scheduled a pre-disciplinary meeting with Noel regarding violation of the directive not to communicate with witnesses. CP 81. The meeting was scheduled for June 1, 2011. *Id.* Prior to the meeting, however, Chief Farrar heard from other officers that Noel was under considerable stress with respect to the shooting, the recent death of

his father, and the lasting impact of the deaths of four Lakewood police officers in 2009. *Id.* Chief Farrar also recognized many years of service as a police officer can take a serious mental toll. *Id.* Chief Farrar attempted to discuss with Noel whether emotional issues were negatively impacting his judgment. *Id.* Chief Farrar offered to hold any disciplinary decision in abeyance if Noel felt it necessary to seek treatment or counseling. *Id.* Noel dismissed the suggestion outright, denying the existence of any emotional issues impacting his performance or judgment. *Id.*

On July 20, 2011, Chief Farrar disciplined Noel for two separate violations. CP 81. He reprimanded Noel for missing the critical incident debriefing and imposed a one-week suspension for violating the directive not to communicate with witnesses. *Id.* Chief Farrar also communicated to Noel his concern about the state of Noel's mental health, and requested Noel pass another psychological fitness for duty examination before being reinstated to active duty. *Id.* Chief Farrar explained his rationale in a written notice provided to Noel.

> In the course of recent investigations of misconduct, I had the opportunity to personally observe your demeanor, interview co-workers who have expressed concern about your mental state, and consider your overall behavior in the workplace. Taken together, I do not have confidence in your ability to perform your duties as a Sergeant with the

> Lakewood Police Department without the assurance of a health care professional that you are truly fit for duty.

CP 194. On July 30, 2011, the Lakewood Police Guild (the "Guild") filed a grievance on behalf of Noel, contesting Chief Farrar's disciplinary decision. CP 70. The Guild also disputed the requirement that Noel submit to a fitness for duty examination. *Id.* However, the Guild later withdrew its grievances shortly before arbitration. CP 71.

#### 4. Noel Refuses to Cooperate During the Fitness for Duty Examination.

The City scheduled a fitness for duty examination for Noel on August 8, 2011. CP 81. Four days before the examination, Assistant Chief Michael Zaro met with Noel to discuss the reasons for the examination and its mandatory nature. *Id.* Noel indicated he understood the issues. *Id.* Nonetheless, on August 5, 2011, Noel filed a complaint (his first lawsuit) in Pierce County Superior Court, seeking injunctive relief and a temporary restraining order preventing the examination from proceeding. CP 254-259. The City defendants opposed Noel's request, which was denied, and the lawsuit was later dismissed after Noel failed to appear in connection with his other claims. CP 81.

On August 8, 2011, Noel appeared as directed for the examination. CP 82. Noel informed the psychologist he would be audiotaping the examination. *Id.* When the psychologist refused to consent, Noel claimed

to have turned off the audiotape. CP 205-212. The psychologist, however, believed Noel continued to audiotape the examination. *Id.* "[Noel] indicated that he understood and turned off the machine. However, I noticed about 60 seconds later than the machine might still be on and inquired as to such. He confirmed that the machine was still on and turned it off. I then asked him to place the machine in his pocket so it would not be present on the table in case it was still recording." *Id.*

During the examination, Noel answered the psychologist's questions concerning his treatment, diagnoses, and medication. *Id.* Following the examination, however, the psychologist followed up with Noel's medical providers and learned Noel provided contradictory information during the examination. *Id.* Noel had been previously diagnosed and treated for more serious psychological problems then he had revealed during the examination. *Id.* For example, Noel failed to disclose a prescription for Xanax, an anti-anxiety medication with potential side effects that could negatively impact his judgment and performance while on-duty. *Id.* According to the psychologist, "Noel did not indicate that he had taken antidepressants in the past. He denied any past history of medication to this examiner during the evaluation. Therefore, he was not being forthright with that information." *Id.* Moreover, the psychologist believed Noel had been dishonest or

intentionally evasive when completing aspects of the psychological testing, including the MMPI-2 (a test used to assess and diagnose mental illness). *Id.* The psychologist issued a report concluding Noel deliberately refused to cooperate with the examination and, as a result, failed the examination because an accurate determination could not be made. *Id.*

**5. The City Terminates Noel's Employment.**

After reviewing the psychologist's report, Chief Farrar voiced concerns to both Noel and the Guild. CP 82. In a letter to the Guild, Chief Farrar indicated the necessity of scheduling another examination and attempted to schedule a meeting to discuss options moving forward. CP 214-215. The Guild responded to the letter, stating it would not attend any meeting, and any concerns about Noel's conduct at the examination should be addressed in a new investigation. CP 217.

After receiving the Guild's response, Chief Farrar initiated a new investigation into whether Noel deliberately refused to cooperate during the examination, including audiotaping the examination without consent. CP 82. Because audiotaping a conversation without consent is a crime in Washington, the investigation was referred to the Washington State Patrol. *Id.* The Washington State Patrol investigated the matter, including an interview with Noel. CP 219-224. Based on the outcome of the

investigation, the City sustained the allegations. CP 226-227.

On January 5, 2012, Chief Farrar held a pre-disciplinary meeting to allow Noel to present evidence as to why his employment should not be terminated. CP 82. Noel attended the hearing but provided no further information. CP 229. On March 2, 2012, Noel was terminated for several policy violations, including (1) obedience to laws, ordinances, and rules; (2) respect to supervisors/insubordination; and (3) truthfulness. *Id.* Neither Noel nor the Guild filed a grievance contesting termination. CP 71.

### 6. Expectations for the Mental Health of Lakewood Police Officers.

Officers of the Lakewood Police Department are entrusted with enforcing laws and ensuring public safety. As a result, officers are subject to heightened standards related to mental health. CP 78. Job applicants are required by law to submit to psychological fitness for duty examinations, subject to rejection for disqualifying mental illnesses. WAC 139-07-010/020. Law enforcement agencies in Washington cannot retain officers on active duty when valid concerns are raised about their mental health. RCW 41.12.080. Consistent with Washington law, the City's collective bargaining agreement with the Guild vests the Chief with the discretion to place any officer on paid administrative leave and require

attendance at a fitness for duty examination if questions of mental health arise. CP 129.

In 2009, the Lakewood Police Department was severely impacted by the shooting deaths of four officers in a local coffee shop. CP 79. The City offered grief counseling and other services to employees. *Id.* Every officer, including Noel, was profoundly impacted. *Id.* As a result, Chief Farrar became particularly sensitive to the emotional health and needs of their employees. *Id.*

### 7. Chief Farrar's Statements Concerning Noel's Mental Health.

During his deposition, Noel was asked to identify any statements made by Chief Farrar concerning his mental health or "perceived" mental disability. CP 235-247. Noel identified only two individuals who heard statements made by Chief Farrar: (1) Detective Bunton and (2) Lt. Mauer. *Id.* Noel claimed Chief Farrar approached Detective Bunton, a close friend of Noel, and asked him to personally speak with Noel about the possibility filing a workers' compensation claim based on mental health issues. *Id.* Other than this conversation, Noel could not recall any other statements made by Chief Farrar. *Id.* As for Lt. Mauer, Noel had no firsthand knowledge of any comments, but believed Lt. Mauer had called his home and spoken to his wife. *Id.* Noel did not know the substance of

the conversation between Lt. Mauer and his wife. *Id.* During her own deposition, Diana Noel testified that Lt. Mauer had called to check on Noel because they were friends, and relayed a question from Chief Farrar as to whether Noel was receiving mental health counselling. CP 249-252.

**B. Procedural History of Noel's Four Lawsuits.**

The lawsuit from which this appeal is taken represents Noel's fourth attempt at legal recovery based on the same underlying facts. The procedural history of Noel's four lawsuits is summarized below. To aid in tracking the litigation history, the City defendants provided the trial court with a table summarizing the claims and lawsuits. A copy of this table can be found at CP 362.

**1. Noel's First Lawsuit (2011).**

On August 5, 2011, prior to his termination from the Lakewood Police Department, Noel filed his first lawsuit in Pierce County Superior Court, requesting injunctive relief in connection with his fitness for duty certification, and asserting a variety of other damage claims against defendants. CP 254-259 (PCSC No. 11-2-123486). Noel's request for a temporary restraining order was denied and Noel was required to attend his fitness for duty examination. Noel's remaining claims were dismissed by the Court after Noel failed to appear at a subsequent hearing.

### 2. Noel's Second Lawsuit (2012).

On May 3, 2012, following his termination, Noel filed his second lawsuit in Pierce County Superior Court, alleging a variety of claims against the City defendants. CP 261-271 (PCSC No. 12-2-08690-2). The City defendants removed the lawsuit to the United States District Court for the Western District of Washington on the basis of federal question jurisdiction. While at the federal level, Noel filed an amended complaint, expanding his claims against the City defendants: (1) breach of contract; (2) due process violations; (3) abuse of process; (4) wrongful termination; (5) WLAD discrimination/retaliation; (6) First Amendment retaliation; (7) defamation; (8) violations of Washington's Public Records Act; (9) civil conspiracy; (10) fraud; (11) misrepresentation; and (12) witness intimidation. CP 273-283. The City defendants then filed their first motion for summary judgment, requesting dismissal of all claims. In his opposition brief, Noel stated his intention to "abandon" his First Amendment, public records act, and breach of contract claims. CP 285-301. The federal district court recognized "there is no rule under which the Noels can abandon claims," and instead interpreted Noel's request as a voluntary dismissal. CP 304-308. The federal court dismissed Noel's remaining claims on grounds Noel failed to identify them on the tort claim form required by RCW 4.96. *Id.* Without any remaining federal claims,

the federal court declined to exercise supplemental jurisdiction and remanded the lawsuit back to Pierce County Superior Court. *Id.* The federal court recognized three claims remained: "After the voluntary dismissal and dismissal for lack of subject matter jurisdiction, the Noels' remaining claims are for discrimination under state law, fraud, and defamation." *Id.*

After remand to Pierce County Superior Court, the City defendants filed their second motion for summary judgment. *See* CP 310-312. On the morning of oral argument, Noel arrived in court and voluntarily dismissed his lawsuit. Before submitting oral argument on their motion, the City defendants notified the trial court that Noel had recently filed yet another lawsuit, his fourth, and inquired whether he was seeking a voluntary dismissal of his lawsuit:

> **Mr. Altman**: Before I begin yammering on, I'm not sure if Mr. Fraley intends to voluntarily dismiss or take some other action.
>
> * * * *
>
> **The Court**: So basically, what I'm kind of getting here, by subtle interference, is: I dismiss this one completely, and the new one that just got filed is going to be taking its place. Is that what you're asserting?
>
> **Mr. Fraley**: Absolutely.

CP 529-535. The trial court asked Noel why he had filed two identical lawsuits. *Id.* Noel explained he was dismissing his earlier 2012 lawsuit to avoid any argument that he failed to satisfy the tort claim prerequisites of RCW 4.96. *Id.* Prior to arriving for oral argument, Noel had filed a revised tort claim with the City, thereby satisfying the requirements of RCW 4.96 and eliminating one of the City defendants' arguments. *Id.* The City defendants still preferred to proceed with the summary judgment hearing because several other independent arguments warranted dismissal with prejudice. Nonetheless, the City defendants recognized they could not stop Noel from exercising his procedural right to voluntarily dismiss under CR 41(a). The trial court agreed Noel had an absolute right to voluntarily dismiss his lawsuit:

> **Mr. Altman**: Your honor, this is admittedly pushing the bounds of my knowledge of the rules of civil procedure. I can't think of any objection I have for Mr. Fraley taking a voluntary dismissal.
>
> **The Court**: I wouldn't think you could think of any reason, either. All right. What we'll do is: **We'll take a voluntary nonsuit on this case**.

*Id.* (emphasis added). The order signed by the trial court, and signed by the parties, clearly indicates that each of Noel's claims were "voluntarily dismissed by plaintiffs." CP 538-539. Noel did not object to the language in the order, nor did he file an appeal. While the City defendants

recognized they had no valid objection to a voluntary dismissal under CR 41(a), they did not agree or stipulate to a dismissal and no evidence supports a contrary finding.

**3. Noel's Third Lawsuit (2013).**

In June of 2013, while his second lawsuit was pending in federal court and had not yet been remanded or voluntarily dismissed, Noel filed his third lawsuit in Pierce County Superior Court. CP 314-321 (PCSC No. 13-2-11383-5). The third lawsuit included the same defendants, the same factual allegations, and many of the same legal claims as his second lawsuit. *Id.* Defendants notified Noel of their intention to seek dismissal of the third lawsuit on grounds of duplicity with the federal court action, judicial economy, res judicata, collateral estoppel, comity, and priority jurisdiction. In response, Noel voluntarily dismissed all claims under CR 41(a): "Noel...moves the court for entry of an order of non-suit and dismissal of the above-entitled matter pursuant to CR 41(a)(1)(B)." CP 323-324.

**4. Noel's Fourth Lawsuit (2014).**

On June 5, 2014, Noel filed his fourth lawsuit in Pierce County Superior Court, the lawsuit from which this appeal is taken. CP 1-7 (PCSC No. 14-2-09354-9). Although Noel elected not to sue Assistant Chief Michael Zaro or the wives of the individual defendants, the current

lawsuit involves the same facts and legal claims as his 2012 and 2013 lawsuits.

### C. Summary Judgment at the Trial Court Level in Connection with Noel's Fourth (2014) Lawsuit.

In August of 2015, in connection with Noel's fourth lawsuit, the City defendants filed their third motion for summary judgment, requesting dismissal of all claims asserted by Noel with prejudice. CP 38-69. The City defendants requested dismissal of all claims asserted by Noel: (1) disability discrimination/retaliation in violation of RCW 49.60; (2) defamation; (3) fraud; (4) wrongful termination in violation of public policy; (5) abuse of process; (6) misrepresentation; and (7) civil conspiracy. *Id.* Noel filed a response brief, opposing dismissal of only three claims: (1) disability discrimination in violation of RCW 49.60; (2) defamation; and (3) fraud. CP 363-389. Noel did not discuss, much less contest, the dismissal of any of his other claims.

Oral argument took place on September 4, 2015 before the Honorable Bryan Chushcoff. RP 1. During argument, Noel admitted he did not contest dismissal of his defamation and fraud claims because they were untimely, and instead focused on his termination claims.

> **The Court:** It's my understanding that Mr. Altman also takes a position that the statute of limitations bars the defamation and fraud claims. **Do you disagree with that?**

> **Mr. Fraley:** **No, I don't**. This case has always been about the termination, for the most part, when it occurred.

RP 13-14 (emphasis added). In addition, after being asked by the trial court, Noel admitted his claims of civil conspiracy and abuse of process lacked merit and should fail as a matter of law. RP 16; 19. After Noel conceded these claims, the City defendants devoted no further argument to them. The trial court ultimately agreed most of Noel's claims failed on the merits and that *all* claims were barred by the "two dismissal rule" of CR 41(a):

> **The Court:** Well, I agree that on the merits, the wrongful termination of public policy, the defamation, the fraud, the abuse of process, the misrepresentation, [and] civil conspiracy would all be dismissed regardless of the two civil—the two dismissal [rule] under CR 41.
>
> **The Court:** And I do think that there's no exception here to the CR 41 two dismissal rule [...] So I don't think I've got a lot of discretion here. The rule says what it says. [...] So I'll dismiss it upon the CR 41 grounds, as well, as to all the claims.

RP 21. Noel timely filed this appeal.

## IV. AUTHORITY AND ARGUMENT

### A. Noel Waived the Right to Challenge Several Claims.

In his opening brief, Noel appears to challenge the dismissal of all claims by the trial court: "the trial court erred when it granted

Respondent's motion for summary judgment because there were issues of material fact applicable to *all claims made by Appellant*." Brief of Appellant at 1 (emphasis added). However, Noel's brief is limited to a discussion of only three claims: (1) disability discrimination/retaliation in violation of RCW 49.60; (2) defamation; and (3) fraud. Noel fails to discuss, much less rebut, the dismissal of his remaining claims, including wrongful termination in violation of public policy, abuse or process, misrepresentation, and civil conspiracy. Noel likewise failed to address these claims during the underlying summary judgment hearing. Noel waived the right to challenge these claims by failing to raise them in his appeal brief.

"Ordinarily, we treat a trial issue not briefed on appeal as abandoned." *State v. Kamps*, 116 Wn. App. 1073, 13 n. 1 (2003). "No portion of the brief is dedicated to this issue. It is deemed waived." *State v. Noah*, 103 Wn. App. 29, 41 n. 3 (2000). "These issues are not briefed, and as a result, we do not consider them." *Wright v. Colville Tribal Enter. Corp.*, 127 Wn. App. 644, 649 (2005), *reversed on other grounds*, 159 Wn.2d 108 (2006). While Noel may have assigned error to "all claims," that is not sufficient to carry the day on appeal. Instead, Noel needed to present argument on each issue in his appeal brief. *See, e.g.*, *R.A. Hanson Company v. Magnuson*, 79 Wn. App. 497, 505 (1995)

(appellant, who assigned error to contempt order, abandoned issue by failing to present relevant argument); *State v. Valentine*, 75 Wn. App. 611, 618 (1994) (court of appeals will not "engage in conjectural resolution of issues" presented as assignments of errors but not actually briefed).

In his opening appeal brief, Noel failed to present any argument contesting the dismissal of his claims of wrongful termination in violation of public policy, abuse or process, misrepresentation, and civil conspiracy. Noel likewise failed to address these claims before the trial court. Any assignment of error to these claims should be deemed waived. There are three remaining claims before the Court: (1) disability discrimination/retaliation in violation of RCW 49.60; (2) defamation; and (3) fraud.

### B. Noel's Claims of Defamation, Fraud, Civil Conspiracy, Abuse of Process, and Misrepresentation are Barred by the Statute of Limitations and Judicial Estoppel.

As an alternative basis for affirming the trial court, five of Noel's seven claims are procedurally barred by expiration of the applicable statute of limitations or by judicial estoppel.

#### 1. The Defamation, Fraud, and Misrepresentation Claims are Barred by the Statute of Limitations.

Noel alleges defamation based on Chief Farrar's alleged statements about his mental health. *See* Brief of Appellant at 31. On May 27, 2011, Noel first identified the facts underlying his defamation claim on the tort

claim form served on the City pursuant to RCW 4.96. CP 189-192. Defamation claims are governed by a two-year statute of limitations. *Phillips v. World Pub. Co.*, 822 F.Supp.2d 1114, 1121 (W.D. Wash. 2011) (*citing* RCW 4.16.100). "We review statute of limitations rulings de novo." *Washburn v. Beatt Equipment*, 120 Wn.2d 246, 263 (1992). The limitations expired no later than May 27, 2013. Noel did not file the current lawsuit until June 5, 2014. Noel's defamation claim was filed at least one year beyond the limitations period.

Noel alleges fraud based on Chief Farrar's alleged statements and suggestions concerning his mental health and the viability of filing a workers' compensation claim. *See* Brief of Appellant at 36. On May 27, 2011, Noel first identified the facts supporting his fraud claim on the tort claim form served on the City pursuant to RCW 4.96. CP 189-192. Fraud claims are governed by a three-year statute of limitations. *Galyean Northwest Trustee Services*, 2014 WL 3360241, *6 (W.D. Wash. 2014). The limitations period expired no later than May 27, 2014. Noel did not file his lawsuit until June 5, 2014. Noel's fraud claim was therefore untimely.

Noel also alleges misrepresentation based on allegedly false statements made by Chief Farrar to others concerning Noel's mental health. CP 4. During his 2012 lawsuit, Noel clarified that his

misrepresentation claim was based on the *intentional* acts of Chief Farrar: "Defendants disseminated information regarding alleged mental defects pertaining to Sgt. Noel...*Said information was intended to induce parties to commit fraud and to which others relied upon the information.*" CP 282 (emphasis added). Under Washington law, intentional misrepresentation is identical to fraud and therefore duplicative. "A claim of intentional misrepresentation is a claim of fraud." *Frias v. Asset Foreclosures Services*, 957 F.Supp.2d 1264, 1271 (W.D. Wash. 2013); *Rouse v. Wells Fargo*, 2013 WL 5488817, *6 (W.D. Wash. 2013) (applying same nine elements of a fraud claim to a claim of intentional misrepresentation). Noel's fraud claim is already barred by expiration of the statute of limitations, therefore the misrepresentation claim is likewise barred.

The fact Noel filed, and then voluntarily dismissed, several previous lawsuits does not toll the statute of limitations for any of the claims discussed above. "When an action is dismissed, the statute of limitations continues to run as though the action had never been brought." *Fittro v. Alcombrack*, 23 Wn. App. 178, 180 (1979). "Where an original action is dismissed, a statute of limitations is deemed to continue to run as though the action had never been brought." *Steinberg v. Seattle First Nat. Bank*, 66 Wn. App. 402, 406 (1992). Noel has no valid argument for tolling.

### 2. The Defamation, Fraud, Civil Conspiracy, and Abuse of Process Claims are Barred by Judicial Estoppel.

Judicial estoppel should bar Noel from contesting his claims of defamation, fraud, civil conspiracy, or abuse of process because he conceded these claims during oral argument on the City defendants' motion for summary judgment.

"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 consistent position." *Cunningham v. Reliable Concrete Plumping Inc.*, 126 Wn. App. 222, 224 (2005). The doctrine "avoids inconsistency, duplicity, and waste of time." *Id.* (internal quotations omitted). Washington courts focus on three factors when deciding whether to apply judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether accepting the new position would create the perception that a court was misled; and (3) whether a party would gain an unfair advantage from the change. *Miller v. Campbell*, 164 Wn.2d 529, 539 (2008).

During oral argument on the City defendants' motion for summary judgment, when asked by the trial court, Noel admitted several of his claims were fatally doomed:

> **The Court:** It's my understanding that Mr. Altman also takes a position that the statute of limitations

bars the defamation and fraud claims. **Do you disagree with that?**

**Mr. Fraley:** **No, I don't**. This case has always been about the termination, for the most part, when it occurred.

* * * *

**The Court:** ...he argued, for instance, that...the civil conspiracy claims, for instance, was just a theory, not a basis for a claim.

**Mr. Fraley:** I would agree with that.

* * * *

**The Court:** What about the abuse of process claim?

**Mr. Fraley:** I would agree that that was a theory.

* * * *

**Mr. Altman:** As for his specific claims, I heard Mr. Fraley say they don't object to [dismissal of] the defamation or the fraud claim or the conspiracy claim.

**The Court:** Or the abuse of process.

RP 13-14; 16; 19. After Noel conceded these claims, the City defendants devoted no further time to a discussion of secondary arguments supporting their dismissal. For example, the City defendants also argued that Noel's claim of civil conspiracy failed on the merits, but dropped the issue after Noel conceded the claim. *See* CP 61. Despite his earlier concessions, Noel now appears to challenge the dismissal of all his claims on appeal (or at least his defamation and fraud claims). *See* Appellants' Opening Brief

at 1. By proceeding in this manner, Noel has violated the three factors used by Washington courts when applying judicial estoppel: (1) Noel's position on appeal with respect to these claims is clearly inconsistent with his position at the trial court level; (2) accepting Noel's new position would create the perception that he misled the trial court by falsely conceding the claims; and (3) if allowed to proceed, Noel would gain an unfair advantage by depriving the City defendants of a full and fair opportunity to argue their case at summary judgment and fully develop a record on appeal. *See Miller*, 164 Wn.2d at 529. These claims are properly barred by judicial estoppel.

Noel's claims of wrongful termination in violation of public policy, abuse of process, misrepresentation, civil conspiracy, defamation, and fraud have either been waived by Noel or are procedurally barred by the statute of limitations or by judicial estoppel. Noel's only remaining claim is disability discrimination and retaliation in violation of RCW 49.60.

### C. Noel's Claim of RCW 49.60 Disability Discrimination and Retaliation is Barred by the "Two Dismissal Rule" of CR 41(a).

Noel's remaining claim is disability discrimination and retaliation in violation of RCW 49.60, Washington's Law Against Discrimination. This claim is procedurally barred by the "two dismissal rule" of CR 41(a).

### 1. Noel Voluntarily Dismissed the Claim in Connection with his Second (2012) and Third (2013) Lawsuits.

Under CR 41(a), a plaintiff in a civil action may voluntarily dismiss claims "at any time before plaintiff rests at the conclusion of his opening case." CR 41(a)(1)(B). When claims are voluntarily dismissed for the first time, the dismissal is without prejudice. CR 41(a)(4). When claims are voluntarily dismissed for the second time, the dismissal is automatically with prejudice and operates as a final adjudication on the merits:

> Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or any state.

*Id.* The purpose of the two dismissal rule is to "prevent the abuse and harassment of a defendant and the unfair use of dismissal." *Feature Realty v. Kirkpatrick & Lockhart Preston Gates Ellis LLP*, 161 Wn.2d 214, 219 (2007). Washington's Supreme Court has held that CR 41(a) is self-executing and applies automatically:

> ...the plain language of the "two dismissal" rule of CR 41(a)(4) does not allow for court discretion...The "two dismissal" rule of CR 41(a)(4) is self-executing. It does not allow for court discretion. [...] We hold that CR 41(a)(4)'s "two dismissal" rule operates as a nondiscretionary adjudication upon the merits when the dismissal at issue are unilaterally obtained by the plaintiff.

*Spokane County v. Specialty Auto and Truck Painting*, 153 Wn.2d 238, 246 (2004). "We review de novo the trial court's application of CR 41(a)(1)(B) to the facts." *Calvert v. Berg*, 177 Wn. App. 466, 471 (2013).

As part of his second lawsuit (2012), Noel alleged a claim of disability discrimination and retaliation in violation of RCW 49.60. The claim was clearly identified in his complaint: "Discrimination in violation of RCW 49.60." CP 269-270; 284. In response to the City defendants' second motion for summary judgment, Noel voluntarily dismissed the claim under CR 41(a). CP 310-312. The voluntary dismissal was recognized by the trial court during oral argument: "we'll take a voluntary nonsuit on this case." CP 533. The order of dismissal, signed by the trial court and by the parties, clearly confirms the claim was voluntarily dismissed: "Plaintiffs' claim of WLAD disability discrimination...voluntarily dismissed by plaintiffs." CP 310-312. Noel did not object to the language of this order, nor did he file an appeal.

As part of his third lawsuit (2013), Noel again alleged a claim of disability discrimination and retaliation in violation of RCW 49.60. The claim was clearly identified in his complaint: "Wrongful termination: The Defendants, each of them, terminated the employment of Sgt. Noel in violation of RCW 49.60...Discrimination in violation of RCW 49.60."

CP 314-321. This claim was voluntarily dismissed by Noel when he later dismissed the entire lawsuit. The nature of a voluntary dismissal under CR 41(a) was stated in Noel's motion and order for a non-suit: "Plaintiff...moves the court for entry of an order of non-suit and dismissal of the above-entitled matter pursuant to CR 41(a)(1)(B)." CP 323-324.

Noel included a claim of disability discrimination and retaliation in violation of RCW 49.60 as part of the present lawsuit. CP 6. The language from the current complaint is identical to Noel's third lawsuit (2013): "Wrongful termination: The Defendants, each of them, terminated the employment of Sgt. Noel in violation of RCW 49.60...Discrimination in violation of RCW 49.60." *Compare* CP 6 *with* CP 320. The claim is barred by CR 41(a) because it was voluntarily dismissed twice. The trial court order dismissing the claim should be affirmed.

### 2. Noel's Argument Concerning a Lack of Subject Matter Jurisdiction at the Trial Court Level Lacks Merit.

In his opening brief, Noel argues the "two dismissal rule" of CR 41(a) and the tort claim presentment and filing requirements of RCW 4.96 (actions against municipal corporations) somehow conflict: "Do RCW 4.96 et seq. and CR 41(a) conflict when a Plaintiff's tort claims are not precise and utilizes a voluntary dismissal?" Appellants' Opening Brief at 1. In particular, Noel appears to argue his failure to comply with the requirements of RCW 4.96 for certain claims deprived the trial court

of subject matter jurisdiction, thereby preventing the trial court from triggering a voluntary dismissal under CR 41(a):

> As a condition precedent to suit Plaintiff must file tort claims for separate and distinct tort causes of action.
>
> * * * *
>
> Taken to its logical step, dismissal of a claim in which a trial court lacks jurisdiction should be dismissed if a condition precedent has not been accomplished prior to filing suit.
>
> * * * *
>
> ...Appellant has not found a case that involved the interplay of both the court rule [CR 41(a)] and the presentment statute [RCW 4.96] in the same case. Appellant argues that the presentment statute takes precedence over the civil rule.

*Id.* at 10-11. In other words, Noel argues the "two dismissal rule" of CR 41(a) does not apply to his earlier voluntary dismissals because these lawsuits were procedurally deficient, thereby depriving the trial court of subject matter jurisdiction. As discussed below, Noel's argument fails to withstand scrutiny.

**(a) The Trial Court Properly Exercised Subject Matter Jurisdiction.**

Noel argues the "two dismissal rule" of CR 41(a) does not apply because the trial court lacked subject matter jurisdiction over the claims asserted in his earlier lawsuits: "The issue in this regard may be jurisdictional." Appellants' Opening Brief at 8. No legal authority supports this position. Moreover, Washington courts are clear that

superior courts retain subject matter jurisdiction over claims that fail to comply with RCW 4.96.

"A court has subject matter jurisdiction where it has authority to adjudicate the type of controversy involved in the action. Superior courts are granted broad original subject matter jurisdiction by Washington Constitution Article IV Section 6." *In re Marriage of McDermott*, 175 Wn. App. 467, 480-81 (2013) (internal citations omitted). "Superior courts possess subject matter jurisdiction that cannot be whittled away by statutes [...] If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Id.* at 481. Superior courts in Washington retain subject matter jurisdiction over a claim even if statutory language suggests "jurisdictional" prerequisites to filing a lawsuit. *Id.* For example, Washington's Supreme Court has analyzed the statutory language of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), enacted by Washington's Legislature to resolve jurisdictional disputes surrounding complex child custody proceedings. *In re Custody of A.C.*, 165 Wn.2d 568 (2009) (*citing* RCW 26.27.221). The Court noted that, notwithstanding the manner in which the UCCJEA uses the term "subject matter jurisdiction," Washington courts "do, in fact, have subject matter jurisdiction over the parties and the issues" in UCCJEA cases. *Id.*

at 573 n. 3. Nevertheless, for consistency, the Court decided to use the statutory language of "jurisdiction" throughout its open. *Id.*

Under RCW 4.96, prior to filing a lawsuit against a local governmental entity, a plaintiff must first file a tort claim with the risk management division of the entity and then wait 60 days. RCW 4.96.010. Similar to the UCCJEA, RCW 4.96 contains some "jurisdictional" language prohibiting a plaintiff from filing a lawsuit if he or she does not first satisfy the statutory prerequisites: "Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages." RCW 4.96.010(1). The filing requirement creates a condition precedent to filing a lawsuit, and failure to comply results in dismissal. *Hintz v. Kitsap County*, 92 Wn. App. 10, 14 (1998). Failure to comply with the requirements of RCW 4.96 provides a local governmental entity grounds to seek dismissal in a lawsuit. RCW 4.96.020(2). However, nothing in any subsection of RCW 4.96 states that a superior court lacks subject matter jurisdiction over deficient claims.

First, to resolve any potential confusion about the arguments presented to the trial court as part of this most recent lawsuit, the City defendants did *not* cite RCW 4.96 as a basis for dismissal of any of Noel's claims. Noel has confused this issue by copying and pasting content from

earlier opposition briefs: "Defendants argue that Plaintiff's WLAD claims fail because it was not included on the tort claim form served on the City by Noel prior to initiating this lawsuit." Appellants' Opening Brief at 8-9. The City defendants never presented this argument to the trial court as part of this lawsuit. While the City defendants submitted this argument in Noel's *previous* lawsuits, they dropped the argument in this lawsuit because Noel finally filed an amended tort claim satisfying the requirements of RCW 4.96. It is unclear why Noel continues to believe the City defendants' motion for summary judgment at issue in this appeal in any way relates to arguments under RCW 4.96. Regardless, it appears Noel also argues the trial court lacked subject matter jurisdiction over his 2012 and 2013 lawsuits, thereby preventing application of CR 41(a). This argument likewise fails.

Washington courts have recognized that superior courts retain subject matter jurisdiction over claims, even if the claims are procedurally deficient under RCW 4.96:

> No action *shall be commenced* against any local governmental entity for damages arising out of tortious conduct until 60 days have elapsed after the claim has first been presented to and filed with the governing body thereof. RCW 4.96.020(4). Kittitas County has apparently assumed that the claim filing statute is a source of jurisdiction because "shall be commenced" is "jurisdictional language." [...] If the claim filing statute is a source of jurisdiction, then failure to comply with it should lead to dismissal for want of

> jurisdiction. But the Supreme Court has held that a claimant's failure to properly file a claim is a defense than can be waived by failing to timely assert it. If it is defense that can be waived, then failure to file a claim does *not* deprive the superior court of subject matter jurisdiction, notwithstanding the use of "jurisdictional language" in the claim filing statute.

*Shoop v. Kittitas County*, 108 Wn. App. 388, 400 (2001) (*citing Miotke v. Spokane*, 101 Wn.2d 307, 337 (1984)). In *Miotke*, Washington's Supreme Court held the State waived the right to assert a defense under RCW 4.92 (tort claim statute applicable to the State of Washington) by waiting to assert the defense until litigation had commenced. *Id.* at 337. A defense based on lack of subject matter jurisdiction cannot be waived. "Lack of jurisdiction can be asserted at any time." *State v. Williams*, 23 Wn. App. 694, 695 (1979); RAP 2.5(a). The same rationale applicable to RCW 4.92 applies to RCW 4.96. The City defendants timely asserted their defense under RCW 4.96 in their answers to Noel's earlier 2012 and 2013 complaints. However, failing to comply with RCW 4.96 prior to filing a lawsuit does not deprive a superior court of subject matter jurisdiction.

Finally, Pierce County Superior Court never actually ruled on whether Noel had properly complied with the requirements of RCW 4.96 for the claims at issue because Noel took voluntary dismissals before the issue could be ruled on. In their summary judgment motion filed as part of Noel's 2012 lawsuit, the City defendants argued that some, but not all,

claims asserted by Noel were procedurally deficient under RCW 4.96. For example, Noel's claim of disability discrimination and retaliation under RCW 49.60 was procedurally deficient because it was not included on the tort claim form Noel filed on May 27, 2011. CP 189-192. In contrast, his claims of defamation and fraud were clearly identified on the tort claim form. *Id.* By including some, but not all, of his claims on his tort claim form, Noel could have argued "substantial compliance" with the requirements of RCW 4.96: "With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory." RCW 4.96.020(5). However, to make this argument, Noel would have needed to proceed with the summary judgment hearing, thereby risking dismissal of his claims with prejudice based on other arguments. Instead of taking this risk, Noel elected to voluntarily dismiss all of his claims under CR 41(a). Pierce County Superior Court therefore never had an opportunity to rule on whether RCW 4.96 had been satisfied, leaving the question unanswered.

**(b) The Case Law Cited By Noel Supports Respondents' Interpretation of CR 41(a).**

In his opening brief, Noel discusses an opinion involving the application of CR 41(a). *Spokane County v. Specialty Auto & Trust*

*Painting*, 153 Wn.2d 238 (2004). *Spokane County* does not support Noel's position.[3]

In the opinion, Spokane County filed its first of several lawsuits against Specialty Auto, but voluntarily dismissed the lawsuit because it had not been legally authorized by the County Board of Commissioners. *Id.* at 241-42. Spokane County filed its second lawsuit after receiving legal authorization from the Board, but then voluntarily dismissed the second lawsuit to "coordinate" with a lawsuit filed by Specialty Auto. *Id.* at 242. In seeking the second dismissal, Spokane County did not discuss the issue with Specialty Auto or obtain any type of agreement or stipulation. *Id.* Spokane County eventually filed its third lawsuit, which Specialty Auto argued was barred by the "two dismissal rule" of CR 41(a). *Id.* Washington's Supreme Court affirmed dismissal under CR 41(a) and rejected a comprehensive series of argument lodged by Spokane County.

First, Spokane County argued its first lawsuit "never existed," and therefore did not count against CR 41(a) because the lawsuit had not been

[3] Noel does not accurately describe the holding in *Spokane County*. For example, Noel asserts the trial court in *Spokane County* declined to dismiss a lawsuit based on CR 41(a): "Specialty Auto filed a motion to dismiss based on CR 41(a)(4), but the trial court denied the motion, finding that the rule did not apply." Appellants' Opening Brief at 12 (*citing Spokane County*, 153 Wn.2d at 242-43). While this is true, Noel neglects to mention the Court of Appeals reversed the trial court decision and held that CR 41(a) applied, a holding later affirmed by Washington's Supreme Court. *Id.* at 243. Noel appears to confuse the holding of *Spokane County* with its companion case, *Faust v. Bellingham Lodge No. 493*.

authorized by its Board of County Commissioners and was therefore legally null. *Id.* at 247. The Court rejected this argument, holding that a null or legally unauthorized lawsuit still counts against CR 41(a): "At least one other court has rejected a similar argument regarding the 'nullity' of a voluntarily dismissed suit, emphasizing that the filing of a complaint alone commences an action for purposes of the 'two dismissal' rule." *Id.* Similarly, Noel argues his previous lawsuits "never existed" because he failed to comply with the requirements of RCW 4.96. As previously dismissed, the trial courts still exercised subject matter jurisdiction over his claims. Moreover, the fact that several of Noel's claims may have been procedurally deficient is immaterial.[4] As recognized in *Spokane County*, Noel commenced an action under CR 41(a) when he filed his first lawsuit, thereby initiating application of the two-dismissal rule.

Second, Spokane County argued CR 41(a) should not apply because its dismissals were "a product of negotiation and agreement between the parties." *Id.* at 247. The Supreme Court rejected this argument: "the rule does not provide for court discretion to look into the reasons for the dismissal. It is undisputed the dismissal was filed *ex parte* by Spokane County and did not reference an agreement between the

[4] Several of Noel's claims had been correctly identified on the tort claim form served on the City defendants under RCW 4.96. These claims were not procedurally deficient, therefore Noel's lawsuit was not "null."

parties. Further, the trial court found that neither dismissal was by stipulation. We reject Spokane County's request that we look beyond this finding and attempt to determine the intent of the parties." *Id.* Noel argues in his opening brief that his voluntary dismissal of his 2012 lawsuit was based on some type of agreement or arrangement between the parties: "...the court entered an order based upon the agreement of the parties and the absence of a full presentment of claims that were dismissed..." Appellants' Opening Brief at 13. This assertion is false. Noel cannot point to any evidence suggesting any type of agreement between the parties. No such agreement was recognized by the trial court in its order. CP 310-312. The trial court order unequivocally states Noel's claims were "voluntarily dismissed by plaintiffs." CP 533.

Third, Spokane County argued CR 41(a) did not apply because its previous lawsuits were dismissed "without prejudice." *Id.* at 248. While this was true, the Supreme Court recognized that prejudice automatically attached when the second lawsuit was voluntarily dismissed: "The plain language of the 'two dismissal' rule does not support this argument. The rule is self-executing and does not allow for court discretion." *Id.* at 248. By operation of CR 41(a), prejudice automatically attached when Noel voluntarily dismissed his second lawsuit, regardless of the language of a dismissal order. "Under CR 41(a), a plaintiff's second unilateral voluntary

dismissal is automatically with prejudice...." *Guillen v. Pierce County*, 127 Wn. App. 278, 281 (2005).

Finally, Spokane County argued CR 41(a) did not apply because the opposing attorney "assented to the first dismissal." *Id.* The Court rejected this argument: "As discussed above, the trial court found that Specialty Auto did not stipulate to either dismissal. The record does not support a finding that Specialty Auto intended to relinquish any rights. Spokane County's waiver argument is without merit." *Id.* Similarly, when Noel voluntarily dismissed his lawsuit for the second time, thereby triggering CR 41(a), the City defendants clarified to the trial court that they were not relinquishing their legal rights to seek dismissal. The Court agreed:

> **Mr. Altman**: I believe this should go without saying, but just so I'm clear: By not objecting to this dismissal, we're not waiving the right to seek dismissal of these claims.
>
> **The Court**: No. No.

CP 534. The City defendants did not agree to Noel's dismissal, they simply recognized they had no basis to object under CR 41(a) because Noel had an absolute right to take a voluntary dismissal.

In *Spokane County*, the Court recognized CR 41(a) applies only to "dismissals that are a unilateral act by the plaintiff." *Id.* at 245. Noel unilaterally obtained both previous dismissals as a procedural tactic to

avoid dismissal of his claims on summary judgment. As recognized in *Spokane County*, CR 41(a) is intended to limit the use of dismissals as a procedural tactic: "The narrow purpose of CR 41(a)(4) is to prevent the abuse and harassment of a defendant and the unfair use of dismissal." *Id.* The Court likewise recognized "the plain language of the "two dismissal" rule of CR 41(a)(4) does not allow for court discretion." *Id.* at 246. Noel has now filed a total of four lawsuits against the City defendants, all based on the same underlying conduct. The entire process has taken a half decade. Noel's claim of disability discrimination/retaliation under RCW 49.60 is properly barred by CR 41(a) and properly dismissed by the trial court. The City defendants request this Court affirm the trial court.

### D. All Claims Asserted by Noel Are Barred by the "Two Dismissal Rule" of CR 41(a).

Earlier in this brief, the City defendants argued that all claims asserted by Noel, with the exception of his disability discrimination/retaliation claim under RCW 49.60, were either deemed waived by Noel or were otherwise procedurally barred by the statute of limitations and judicial estoppel. If the Court rejects these arguments, all of Noel's claim are nonetheless barred by CR 41(a).

Noel's defamation claim is barred by CR 41(a) because it was expressly voluntarily dismissed twice. Noel voluntarily dismissed the defamation claim for the first time in connection with his 2012 lawsuit:

"Plaintiffs' claim of defamation: voluntarily dismissed by plaintiffs." CP 310-312. Noel voluntarily dismissed the defamation claim for a second time in connection with his 2013 lawsuit: "Plaintiff...moves the court for entry of an order of non-suit and dismissal of the above-entitled matter pursuant to CR 41(a)(1)(B)." CP 323-324. The claim is barred by CR 41(a) because it was expressly and voluntarily dismissed by Noel twice.

Noel's other claims (wrongful termination in violation of public policy, fraud, abuse of process, misrepresentation, and civil conspiracy) were voluntarily dismissed once, but not twice, in his earlier lawsuits. Although these claims have not been twice dismissed by Noel, they are still barred by CR 41(a) because they arise from the "same transactional nucleus of facts" as Noel's earlier lawsuits. CR 41(a) imposes a procedural bar on a third lawsuit when a plaintiff has twice voluntarily dismissed "an action based on or including *the same claim...*" *Id.* Federal courts in the Ninth Circuit, analyzing the analogous Fed. Rule Civ. Pro. 41(a), have interpreted "the same claim" broadly, meaning a lawsuit as a whole. Because CR 41(a) is modeled after Fed. Rule Civ. Pro. 41(a), Washington courts look to the federal rule for persuasive guidance. *Beckman v. Wilcox*, 96 Wn. App. 355, 359 (1999).

In *Camacho v. Greenpoint Mortgage Funding*, 489 B.R. 837 (E.D. Cal. 2013), a federal court in California addressed "the same claim" for purposes of the "two dismissal rule" under Fed. Rule. Civ. Pro. 41(a). The court addressed "serial plaintiffs" who filed three complaints against the same defendants, but with varying claims in each of their complaints:

> The linchpin of the rationale is that the term "same claim" in Rule 41(a)(1)(B) means "claim" as used in the Restatement (Second) of Judgments § 24. That is, "same claim" is determined under a transactional analysis to include all rights of a plaintiff to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Here, all relief sought in the complaints arises out of a common nucleus of operative facts.

*Id.* at 839. Although the plaintiff's third complaint in *Camacho* included new legal theories not previously included in the first two complaints, the federal court nonetheless dismissed them under "the two dismissal rule." Likewise, in *Melamed v. Blue Cross of California*, 2012 WL 122828, *5 (C.D. Cal. 2012), the federal district court ruled the analysis under FRCP 41(a) was similar to the *res judicata* inquiry: "the relevant inquiry is not whether the claims identified in the various complaints match up exactly, but whether the two suits arise from the 'same transactional nucleus of facts' such that the claims pleaded are all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties." *Id.* This ruling was affirmed by the Ninth Circuit,

which held that the "two dismissal rule" applied to any claims arising "out of the same transactional nucleus of facts." *Melamed*, 557 Fed. Appx. 659, 662 (9th Cir. 2014) (applying procedural bar even if certain claims could not have been asserted in voluntarily dismissed actions).

The rationale underlying the federal interpretation of Fed. Rul. Civ. Pro. 41(a) makes perfect sense given the intent and purpose of the "two dismissal rule" in Washington, which strives to "prevent the abuse and harassment of a defendant and the unfair use of dismissal." *Feature Realty*, 161 Wn.2d at 219. All of Noel's claims, and all of Noel's lawsuits, stem from his employment and termination from the Lakewood Police Department. Noel has already dismissed two previous lawsuits based on the same transactional nucleus of facts, including the same allegations, the same timeline, and the same parties. The City defendants have been hauled into court across four separate lawsuits, spanning over half a decade. The fact Noel elected to vary his legal claims across lawsuits has not minimized the burden imposed upon defendants. Based on the federal authority, *all* of Noel's claims stemming from his termination from the Lakewood Police Department should be dismissed under CR 41(a).

## V. CONCLUSION

Based on the foregoing authority, the City defendants respectfully request the Court affirm the trial court order dismissing all claims asserted by Noel with prejudice.

DATED this 11th day of April, 2016.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date below, I caused the foregoing document to be served upon the following, via electronic service:

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DATED this 11th day of April, 2016.

Karla Struck, Legal Assistant

# SUMMIT LAW GROUP PLLC

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