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No: 72614-5-1

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

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

Plaintiff/Appellant

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

BRIEF OF APPELLANTS

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I. INTRODUCTION.

Res judicata and collateral estoppel were improperly applied to dismiss an action against Lake Stevens for negligent misrepresentation of its tasing requirement. *Res judicata* does not apply where different subject matter or different causes of action are involved. Collateral estoppel applies only to issues actually decided. In this case, the prior action only decided the statute of limitations applicable to a cause of action based on negligent tasing; it decided nothing with respect to negligent misrepresentation, which is a completely independent cause of action by Lake Stevens' own admission.

II. ASSIGNMENTS OF ERROR

A. The Superior Court erred when it entered its order granting Lake Stevens summary judgment September 5, 2014. CP 69-70.

B. The Superior Court erred when it denied reconsideration of its order granting Lake Stevens summary judgment and awarding Lake Stevens attorneys fees and CR 11 sanctions. CP 11-12.

C. The Superior Court erred in finding "[t]his 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." CP 12.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Negligent tasing and negligent misrepresentation involve different subject matter. Can *res judicata* apply to dismiss a subsequent litigation when the two causes of action involve different subject matter?

B. Negligent tasing and negligent misrepresentation were argued by Lake Stevens to be completely separate causes of action in order to achieve dismissal of a prior lawsuit. Should judicial estoppel operate to prevent Lake Stevens from taking the opposite position in this lawsuit in order to achieve *res judicata* dismissal?

C. Negligent tasing and negligent misrepresentation are different causes of action. *Res judicata* requires identical causes of action to apply. Should the Superior Court have dismissed Hyde's negligent misrepresentation lawsuit based on *res judicata* because he had previously filed an action against Lake Stevens for negligent tasing?

D. Claim splitting is a *res judicata* doctrine. *Res judicata* cannot apply when different causes of action are involved. Should the Superior Court have found impermissible claim splitting and applied *res judicata* to dismiss this lawsuit based on a negligent misrepresentation cause of action when the previous litigation had only involved a cause of action for negligent tasing?

E. Collateral estoppel applies only to issues actually decided. Should collateral estoppel have been applied to dismiss this lawsuit where the only issue decided in the previous litigation was the statute of limitations applicable to Hyde's negligent tasing claim, which had nothing to do with the negligent misrepresentation claim made in this lawsuit?

F. Should CR 11 sanctions have been awarded where required findings were not made and where it cannot be said that Hyde's claim had absolutely no chance of success?

IV. STATEMENT OF CASE

Steve Hyde was hired by the police department of the City of Lake Stevens to be a law enforcement officer. During the course of his training he was told it was mandatory that he be tased. Hyde stated he did not want to be tased; his training officer told him he had to be tased if he wanted the job. CP 164.

Subsequently, Hyde was tased. The tasing caused him to suffer serious injury. He is permanently disabled. CP 164.

Hyde later learned that the taser had been improperly applied to him. CP 164. He filed suit for negligence against the City of Lake Stevens (the prior lawsuit). CP 178.

During the course of the prior lawsuit against Lake Stevens, the Lake Stevens police chief was deposed June 30, 2011. At that time Hyde

learned for the first time that, contrary to the training officer's representation, being tased was not a requirement of the job. CP 165.

Lake Stevens moved for summary judgment in the prior lawsuit on a number of grounds, including the statute of limitations. CP 245. Hyde pointed out that the statute of limitations could not have run on his claim that the requirement that he be tased had been misrepresented by the training officer. CP 130, CP 134-CP 138.[1] In reply Lake Stevens successfully argued negligent misrepresentation of the tasing requirement was a brand new cause of action that had never been in the case. CP 142-3. Summary judgment was granted and Hyde appealed all bases of the grant of summary judgment to the Court of Appeals. CP 182; CP 146-50.

The Court of Appeals agreed with Lake Stevens' position that negligent misrepresentation had never been in the negligent tasing case. CP 159. It then found the statute of limitations had expired with respect to Hyde's claim for negligent tasing. The Court of Appeals did not address any of the other issues that had been appealed by Hyde. CP 160-1.

[1] See Appendix A for legible copies of CP 134-138. Clerk's papers provided by Snohomish County Superior Court were illegible in places, due to copy error related to highlighting in the original documents.

Hyde subsequently filed this lawsuit based on his negligent misrepresentation cause of action. CP 266-8. Lake Stevens moved for summary judgment, claiming *res judicata*, collateral estoppel and asking for attorneys fees and sanctions under CR 11. CP 213. Hyde opposed, pointing out that *res judicata* does not apply to different causes of action and that collateral estoppel only applies to issues actually decided in the prior litigation. CP 120-9.

The Superior Court granted summary judgment. CP 5-6. Reconsideration was moved for and denied. CP 54-65. The Superior Court additionally awarded Lake Stevens attorney fees totaling $17,145.00 and sanctions of $5,000.00. CP 11-12.

This appeal timely followed. CP 1.

V. ARGUMENT

A. *Res Judicata* should not have been applied to dismiss this cause because there is no identity of either subject matter or cause of action with a prior litigation.

Whether *res judicata* bars an action is reviewed *de novo*. Berschaver Phillips Const. Co. v. Mutual of Enumclaw Ins. Co., 175 Wn.App. 222, 227, 308 P.3d 681 (2013). The party asserting *res judicata* has the burden of proving that the action involves the same subject matter,

cause of action, persons or parties, and quality of persons as a prior adjudication. Williams v. Leona & Keeble Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). *Res judicata* requires satisfaction of all four elements for it to apply. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). *Res judicata* also requires a final judgment on the merits. Schoeman v. New York Life Ins. Co., 106 Wn.2d 885, 860, 726 P.2d 1 (1986).

1. *Res judicata* cannot apply because the subject matter of this cause of action is whether the tasing requirement was misrepresented while the subject matter of the prior lawsuit was whether the tasing itself was negligently performed.

The Superior Court found *res judicata* mandated dismissal of this cause. For *res judicata* to apply the Supreme Court of the State of Washington has stated that the subsequent action must be "...identical with a previous action in four respects: (1) the same subject matter; (2) same cause of action; (3) same persons or parties; (4) the same quality of the persons for or against whom the claim is made." Hayes v. City of Seattle, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). If there is a lack of identity between the two actions with respect to any of the four elements, there can be no *res judicata*. Loveridge, 125 Wn.2d at 763.

With respect to elements 3 and 4 there is identity. The same parties are involved in both actions, and the quality of the involved persons is the same in both actions. The same cannot be said for elements 1 and 2.

Element 1 requires that the subject matter be the same in both actions. The Washington Supreme Court emphasized in Hayes that "two lawsuits. . . do not concern the same subject matter simply because they both arise out of the same set of facts." Id.

Hayes involved a man, Michael Hayes, who appealed a Seattle City Council imposition of restrictions on a master use permit which had been previously approved. He filed a complaint for judicial review, contending the Council had acted arbitrarily and capriciously. The Superior Court ruled the findings of the Council had been conclusory and remanded to the Council with instructions to identify adverse impacts and how the restrictions would mitigate the identified adverse impacts. The Seattle Council reconsidered and approved the master use permit without restriction. Mr. Hayes then filed another action in King County Superior Court asking for damages, costs and attorney fees. Seattle defended, contending *res judicata* barred the action because Hayes' action for damages was not joined with his earlier filed action based on the same transaction. Id. at 710-11.

The Washington Supreme Court in Hayes pointed out that in a prior case, Mellor v. Chamberlin, 100 Wn.2d 643, 673 P.2d 610 (1983), it had held two lawsuits arising from the same real estate transaction did not involve the same subject matter. The Hayes court described the facts of Mellor as follows:

> In the first of those lawsuits, a buyer of land contended that the seller had misrepresented the extent of the property included in the sale. That lawsuit was settled and an order of dismissal with prejudice was thereafter entered. Shortly thereafter, the buyer brought a second lawsuit claiming that the seller breached a covenant of warranty. The buyer prevailed in that action on the theory that an adjoining landowner's encroachment onto the property breached the seller's warranty of quiet and peaceful possession.

Hayes at 712.

After explaining that two lawsuits do not involve the same subject matter simply because they both arise out of the same set of facts, the Hayes court held that, although Mr. Hayes had brought two lawsuits out of the same set of facts, they did not involve the same subject matter for purposes of *res judicata* "because the nature of the two claims is entirely disparate." Hayes at 713. The court explained:

> The action for judicial review focused exclusively on the propriety of the decision making process of the Seattle City Council. On the other hand, the subsequent action was for a judgment for money to compensate Hayes for the damages he allegedly suffered as a result of the Council's action.

Id.

In the case at bar the prior lawsuit was based on the claim that the method of taser application to Hyde was negligent. The current lawsuit is based on the claim that the training officer had negligently misrepresented that Hyde had to undergo tasing. The subject matter of the two claims is clearly different. The two claims even had different statutes of limitation. The statute of limitation with respect to the negligent tasing claim was found to begin running at the moment of tasing in the previous litigation. CP 160-1. The negligent misrepresentation claim did not begin running until Hyde discovered the misrepresentation, which was when the Lake Stevens police chief was deposed, 2 years after Hyde was tased. CP 165.

The only issue decided in Hyde's prior lawsuit was that the statute of limitations had run on the negligent tasing claim. The subject matter of the case at bar was not decided and there was no finding that the statute of limitations with respect to negligent misrepresentation had run.

The subject matter of the case at bar is not the statute of limitations applicable to the negligent tasing cause of action. If the prior case bars this one, it is in effect a finding that the expiration of the statute of limitations as to one cause of action extinguishes all other causes of action even if they have statutes of limitations which have not yet expired.

Res judicata dismissal was erroneous because the subject matter of this lawsuit is not identical with the subject matter of the prior lawsuit.

2. *Res judicata* dismissal cannot apply here because the negligent misrepresentation cause of action is different from the negligent tasing cause of action.

In addition to the same subject matter, *res judicata* also requires that both lawsuits involve the same cause of action. A lack of identity between causes of action is fatal to *res judicata*. Loveridge, 125 Wn.2d at 763.

This lawsuit and the prior lawsuit not only involve different subject matter, they also involve different causes of action. The simplest proof of that is the fact that Lake Stevens defended the first lawsuit by successfully taking the position that negligent misrepresentation and negligent tasing were completely independent causes of action. CP 142-3 (Appendix A). However, even if Lake Stevens had not taken this position in the prior litigation, the case law reveals that this in fact is the case.

This subsection will first discuss judicial estoppel as it relates to Lake Stevens' position shift with respect to the independence of the causes of action. It will then explain how the causes of action are independent even if Lake Stevens is allowed to take the opposite position in this litigation. Finally, it will discuss how claim splitting was improperly used

as a basis for dismissal and that the Superior Court's application of claim splitting is at odds with the case law and CR 18.

a. Judicial estoppel prevents Lake Stevens from taking the position that negligent tasing and negligent misrepresentation are completely independent causes of action in Hyde's first lawsuit in order to accomplish statute of limitations dismissal of the negligent taser application case and then to in subsequent litigation take the position that they are the same cause of action to accomplish dismissal based on *res judicata*.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison v. Ethan Allan, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). A purpose of the doctrine is to protect the intergrity of the judicial process. New Hampshire v. Maine, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

Three core factors guide application of judicial estoppel. First, the court considers whether the party's later position must be clearly inconsistent with its earlier position. Second, the court considers whether judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second court was misled.

Third, the court considers whether the party asserting the inconsistent position would either derive an unfair advantage or impose an unfair deteriment on the other party is not estopped. Arkison, 160 Wn.2d at 538-39.

Turning to the facts involved here, in the prior lawsuit Lake Stevens successfully made a motion to dismiss based on a statute of limitations, which it had argued began running the day Officer Hyde was negligently tased, June 11, 2009. CP 245. Hyde pointed out that dismissal was not appropriate because he did not learn of the negligent misrepresentation of the requirement that he be tased until the day the chief was deposed June 30, 2011, which was well within the statute of limitations. CP 121.

Inclusion of Hyde's misrepresentation claim in the prior lawsuit would have been fatal to Lake Stevens' statute of limitations defense, and Lake Stevens aggressively argued negligent misrepresentation was a different cause of action which had never been in the case. Specifically, Lake Stevens stated:

> Hyde urges the court to divine a negligent misrepresentation claim from his Complaint where no such cause of action was previously pled, asserted in discovery, or argued in the voluminous pleadings. . . .
> . . . . Hyde's argument based on a brand new cause of action should be

rejected.

CP 142-3.[2]

In the case at bar Lake Stevens successfully moved for summary judgment based on *res judicata*. This clearly conflicts with their earlier assertion that the causes of action were completely independent, because *res judicata* cannot apply where causes of action are independent.

The scenario thus that is in the prior lawsuit Lake Stevens successfully accomplished statute of limitations dismissal by claiming negligent misrepresentation was an independent cause of action which had not been pled and had therefore never been in the case. It then reversed field in the second litigation and successfully claimed *res judicata*, which by definition cannot apply unless the causes of action are the same.

Either the first court was misled or the second court was misled. Lake Stevens achieved unfair advantage with its inconsistent positions and imposed unfair detriment on Mr. Hyde.

For *res judicata* to apply causes of action must be identical. Hayes, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997). Lake Stevens in the

[2] Readable copies of CP 142-3 are attached as Appendix A. Clerk's papers provided by Snohomish County Superior Court were illegible in places, due to copy error related to highlighting in the original documents.

first litigation took the position that negligent tasing and negligent misrepresentation are independent causes of action. They cannot claim otherwise to achieve *res judicata* in this litigation.

Lake Stevens is bound by its prior assertion that negligent misrepresentation was a brand new cause of action. As a brand new cause of action, negligent misrepresentation cannot be dismissed based on *res judicata*.

b. Even if Lake Stevens were not bound to its prior position by judicial estoppel, negligent tasing and negligent misrepresentation are in fact different causes of action.

The cause of action is the tort, the wrongful conduct, not the damages flowing from the wrong. Sprague v. Adams, 139 Wash. 510, 247 P. 960 (1926). The term "cause of action" actually reveals this. The "cause" of the action is the wrongful conduct. The "result" of the wrongful conduct is the damage.

Sprague involved a motor vehicle accident. Mrs. Sprague was injured when defendant's taxicab ran into her Ford sedan. She initiated an action in justice court to recover for damage to her vehicle which resulted in a judgment in her favor. She then instituted another action in Superior Court to recover for the injuries to her person. The defendant argued *res judicata* prevented the second action.

The Washington Supreme Court in Sprague analyzed whether or not *res judicata* operated to prevent Mrs. Sprague from splitting her claim. In the course of its analysis the Supreme Court had to determine what constituted the cause of action. It pointed out that the English rule would have permitted Mrs. Sprague to bring separate actions for property damage and personal injuries, stating:

> The English rule . . . is based on the proposition that the cause of action rests not on the negligent act, but on the consequence of the wrong, from which it is argued that separate proceedings may be instituted for the different injuries as they accrue.

Id. at 519.

Sprague noted that the English rule went against the weight of United States authority. It found that the cause of action was the wrongful act, not the consequences of the wrongful act. The Washington Supreme Court stated: "If the cause of action is the wrongful act, and we so hold, then all the damages sustained thereby, whether to person or property, are properly sought in one suit." Id. Sprague concluded:

> We are of the opinion that the decided weight of authority in this country supports the view that damages resulting from a single tort, even though such damages be partly property damages and partly personal injury damages, are, when suffered by one person, the subject of only one suit as against the wrongdoer.

Id. at 520.

The point of Sprague is that the cause of action is the tort or wrongful act. The damages flowing from a single tort cannot be split into multiple lawsuits.

Sprague is still good law and is frequently cited. The evolved case law has continued to define causes of action in terms of the wrongful act, not the consequential damages.

The wrongful act or tort involved in this lawsuit is different from the wrongful act or tort involved in the prior lawsuit. The wrongful act in the prior lawsuit was tasing Mr. Hyde in a negligent manner. The wrongful act or tort in this lawsuit was the training officer negligently misrepresenting that Mr. Hyde had to be subjected to tasing if he wanted the job. These are separate torts and by extension are separate causes of action, since Sprague makes it clear the wrongful act, not the consequential damage, is the cause of action. In the case at bar we had two separate torts leading to the same damages. Under Sprague these are different causes of action. We have already established there is no *res judicata* where different causes of action are involved.

Subsequent case law does not drift away from the holding of Sprague. Hayes v. City of Seattle, 131 Wn.2d 706, 934 P.2d 1179 (1997) also addresses deciding when two causes of action are the same:

> In deciding whether two causes of action are the same we are to consider the following four factors: (1) [W]hether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 713.

The court in Hayes then applied the factors to its facts and determined there was no *res judicata*. Significantly for purposes of the case at bar, Hayes found this despite the fact that it found the two separate actions could have been joined for trial. Id. at 714. This underlines that a party does not have to join every cause of action he could have brought in order to avoid application of *res judicata*.

Applying the four factors described in Hayes to Mr. Hyde's circumstance makes it clear negligent tasing and negligent misrepresentation are separate causes of action. Taking the four factors in order: (1) the only right or interest established in the prior action was the determination that the statute of limitations had expired with respect to the negligent tasing claim; this is not an issue involved in the negligent misrepresentation case; (2) the evidence related to proving negligent misrepresentation is totally different from evidence related to proving negligent tasing; (3) the rights of Hyde infringed on for negligent tasing

and negligent misrepresentation are not the same; (4) the suits do not arise out of the same transactional nucleus of facts; the wrongful transaction in the first case was negligent application of the taser to Mr. Hyde; the wrongful transaction in this case was the misrepresentation by the training officer that Mr. Hyde had to be tased if he wanted the job.

Negligent misrepresentation and negligent tasing are different causes of action even if judicial estoppel were not to apply. *Res judicata* cannot apply to different causes of action. Summary dismissal was error.

c. Claim Splitting is a form of *res judicata* and cannot apply where the elements of *res judicata* are not met. In particular it does not apply where separate causes of action are involved.

Lake Stevens persuaded the Superior Court that, because Mr. Hyde could have brought his negligent misrepresentation cause of action with his negligent tasing cause of action, he improperly split his claims and *res judicata* applied. This goes against Washington law. The prohibition is against "claim" splitting not "claims" splitting.

Claim splitting does not happen when separate causes of action are involved. Claim splitting happens when a single cause of action is divided into multiple litigations. In the case at bar two separate causes of action are involved, so there is no claim splitting.

The Washington Supreme Court has made it clear claim splitting refers to taking a single wrongful act or tort and dividing it, not taking different torts or wrongful acts and splitting them:

> It is well settled law in this case, as it seems to be universally elsewhere in common-law states and countries, that a claimant will not be permitted to split a single claim or cause of action which he may possess, and thereby put his opponent to the possible defense of one or more suits thereon.

Sprague, 139 Wash. at 515. What is not permitted is the split of "a single claim or cause of action." Similarly, Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange, 4 Wn.App. 49, 480 P.2d 226 (1971), citing Sprague, states:

> The rule is well settled that a claimant may not separate his cause of action into parts, since to do so would lead to a multiplicity of suits and place the tort feasor in the expensive and vexatious position of having to defend against one or more plaintiffs in one or more forums, even though the items claimed all arose from the same tort.

Id. at 50-1. Again claim splitting is defined as separating "his cause of action into parts," not "causes" of action. The phrase "even though the items claimed all arose from the same tort" also makes it plain that the prohibition relates to dividing a single tort into multiple litigations, not multiple torts into multiple litigations.

Claim splitting is a doctrine of *res judicata*. *Res judicata* cannot apply unless there is identity of subject matter and causes of action. The subject matter of the prior litigation was negligent tasing; the subject matter of this litigation is negligent misrepresentation. The cause of action in the prior lawsuit was negligent tasing; the cause of action in this lawsuit is negligent misrepresentation.

It is important to underline that the prior litigation finally adjudicated only the issue of the statute of limitations applicable to the negligent tasing claim. It decided nothing with respect to the negligent misrepresentation claim.

Lake Stevens successfully argued to the Superior Court in the case now on appeal that, because Mr. Hyde could have joined his claim against Lake Stevens for negligent misrepresentation with his claim for negligent tasing in the prior action, that Mr. Hyde has engaged in impermissible claim splitting and that, as a consequence, his claim for negligent misrepresentation is barred by *res judicata* even though it is an independent cause of action which was not adjudicated in the prior action. The Lake Stevens argument ignores the requirement that subject matter and cause of action be both identical to the prior action in order for *res judicata* to apply. The Lake Stevens argument also misunderstands what claim splitting is.

Claim splitting is taking a single tort or wrongful act and dividing it into multiple litigations. It is not taking multiple torts or wrongful acts and pursuing them in different litigations.

The Washington Supreme Court addressed this misunderstanding in Seattle-First National Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978). The court stated:

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

Id. at 226. Kawachi went on to state:

> And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. A judgment is *res judicata* as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.

Id.

There is no requirement that different causes of action against a particular party be joined. Failure to join different causes of action in the same lawsuit is not claim splitting.

A party must raise every claim he has against a party related to a single cause of action. He does not have to bring every cause of action he

has against a party in a single litigation. Dismissal based on the *res judicata* doctrine of claim splitting was error.

B. Collateral estoppel should not have been applied to dismiss this cause because the only issue finally decided in the prior litigation was the statute of limitations applicable to Hyde's negligent tasing cause of action, which is not an issue in the case at bar.

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

> In addition, collateral estoppel precludes only those issues that have actually been litigated and determined; it does not operate as a bar to matters which could have. . . been raised [in prior litigation] but were not.

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

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

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

Id. at 618.

Collateral estoppel can only apply to one of the issues from the prior lawsuit because only one issue was finally adjudicated – the statute of limitations applicable to the negligent tasing cause of action. Steve Hyde appealed all of the Superior Court's summary judgment rulings in the prior lawsuit, and the Court of Appeals chose not to make any determination with respect to any issue but the statute of limitations. Accordingly, there has been no final determination of issues other than the negligent tasing statute of limitations.

Collateral estoppel applies only to issues which actually were litigated to conclusion in a prior litigation. 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.

The summary judgment order in the prior litigation addressed a number of issues, all of which were appealed by Mr. Hyde in the prior litigation. CP 146-50. However, the Court of Appeals in the prior litigation declined to address any of the issues on appeal save the statute of

limitations applicable to the negligent tasing cause of action, which it found began running as soon as Mr. Hyde was tased. CP 160-1.

Accordingly, the only issue from the prior litigation to which collateral estoppel would apply is the statute of limitations applicable to Mr. Hyde's negligent tasing cause of action. No issue related to Mr. Hyde's negligent misrepresentation cause of action was decided in the prior litigation.

Dismissal based on collateral estoppel was error.

C. The award of attorney fees and sanctions to Lake Stevens was an abuse of discretion because the required CR 11 findings were not made and because it cannot be said this lawsuit was a baseless filing with absolutely no chance of success.

The standard of review for a trial court's ruling granting or denying sanctions is abuse of discretion. Gander v. Yeager, 167 Wn.App. 638, 282 P.3d 1100 (Div. 2, 2012). "Trial courts should only impose CR 11 sanctions if an attorney makes a baseless filing and 'it is patently clear that [the] claim has absolutely no chance of success.' Skimming v. Boxer, 119 Wn.App. 748, 755, 82 P.3d 707 (2004)." Gander at 652. "The burden is on the movant to justify the request for [CR 11] sanctions." Biggs v. Vail, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). "[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable

conduct in its order. The court must make a finding 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." Id. at 201. The trial court imposing CR 11 sanctions must "(1) make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation and (2) impose an appropriate sanction for any such violation which may include the amount of Vail's attorney fees incurred in responding specifically to the sanctionable conduct." Id. at 202 [emphasis in original].

"A trial court may not impose sanctions for a baseless filing unless it also finds that the attorney who filed the pleading, motion or legal memorandum failed to conduct a reasonable inquiry into the factual and legal basis of the claim." Stiles v. Kearny, 168 Wn.App. 250, 261, 277 P.3d 9, review denied, 175 Wn.2d 1016, 287 P.3d 11 (2012) [emphasis in original]. "To impose sanctions, the court must enter findings specifying the actionable conduct." Id. at 262.

"Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. The fact that a complaint does not prevail on its merits is not enough." Building Industry Association of Washington v. McCarthy, 152 Wn.App. 720, 745, 218 P.3d 196 (2009).

The purpose of CR 11 sanctions is "to deter baseless filings and to curb abuses of the judicial system" but not "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992).

In the case at bar the Superior Court entered an order awarding Lake Stevens $17,145.00 in attorney fees and sanctions of $5,000.00. CP 11-12. The Superior Court made no specific findings of fact. It simply stated in its order: "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." CP 12. These are unfounded, untrue, conclusory and lack the required specificity necessary to support the sanctions awarded.

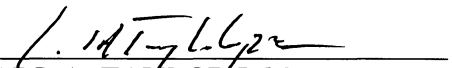
Further, it cannot be said that it was patently clear Mr. Hyde's second lawsuit had "absolutely no chance of success." Not only did Mr. Hyde's lawsuit "have a chance of success," there is reason to believe his analysis of the law was correct and certainly not baseless. Sanctions were inappropriate, particularly where, as here the Superior Court's dismissal was erroneous.

VI. CONCLUSION

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

Dated this 9th day of March, 2015.

LOPEZ & FANTEL, INC., P.S.



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APPENDIX A

Answers despite the requirement of CR 8(c). It is not a jurisdictional defense; it can be waived. Setting aside the "lying in the weeds" aspect of the City of Lake Stevens' behavior, which would defeat the City's attempt at dismissal based on statute of limitations in any event, the statute of limitations had not yet run at the time of the third service of process on Lake Stevens and still has not run.

Steve was tased June 11, 2009. Three months later, September 25, 2009, he contacted Taser International and inquired about the method used to tase him during his training. September 30, 2009 Taser International informed Steve that the method of taser exposure used on him was not recommended. This was the earliest date it can be said he discovered the elements of his cause of action, which means the earliest Steve's claim can be said to have accrued is September 30, 2009. This means the applicable statute of limitations (3 years plus 60 days) still has not expired.

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

Since the City of Lake Stevens presumably denies the taser application was negligently performed, Lake Stevens cannot argue Steve should have known this before he received the email from Taser International saying so. At minimum a question of fact is presented which prevents dismissal based on the statute of limitations.

In the case at bar, even if the statute of limitations had expired prior to acquisition of jurisdiction by the court (which is not the case), it would not be a bar to recovery. The City of

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assuming express assumption of risk could apply, it cannot seriously be argued that it also applies where unrecommended technique is used in the application.

The Washington State Supreme Court recently addressed assumption of risk. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010). The court stated:

> Four varieties of assumption of risk operate in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable assumption of risk.

Id. at 636. The court went on to state:

> The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to release the defendant of a duty – owed by the defendant to the plaintiff – regarding specific known risks.

Id. The Supreme Court stated:

> Express and implied primary assumption of risk share the same elements of proof: The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the risk, and (3) voluntarily chose to encounter the risk.

Id. That obviously is not the case involved here, since Steve did not want to be tased and since there was only a general description of a risk of injury contained in the release.

Express assumption of risk does not apply.

CONCLUSION

Summary judgment should be denied.

DATED this 7 day of September, 2012.

LOPEZ & FANTEL, INC. P.S.

By: _____
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CP 135

EXHIBIT B

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

STEVENN W. HYDE and SANDRA D. BROOKE, husband and wife Plaintiffs, vs. CITY OF LAKE STEVENNS, Defendant.	NO.10-2-10516-4 PLAINTIFFS' MOTION AND MEMORANDUM FOR RECONSIDERATION

1. Relief Requested. Plaintiffs move the court for an order vacating the summary judgment dismissal of their claims against the City of Lake Stevens entered October 17, 2012.

2. Statement of Grounds. This motion is based on CR 59, including CR 59(a)(3), CR 59(a)(4), CR 59 (a)(7), CR 59(a)(8) and CR 59(a)(9). The particular applicable ground will be described in the relevant section.

3. Statement of Issues.

A. Whether it was error to find insufficiency of process given the city clerk deposition and to fail to apply equitable estoppel and Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000) where Defendant Lake Stevens failed to respond to legitimate discovery regarding sufficiency of process until after it felt the statute of limitations had expired more than

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a year and a half after the discovery request was promulgated.

B. Whether it was error to find as a matter of law that Steve Hyde's claim for negligent tasing accrued June 10, 2009, the date he was tased, where uncontroverted evidence established Steven Hyde did not learn he may have been tased using improper technique until September 30, 2009.

C. Whether it was error to dismiss Steven Hyde's claim based on negligent misrepresentation of the Lake Stevens tasing requirement where uncontroverted evidence established Steven Hyde did not learn of the negligent misrepresentation until June 30, 2011.

D. Whether it was error to find Steven Hyde could not sue his employer under the LEOFF statute where evidence establishes he was 'member" of LEOFF at the time of his tasing.

E. Whether it was error to find Sandra Brooke could bring no claim under the LEOFF statute for her husband's injuries.

F. Whether a release generated by Taser International, Inc., which by its terms does not extinguish any rights available under workmen's compensation laws cans operate to extinguish rights Steven Hyde has under RCW 41.26.281.

G. Whether it was error to dismiss Steven Hyde's claim based on assumption of risk where case law establishes that assumption of risk is a factor for the trier of fact to consider in the context of comparative negligence and cannot be used as a total bar to recovery.

4. Evidence Relied Upon. This motion is supported by the Declarations of Carl A. Taylor Lopez, Declaration of Steven Hyde, Declaration of Jennifer Goss, and Declaration of Stanley Kopp, M.D.

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threshold issue of whether the rule applied in the first instance because the parties on appeal has effectively stipulated to its application. *Id.* at n.4. Instead, the court generally referred to the *Hibbard* decision regarding applicability of the discovery rule. *Id.*

This Court should deny reconsideration as no CR 59 grounds are demonstrated by Hyde.

C. The Newly Minted Arguments Based on Negligent Misrepresentation Were Never Pled or Argued and Should be Categorically Rejected.

Hyde urges the Court to divine a negligent misrepresentation claim from his Complaint where no such cause of action was previously pled, asserted in discovery, or argued in the voluminous pleadings filed in the motion practice in this case. **App. D** (Hyde's description of this Negligence claim in his Complaint and discovery). Because CR 59 is not a vehicle for amending the Complaint or articulating new legal theories, such arguments should be summarily rejected by the Court. *Wilcox* at 241.[15]

Having now received an adverse decision, CR 59 does not permit plaintiff to run a new liability theory up the flag pole—particularly, one that was never raised or argued. This is just plain wrong. If parties were permitted to ignore CR 8 and CR 15, this would strip the pleading rules of any real meaning and render preparation of an intelligent defense impossible.[16] A party receiving a summary judgment order "...is entitled to the same measure of finality that is associated with any other judgment." Tegland, 14A

[15] Hyde discusses the judicially created extension of the discovery rule to apply to a cause of action for negligent failure to advise an employee of retirement benefits; however such extension of the rule was not carved out by the trial court, but by the court of appeals. Mot. Recon. at 12-13. *Samuelson,* 75 Wn. App. 340, 346 (1994).

[16] Claims, by definition, involve different elements, proofs, procedures, and damages. It is unclear how one would prepare to go to trial against "any law, statute, or ground that would entitle the plaintiff to relief."

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WASHINGTON PRACTICE, § 26.1 (2012). Having failed to demonstrate a viable CR 59 ground, Hyde's argument based on a brand new cause of action should be rejected.

D. The Court Properly Concluded the Legislature's Definition of Commissioned Law Enforcement Officer Was Unambiguous and Hyde Had No Right to Sue (RCW 41.26.281).

Hyde's arguments repeating what was previously argued on summary judgment should be rejected. The Declaration of Goss is not newly discovered evidence inasmuch as Hyde has not demonstrated at all that the evidence could not have been presented to the Court before October 17; nor has Hyde demonstrated that the Goss Declaration could not with reasonable diligence have been discovered and provided to the court in opposition to summary judgment. CR 59; *Sligar,* 156 Wn. App. 720, 734. Similarly, the "new" Declaration of Plaintiff Hyde should be rejected for the same reasons.

Even if the Goss Declaration is considered, it merely supports the argument previously rejected by the Court that mistakenly enrolling Hyde in LEOFF through DRS prior to Hyde receiving his police commission from his employer does not satisfy the definition of a law enforcement officer entitled to sue his employer. RCW 41.26.281; RCW 41.26.030 (18) (a) - (d). *See Dec Edin.* Additionally, Goss does *not* state that Hyde was a member as of *June 11,* 2009, the date he received his Taser application. Nor does Hyde provide any evidence that he was *commissioned* by his employer as of June 11, 2009.

Plaintiff Hyde's attempt to make an end run around well-established case law regarding statutory interpretation is not well taken. Plaintiff Hyde takes the position that because LEOFF is a "remedial statute," it must be construed liberally. However, such flies in the face of well-established Washington case law holding that an unambiguous statute is

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

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

Plaintiff/Appellant

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

CERTIFICATE OF SERVICE OF BRIEF OF APPELLANTS

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ORIGINAL

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

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

2. On the 9th day of March, 2015, I caused to be served the following document on counsel as follows:

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

[ ] via Fax:
[ ] via ABC legal messenger
[✓] via U.S. regular mail

Brenda L. Bannon
Keating, Bucklin and McCormack, Inc., PS
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[ ] via ABC legal messenger
[✓] via U.S. regular mail

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

Dated at Seattle, Washington, this 9th day of March, 2015.

Cynthia Ringo Palmer
Cynthia Ringo Palmer