Supreme Court No. 95468-2
Court of Appeals No. 49631-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA BILLINGS, individually,

Petitioner

vs.

TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUB, individually, and PAUL LOVELESS, individually

Respondents

ANSWER TO PETITION FOR REVIEW

Jayne L. Freeman, WSBA #24318
Derek Chen, WSBA #49723
Keating, Bucklin, & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104-1518
Phone: (206) 623-8861
Email: jfreeman@kbmlawyers.com
dchen@kbmlawyers.com
Attorneys for Respondents

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I. COUNTER STATEMENT OF CASE

The arbitrator's detailed ruling established that Officer Billings engaged in misconduct that violated Town and Department policies and was contrary to the interests of the Town, that the misconduct was the reason he was terminated, and that termination was appropriate in light of his conduct, his unwillingness and/or inability to change his conduct, and the negative impact his conduct had on the Department. CP 1398-1454 (*Arb. Award*). Despite Billings' disagreement with the arbitrator's findings (CP 1651-1657), his unilateral, conclusory opinion does not create a question of material fact as to whether these issues were fully and fairly litigated.

At arbitration, the burden of proof was placed on the employer-Town and the arbitrator applied a higher "clear and convincing evidence" standard instead of the "preponderance of the evidence" standard that is applied in civil cases. CP 1428. The arbitrator found that the Town met its burden of proving by clear and convincing evidence eleven violations of Department policy demonstrated by three separate investigations (both internal and external), evidence which established the Town had "just cause" to terminate Billings' employment. CP 1433-1454.

However, the arbitrator did not merely make a conclusory "just cause" determination. Rather, she specifically ruled that the Town proved that Billings engaged in unsatisfactory performance and violated

Department policies related to poor officer safety tactics (CP 1433-1434), insubordination (CP 1435-1437), lying (CP 1437-1439), failure to perform job duties (CP 1439-1440), unbecoming conduct (CP 1440-1441), unsatisfactory performance (CP 1441-1443), and leaving his duty post (CP 1445). She found Billings demonstrated a "destructive" attitude that greatly harmed his performance and relationships with his superiors, that "Billings lost sight of the fact that he worked for the Town" and agreed with Chief Schaub's conclusion that "Billings had grown into… [a] self-serving manipulator of the system and disrespectful and resistant to all who dare to suggest change to the system in place." CP 1449.[1]

Significantly, when faced with the question of whether a lesser sanction should have been imposed as a means of "progressive discipline," the arbitrator found "[t]he record does not show how a lesser punishment would change Billings' attitude and upheld termination as the appropriate sanction." CP 1451. Based largely on evidence and testimony from Billings himself, the arbitrator recognized the pervasiveness of negativity, disruption, and intentional insubordination that Billings brought to the Department and acknowledged the employer's need to end it. CP 1450-1452. The arbitrator concluded "termination is the just and appropriate

[1] "[Billings'] disdain for both Schaub and McVay was demonstrated by his testimony at the hearing… Billings clearly does not see the impact of his attitude." CP 1448-1449.

result" because if he remained employed, "he could do damage to the department as a PSO who would continue to challenge the directions." CP 1451.

The arbitrator reviewed the same evidence submitted to the court in this litigation and available to the trial court and the Court of Appeals on *de novo* review of the summary judgment ruling. The only evidence Billings submitted in opposition to the Town's summary judgment motion was his own declaration (CP 1639-1658), largely consisting of inadmissible, conclusory statements. CP 1769-1779. What the declaration lacks is any additional evidence creating a question of fact material to the elements of his civil claims or application of collateral estoppel.[2]

The arbitrator ruled "I agree with the employer though, that at some point Billings seems to have lost perspective on his job responsibilities." (CP 1446) and that "Billings has forfeited his opportunity to further serve the Town as a Sergeant or officer." CP 1449. Therefore, her rulings conclusively established that the Town had legitimate reasons for terminating Billings, unrelated to any alleged discrimination. The only procedural differences between the grievance arbitration and this civil

[2] For example, Billings declaration is void of any examples of additional evidence he would have offered in the arbitration proceedings that was rejected or excluded, nor does it contain evidence of procedural irregularities, or offer evidence that would change the outcome of the summary judgment analysis applied by the Court of Appeals. CP 1639-1658.

litigation significantly favor Billings—not the Town. Billings testified for five days and submitted a plethora of documentary exhibits. CP 112-117, 137-1461, 1398-1454. The arbitrator did not purport to make any rulings on constitutional issues or substantive civil claims Billings pursued in this lawsuit, nor did the Town suggest her rulings amounted to such.

Nearly all of Billings' legal argument on collateral estoppel cites cases raising theoretical procedural shortcomings of arbitrations and other administrative proceedings—none of which exist here.[3] In addition, Billings distorts the underlying courts' arguments and conclusions. Washington courts have repeatedly found arbitrators are competent to make factual findings. The Opinion does not conflict with firmly established precedent regarding arbitrators' fact-finding abilities and, thus, judicial review is not warranted.

II. ARGUMENT

Petitioner presents ten "issues for review" (*Pet.*, pp. 1-3) but only provides analysis of a few.[4] The Court of Appeals properly set forth and applied well-established principles of collateral estoppel (*Opinion,* p. 8-21),

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[3] The lack of a transcript or recording of the entire proceedings is remedied by the arbitrator's detailed ruling and the extensive documentation of the evidence presented to and considered by the arbitrator to support each of her findings.

[4] The court will review only questions raised in the petition, unless the court orders otherwise. RAP 13.7(b). *Shumway v. Payne*, 136 Wash. 2d 383, 392–93, 964 P.2d 349, 353 (1998). Issues 4, 5,6, and 9 were not briefed in the Petition.

summary judgment standards (p. 7, 16-19, 21-24), and substantive employment and civil rights law (p. 21-24). Consistent with his arguments below, Billings continues to treat the Court's opinion as if his claims were dismissed pursuant to CR 12(b)(6). *Opinion*, p. 20, n. 5. He continues to ignore the Court's repeated conclusions that he simply failed to produce evidence sufficiently supportive of the substantive elements of his claims. Billings was not barred at the courthouse steps from pursuing his civil claims; the evidence regarding his termination merely precluded him from moving past the summary judgment stage of litigation. Petitioner has not met the standards of RAP 13.4(b).

A. The Court Did Not Apply Collateral Estoppel to Billings' §1983 First Amendment Claim, and Therefore the Opinion Does Not Conflict With Decisions from the U.S. or Washington Supreme Courts (RAP 13.4(b)(1) and (2)).

Issues 1-4, and 6 purport to seek review of an appellate decision affirming dismissal of a §1983 First Amendment claim "based on collateral estoppel." Supreme Court review "is generally limited to questions that have been presented to and addressed by the Court of Appeals" unless there is an issue included in the record and discussed in the briefs that is necessary to decide the case on the merits. *State v. L.J.M.*, 129 Wn. 2d 386, 397, 918 P.2d 898, 904 (1996). Petitioner concedes the appellate court left the question of whether collateral estoppel operates to bar re-litigation of First

Amendment claims unanswered; resolution of that question was not necessary then, nor is it now, to affirm dismissal of Billings' claims. *Opinion*, p. 6 ("We need not decide whether his 42 U.S.C. §1983 claim is precluded by collateral estoppel.").

Instead, the Court of Appeals "review[ed] the evidence presented at summary judgment" and ruled that Billings failed, as a matter of law, to establish "with evidence" that his "actions constituted protected speech, that would give rise to a First Amendment claim." (p. 24), relying on *Connick v. Myers*, 461 U.S. 138, 149 (1983) (whether speech warrants First Amendment protection is a" pure question of law"). *Opinion*, pp. 22-24 ("Billings provided insufficient evidence to establish a prima facie case under §1983"). Petitioner does not seek Supreme Court review of the appellate court's application of this well-established First Amendment jurisprudence to the evidence in this case on the issue of whether Billings spoke on a matter of public concern. *Opinion,* p. 23-24. The court did not rely on the collateral estoppel doctrine to reach this conclusion, and thus could not conflict with any other State or Federal caselaw on that issue to warrant review under RAP 13.4(b)(1) or (2).

B. This Case Does Not Present Significant Question of Law Under the United States or Washington State Constitutions Regarding Collateral Estoppel of First Amendment Claims.

Even assuming the Court of Appeals' decision had applied collateral

estoppel to dismiss Billings' claims, such a decision would not create a conflict warranting Supreme Court review here.

1. The 1984 *McDonald* decision does not prohibit collateral estoppel in all §1983 actions; Federal courts have more recently approved such application.

Petitioner's reliance on *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 285-93, 104 S.Ct. 1799 (1984) to suggest an arbitration can *never* bar a subsequent §1983 claim is misplaced. *Pet., p. 11-12.*[5] To the contrary, since the 1984 *McDonald* decision, the Supreme Court has ruled that it is appropriate "to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity." *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 797, 106 S. Ct. 3220, 3225 (1986) (citing *United States v. Utah Const. & Mining Co.,* 384 U.S. 394, 86 S.Ct. 1545 (1966)). In turn, these facts would also prevent Billings from proving he was terminated for constitutionally-protected speech, or that he would not have been fired anyway, required elements in a First Amendment claim. Billings cites no evidence (nor does any exist) in the record creating a question of

[5] The supporting analysis reasons (1) an arbitrator may not have the expertise required to resolve the complex legal questions in a §1983 action, (2) an arbitrator may not have the authority to enforce §1983, (3) the union usually has exclusive control over an employee's grievance, and (4) arbitral fact-finding is generally not equivalent to judicial fact-finding. *Id.* at 290-91. Factors (1) and (2) are inapplicable here as the Town relied only on factual findings. Element (3) fails as the record clearly established the union was acting in Billings' interest—the hearing was only about his termination, not some broader issue where the Association and Billings' interests may diverge. The arbitrator's detailed fact-finding and evidentiary basis resolve concerns raised by factor (4) on the record in this case.

fact as to whether the Town would have fired him for his repeated misconduct, and in his own arbitration testimony he declared his intention to continue to subvert the Town's interests. CP 1446-1451.

In *Christensen v. Grant Harb. Hosp.*, 152 Wash. 2d 299, 313, 96 P.3d 957 (2004), this court more recently confirmed that factual findings in administrative proceedings *can* have preclusive effect even on federal civil rights claims, where the **issue** decided would prohibit the plaintiff from establishing the necessary elements of the claim, citing the 1986 *Elliott* decision:

> The United States Supreme Court has held, for example, that **findings by a state administrative body will be given preclusive effect in a subsequent 42 U.S.C. §1983 claim** of racially motivated discharge from employment, provided the requirements for issue preclusion are otherwise satisfied. *Elliott,* 478 U.S. at 794–99, 106 S.Ct. 3220. Similarly, under Washington law preclusive effect can be given in a §1983 civil rights action to an administrative agency's **earlier factual findings** that the employee's reductions in rank were not retaliatory. *Shoemaker,* 109 Wash.2d 504, 745 P.2d 858. Simply because the tort action rests on public policy does not mean that public policy dictates that collateral estoppel should never be applied.

Id., at 313(emphasis added).

In fact, in a companion case to *Shoemaker v. City of Bremerton*, 109 Wash.2d 504, 745 P.2d 858 (1987), the Federal court also applied collateral estoppel to dismiss §1983 First Amendment retaliation claims based on the same Civil Service Commission decision that barred the employee's state

law wrongful discharge claim; the Ninth Circuit affirmed the decision. *Shoemaker v Bremerton*, 844 F.2d 792 (9th Cir. 1988) (unpublished) (citing *Elliott*, 106 S.Ct. 3220 (1986).[6]

Ninth Circuit decisions focus less on what the prior proceeding is titled and more on whether it meets criteria which would make its findings reliable. *See*, *White v. City of Pasadena,* 671 F.3d 918 (9th Cir. 2012) (grievance proceeding "conducted in a judicial-like adversarial hearing in front of an impartial arbiter" had the "requisite judicial character" to preclude §1983 claims);[7] *Eaton v. Siemens*, 571 F. App'x 620, 621 (9th Cir. 2014) (arbitration with witnesses and exhibits had "sufficient judicial character" to preclude §1983 claims); *Eaton v. Siemens*, 2012 WL 1669680, at *2 (arbitrator's finding of policies violations met the *Utah Construction* requirements and had preclusive effect).[8] " Even if applied, collateral estoppel of Billings' §1983 claim would not conflict with State or Federal law on this record.

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[6] *Elliot* was decided two years after *McDonald,* and this Court reaffirmed this ruling in *Shoemaker* (1988) and *Christensen* (2004).

[7] *Miller v. Cty. of Santa Cruz*, 39 F.3d 1030 (*as amend.*), 1033 (9th Cir. 1994) (requisite judicial character met under *Utah Construction* if "(1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issued of fact properly before it, and (3) that the parties have an[] adequate opportunity to litigate."); *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir. 1988)("[f]ederal courts must give preclusive effect to… unreviewed administrative findings under federal common law rules of preclusion.").

[8] Unpublished dispositions and orders of the 9th Circuit after January 1, 2007, may be cited in accordance with FRAP 32.1." Ninth Circuit Rule 36-3(b).

2. The 2018 *Sprague* decision does not preclude collateral estoppel where factual issues are fully and fairly litigated and does not conflict with the court's Opinion.

Sprague v. Spokane Valley Fire Dept., 409 P.3d 160 (2018) is also distinguishable in important respects. *Sprague* did not involve factual findings in the prior proceeding or evaluation of sufficiency of evidence to support the elements of specific civil claims; rather, it involved a pure question of law under the U.S. Constitution:

> Here, neither party argues before this court that the First Amendment issue should be remanded to the trial court. Instead, all parties argue that they are entitled to judgment on the constitutional issue as a matter of law.

Id., p. 171 (evidence in Civil Service proceeding and trial court solely related to whether application of the Department's policy violated U.S. Constitution). Ultimately, this court ruled—as a matter of law—that the Department's policy itself violated the First Amendment based on the agreed facts that the policy prohibited an employee from joining email conversations if the content of his emails contained religious references.[9]

In so holding, *Sprague* acknowledged, but did not overrule or detract from its earlier decision in *Shoemaker,* 109 Wn.2d 504, which applied collateral estoppel to preclude re-litigation of *factual* issues fully litigated

[9] *See, also, Sprague v. Spokane Valley Fire Dept.*, 196 Wn.App. 21, 49-50, 381 P.3d 1259 (2016) (dissent) (employee there was terminated for violating a directive or policy that was in and of itself unconstitutional and, thus, operated more like a "prior restraint" of First Amendment rights).

before a Civil Service Commission. *Id.*, p. 184. The *Sprague* decision appropriately noted that a Civil Service Commission does not have the "competence" or "authority" to make constitutional conclusions, "such as whether SVFD violated Sprague's free speech rights." *Id.*, at 185, *citing Shoemaker*, at 511 with approval ("stating that the Commission has competence to make factual determinations only"). That is a correct reading of the law and the Billings decision, below, does not contradict it.

In contrast, the arbitrator here never made *legal* conclusions regarding *constitutional* issues or public policy of significance under Washington law; nor did the Town argue that any such conclusions would collaterally estop Billings' claims. The Town never argued that the arbitrator's finding of "just cause," in and of itself, barred Billings' claims. CP 15-31, 1716-1725. Rather, the Town relied on a series of specific *factual* findings by the arbitrator, supported by evidence in her written opinion and the evidentiary record—also independently supported by the evidentiary record presented to the trial court—and applied those facts to the substantive framework that any superior or appellate court would use to evaluate whether claims under WLAD, public policy wrongful termination, or First Amendment retaliation can withstand summary judgment. CP 14-102, 1716-1727, 1780-1790.

Further, the "disparity of relief" referenced in *Sprague* is not present

here. The arbitrator was not limited to the remedy of reinstatement, but was also authorized to award back pay and other benefits to Billings. *Id.*, 409 P.3d at 185. As noted in *Piel v. City of Federal Way*, 177 Wn.2d 604, 615-616, 306. P.3d 879 (2013), collateral estoppel would apply just as equally to an employer who received an adverse factual finding from an arbitrator in a subsequent action for damages by the employee. The factual record here is void of any indication that Billings was *actually precluded* from presenting any testimony or evidence that would have changed the findings made by the arbitrator or would make a difference to his civil claims. CP 1398-1454, 112-117, 137-1461. Nor has Billings offered evidence that his ability to fully and fairly litigate this case was in any way *actually limited* by his status as a union member or representation by union counsel. *Id.*

Finally, this court determined that public policy considerations in *Sprague* weighed against applying collateral estoppel because it involved litigation of an "important public question" of both Federal and State law: "the extent to which an employer may restrict an employee's speech, especially when that speech is religious." *Id.* at 185-186. Here, Billings' fact-specific disagreement with his employer's termination decision is significant only to him and his personal interests; it is of no significance to

public employees or employers state-wide.[10] It does not present significant issues of unresolved constitutional or public policy law. The summary judgment proceedings were merely a matter of evaluating the nature and sufficiency of evidence Billings and the Town would be presenting to a judge in a bench trial in this civil proceeding.[11]

C. Petitioner Does Not Raise Issues of Substantial Public Interest Simply Because He Pursued Claims of Discrimination, Retaliation, or Wrongful Discharge.

Petitioner suggests the Court of Appeals' decision and the nature of his claims inherently creates issues of substantial public interest. Neither *McDonald*, *Sprague*, or any other authority cited, suggest the "mixed motive" nature of First Amendment or discrimination claims affects application of collateral estoppel. Both involved prior administrative decisions exceeding jurisdictional authority by making *legal* conclusions about federal constitutional questions.

Petitioner improperly confuses *res judicata* principles with collateral estoppel analysis, *citing Yakima Cty. v. Yakima Cty. Law Enf. Offc. Guil*d, 157 Wn.App. 304, 237 P.3d 316 (2010) (*Pet., pp.* 13-14). The

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[10] For the same reasons, cases from other jurisdictions cited at Pet., p. 15-16, are inapplicable here.

[11] Petitioner also cites *Piel*, supra, at 612-13 to argue that an officer can choose to pursue civil wrongful termination claims even if he has not exhausted administrative remedies; again, the Town does not disagree. However, Billings' claims were not dismissed on an "exhaustion" theory (nor did the Town ever assert it), so it has no application.

Town never argued Billings was precluded from *pursuing* civil claims, nor did the Court of Appeals so rule. However, it is a well-established principle of summary judgment jurisprudence that the court should dismiss civil claims as a matter of law where the plaintiff fails to present admissible evidence to support each of the substantive elements of those claims. *See, Hill v. BCTI Income Fund*, 114 W.2d, 850, 862, 200 P.3d 764 (2009), *overruled on other grounds* by *McClarty v. Totem Elect.*, 157 W.2d 214, 137 P.3d 844 (2006) (summary judgment standards for WLAD claims).

The City provided a substantial evidentiary record to support dismissal of Petitioner's RCW Ch. 49.60 (WLAD) and wrongful termination claims, and the court properly analyzed them claims under the *McDonnell-Douglas*[12] and *Hill* and wrongful discharge burden-shifting framework. Petitioner does not argue, nor is there support for suggesting the arbitrator's factual findings arising out of a fully-litigated proceeding cannot collaterally estop an employee from re-litigating those same facts in hopes of a different outcome in front of another judge in a bench trial. *See, Shoemaker, supra; Reninger v. Dept. of Corr.*, 134 Wash.2d 437, 951 P.2d 782 (1998); *Christensen, supra,* 152 Wash.2d 299; *Plancich v. Cty. of Skagit*, 147 F. Supp. 3d 1158, 1163 (W.D. Wash. 2015).

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[12] *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct., 1817, 36 L.Ed. 2d 668 (1973)

Petitioner's efforts to mix and match legal concepts highlights the distinction between "claim preclusion" and "issue preclusion"—though the arbitrator appropriately chose not to issue an ultimate legal conclusion regarding a "union retaliation" **claim**, to the extent the **issues** that she ruled on operate to bar such a claim under the substantive legal and summary judgment standards that apply here, Billings' claims can and should be dismissed. *See*, *Brownfield*, at 871 (collateral estoppel applies even though the ultimate claims are different in the two suits).

1. Mixed-motive claims are not exempt from summary judgment where the evidence does not meet the substantive elements of the claim.

If circumstances exist such that a public policy or WLAD claim (or First Amendment) can be disposed of on summary judgment when applying the substantive prism for evaluating such claims, there is no injustice to parties simply because the factual basis was fully and fairly litigated in an arbitration proceeding as opposed to a civil trial.[13]

Petitioner suggests his addition of a §1983 First Amendment claims the day of the summary judgment hearing necessarily transforms his employment claim into a matter of "substantial public interest,", once again relying on the 2018 *Sprague* decision for inspiration. Unlike *Sprague*,

[13] Here, Billings had already waived his right to file a jury demand in this case. CP1796-1797 (¶ 4), Opinion, p. 12-13.

which resolved a significant legal issue of constitutional interpretation, this case arises out of a run-of-the mill claim by an employee based on the facts of his own case applied to an already well-established legal framework. There is no wide-reaching, fundamental legal issue that needs be resolved by this court to educate the public or prevent manifest injustice to this one individual on the record presented here.

In 2013, this court again acknowledged the strong foundation of the collateral estoppel doctrine as applicable even in public policy wrongful termination actions in *Piel, supra,* at 615-616:

> Declaring a wrongful termination tort claim dead on arrival in the face of administrative remedies **would likewise unsettle the body of law this court has developed addressing collateral estoppel where wrongful discharge tort claims coexist with administrative remedies**. We have on several occasions discussed the interplay between administrative proceedings such as under PERC and wrongful termination tort actions. In *Reninger v. Department of Corrections*, 134 Wash.2d 437, 951 P.2d 782 (1998), we held that **an employee who loses in an administrative proceeding (there, a personnel appeals board hearing) may be collaterally estopped from asserting a wrongful discharge claim.** In *Smith*, we noted that *Reninger* made it "even more compelling" to hold that the public policy tort does not require first pursuing PERC administrative remedies. 139 Wash.2d at 810, 991 P.2d 1135. **Recognizing the collateral estoppel effect of a prior administrative proceeding,** we observed:
>
> ...in *Christensen v. Grant County Hospital District No. 1,* 152 Wash.2d 299, 96 P.3d 957 (2004), we examined both *Reninger* and *Smith*, and **held that factual findings in a PERC administrative proceeding have preclusive effect in a later tort action for wrongful discharge**. We found it **especially important that the plaintiff "chose to litigate in the administrative setting" before**

> **bringing a tort claim**. *Id.* at 313, 96 P.3d 957; *see also, id.* at 318 n. 10, 96 P.3d 957 (**noting plaintiff had a choice**).

(Emphasis added).

In *Carver v. State*, 147 Wash. App. 567, 574, 197 P.3d 678, 681 (2008), the court recognized that nothing in RCW Ch. 49.60, despite its pronouncement of public policy and broad application, suggests the doctrine of collateral estoppel would not apply to discrimination claims:

> [T]he Legislature knows how to bar issue preclusion when it wants to do so. It has not chosen to do so in the WLAD. Accordingly, in light of the authorities cited, we conclude that collateral estoppel may be applicable to an action brought under our anti-discrimination laws.

Carver, at 574.[14]

The Court's Opinion properly analyzed and concluded that application of collateral estoppel here did not work an injustice, noting "the injustice component is generally concerned with procedural, not substantive irregularity." *Opinion*, p. 11-14, quoting *Christensen, supra,* 152 Wn.2d at 304. The court properly found Billings had a full and fair opportunity to litigate the issues of what led to his termination based on a record complete with all the evidence necessary to render such an opinion, including

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[14] *See also, Brownfield v. City of Yakima*, 178 Wn.App. 850, 869-70, 316 P.2d 520 (2014) ("causation" element of wrongful discharge not met where prior ruling found termination was for insubordination and unfitness for duty); *Plancich, supra,* (wrongful termination, retaliation claims dismissed where arbitrator found deputy engaged in conduct warranting termination).

exhibits, and a ten-day arbitration with witness testimony and direct/cross examination by experienced attorneys for both parties—five days of which was Billings' own testimony—and no record of any evidence or testimony that was excluded or would have resulted in a different factual finding. CP 134-135, 136-1395.[15] Billings failed to reveal any procedural deficiencies, had already waived any jury demand, and the Town prevailed on material issues despite bearing the burden of proof under a higher burden ("clear and convincing evidence") than would be on Billings in civil proceedings ("preponderance of the evidence"). *Op.*, p. 12.

D. Collateral Estoppel Properly Precluded Re-Litigation of Specific, Factual Findings Material to the Elements of Billings' Civil Claims; Summary Judgment Was Not Granted Based Solely On the "Just Cause" Finding and No Injustice Occurred Here.

The arbitrator's decision and extensive, detailed, underlying evidence presented to the trial court and the appellate court on *de novo* review satisfied all legal elements necessary to apply collateral estoppel; it and was not simply the words "just cause." In fact, Respondents took great care to detail the specific factual findings, rulings, and supporting evidence that led the arbitrator (and thus the court) to the proper conclusion. Importantly, the arbitrator here found—and the record established—that Billings did engage in the conduct that was alleged. These were the factual

[15] The court also noted that Billings' arguments unsupported by legal authority and mere unsupported conclusory arguments should not be considered. *Opinion*, p. 13, n.3.

"issues" that could not be re-litigated in subsequent civil action.

There is no reason for the parties to engage in lengthy discovery and litigation in an attempt to obtain a different factual finding based on the same evidence.[16] The doctrine of collateral estoppel allows these findings to be applied to the substantive elements of the claims at issue—here, discrimination, retaliation, and wrongful discharge—to demonstrate the employee could not overcome summary judgment. *See, Milligan v. Thompson*, 110 Wash.App. 628, 638, 42 P.3d 418 (2002) (*quoting Reeves v. Sanderson Plumb. Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).[17]

E. Petitioner's Arguments Regarding "Overriding Justification" in a Wrongful Termination Case Do Not Satisfy Any Factor Under RAP 13.4 Warranting Review.

Neither *Rickman v. Premera*, 2016 WL 2869083 (2016), nor *Martin v. Gonzaga*, 200 Wn.App. 332, 402 P.3d 294 (2017) suggest an employer is required to *concede* it acted "because of a legally prohibited reason" before establishing an "overriding justification" for termination. Even assuming, *arguendo*, that a question of fact exists regarding causation or

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[16] In fact, the trial court continued the summary judgment hearing twice (at least once because Billings' stated he needed more discovery) but Billings never sent supplemental discovery requests. CP 1511-1514, 1520-1520, 1551-1552.

[17] When the "'record conclusively reveal [s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination has occurred,' then summary judgment may be granted." *Id.*

any other element, the employer prevails if it establishes it had a justification that would override even an arguable mixed motive. *Martin*, at 360-362, *citing Rickman v. Premera*, 184 Wn.2d 300, 358 P.3d 1153 (2015) (if prima facie case met, burden shifts to employer to show termination was justified by an overriding justification); *Gardner v. Loomis, Arm. Inc.*, 128 Wn.2d 931, 947-948, 913 P.2d 377 (1996). Summary judgment is appropriate where a plaintiff cannot meet *all* of the elements as a matter of law.[18]

DATED this 1st day of March, 2018.

Respectfully submitted,

Jayne L. Freeman, WSBA # 24318
Attorney for Respondents

[18] Billings fails to present any basis for review of the court's comments, in *dicta*, regarding attorney fees. He was not the prevailing party, so he was never entitled to fees, and concedes the issue is moot. Pet., p. 20.

SUPREME COURT OF THE STATE OF WASHINGTON
OF THE STATE OF WASHINGTON

JOSHUA BILLINGS, individually, Plaintiff, v. TOWN OF STEILACOOM, a municipal corporation, RONALD SCHAUB, individually, and PAUL LOVELESS, individually, Defendants.	Supreme Court No. 95468-2 DECLARATION OF SERVICE

I, LaHoma Walker, declare that I am over the age of 18 and am a legal assistant at the law office of Keating, Bucklin & McCormack, Inc. P.S. I further declare that on 2/7/2018, a true and correct copy of the ANSWER TO PETITION FOR REVIEW was sent to the following parties of record via method indicated:

Attorneys for Plaintiff

Richard H. Wooster
Kram & Wooster, P.S.
1901 South I Street
Tacoma, WA 98405-3810
(253) 572-4161 (voice)
(253) 572-4167 (fax)
Email: rich@kjwmlaw.com
Connie@kjwmlaw.com

☑ E-mail ☐ United States Mail ☐ Legal Messenger

DATED this 1st day of March, 2018, at Seattle, Washington

LaHoma Walker, Legal Assistant

Keating, Bucklin & McCormack, Inc., P.S.
801 Second Avenue, Suite 1210
Seattle, WA 98104-1518

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