No. 99071-9

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 36508-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

CHRIS WILLIAMS,

Plaintiff/Respondent,

vs.

CITY OF SPOKANE and AMERICAN TRAFFIC SOLUTIONS, INC,

Defendants/Appellants.

RESPONDENT CHRIS WILLIAMS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER, CITATION TO APPELLATE DECISION & INTRODUCTION

Chris Williams (Respondent in the Court of Appeals) seeks review of the unpublished decision in *Williams v. City of Spokane and American Traffic Solutions, Inc,* 13 Wn. App. 2d 1106, __ P.3d __ (June 18, 2020) and Order Denying Reconsideration (September 1, 2020). (Copies attached as Appx. A). On September 29, 2020, this Court granted an extension of time to file this Petition due to the sudden and unexpected passing of lead-attorney Larry Kuznetz.

Williams filed a class action against the City of Spokane and American Traffic Solutions, Inc. (ATS) alleging the two were acting in concert and unlawfully ticketing motorists outside a school speed zone that was never lawfully extended. Thousands of motorists were ticketed at this location. Spokane failed to conduct the requisite traffic and engineering investigation or to pass the resolution required by state law and regulation to extend such a zone. Williams sought restitution for unlawful enrichment and declaratory and injunctive relief determining the school speed zone was not lawfully extended.

Within 20 days of receiving the complaint, the defendants filed a motion for summary judgment. Standing was neither raised nor argued in the trial court. The court granted Williams' CR 56(f) motion and permitted a single, limited deposition of Spokane City Traffic Engineer Robert Turner. The trial court subsequently denied summary judgment due to genuine issues of material fact.

Division III accepted discretionary review. The defendants then attempted to supplement the record with a city resolution *passed after review was accepted*. They argued (for the first time on appeal) that Williams lacked standing to bring

his declaratory action pursuant to the newly adopted resolution. A Commissioner denied the request to supplement the record on appeal pursuant to RAP 9.11, not only ruling that the resolution was not properly before the court on review, but that the parties must amended their briefing to redact any references to the resolution and any corresponding arguments. Spokane and ATS did not fully redact their standing argument.

At oral argument, the panel asked both parties questions about standing. Spokane and ATS conceded that they did not contest Williams' standing to bring his declaratory action claim in the trial court. Nonetheless, the appellate court ordered supplemental briefing on standing and whether the Court should consider this uncontested issue *sua sponte* for the first time on appeal. Williams adamantly objected that he had no opportunity to create a record on standing, let alone to fully and fairly argue the issue.

On June 18, 2020, Division III filed an unpublished opinion dismissing the matter entirely based on lack of standing. Williams filed a timely motion for reconsideration and a declaration asserting that he had standing and frequently travels through the school zone in question. His motion was summarily denied. The panel also denied a third-party's motion to publish.

The appellate decision shortcuts justice. It denies Williams and the class their day in Court. It is not rooted in fairness or law, but in convenience: "Assuming we refused to address Chris Williams' standing to assert equitable relief, we would need to decide other difficult questions on appeal." (Appx. A at 25). That was their job. This Court should grant review.

II. ISSUES PRESENTED FOR REVIEW

A. Whether the appellate court erroneously dismissed Williams' class action for declaratory and injunctive relief on grounds of standing, where that issue was never raised before the trial court or factually developed, and genuine issues of material fact precluded summary judgment. RAP 9.11; CR 56.

B. Whether the appellate decision conflicts with this Court's decision *Orwick*, closing the courthouse door to class-action relief against municipalities.

C. Whether the appellate decision conflicts with *Doe v. Fife* in holding that Williams and the potential class must vacate their tickets individually through municipal court, where a decision on the merits does not exist.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Plaintiff-Respondent Chris Williams ("Williams") filed this class action against the City of Spokane ("Spokane") and American Traffic Solutions, Inc. ("ATS") alleging the defendants were in concert and privity in utilizing automated camera equipment to ticket motorists at an unlawfully extended school speed zone. (CP 1-11). Williams brought two claims in equity and prayed for declaratory and injunctive relief, as well as a restitution. *Id.* The premise and crux of his lawsuit was that the City never complied with applicable state laws and regulation to extend the school speed zone in question, specifically that Spokane never conducted the requisite traffic and engineering investigation and never passed a resolution extending the speed zone. *See* RCW 46.61.440; WAC 468-95-330. Within 20 days of filing suit, Spokane and ATS moved to dismiss the action entirely pursuant to CR 56. (CP 52-54). Williams was only allowed to conduct a single and limited deposition of Spokane's City Engineer Robert Turner. With no other discovery taking place whatsoever, the trial court denied summary judgment finding issues of fact existed in this case. (CP 394-97). The

issue of whether Williams had standing to bring his declaratory action was not an issue before the trial court.

B. PROCEDURAL POSTURE ON APPEAL

The Court of Appeals accepted discretionary review of the denial on Summary Judgment. After acceptance of review, Spokane allegedly passed a resolution that extended the school speed zone in question, along with approximately 70 other speed zones. Spokane and ATS attempted to supplement the record with the resolution and argued in its initial briefing that the resolution impacts Williams standing to bring his declaratory action. (App. Req. for Judicial Notice, Aug. 26, 2019). Commissioner Wasson denied the request to supplement the record. (Appx A at 31-36). She held the resolution was improper to supplement on appeal, and ordered the parties to submit amended briefing redacting references to the resolution and related arguments. *Id.* Williams complied with the Commissioners ruling and redacted all responsive arguments to Spokane and ATS's arguments on standing. Spokane and ATS did not fully redact their standing arguments.

After oral argument, the Appellate Court requested supplemental briefing on the issue of standing and whether it can be raised now, for the first time on appeal. (*See* Appx A at 37-71). On June 18, 2020 the Court issued an unpublished decision holding Williams lacked standing for declaratory and injunctive relief. *Id.* at 1-30. Williams moved for reconsideration, and provided a declaration evidencing that he frequently drove through the unlawful speed zone in question. *Id.* at 96-104. Nevertheless, without analysis, the Court denied his motion for reconsideration. *Id.* at 105-07.

The appellate court dismissed Williams' potential class action for declaratory relief and injunction for lack of standing despite that issue never being raised before the trial court, never being developed on the record, and never giving Williams an opportunity to fully and fairly respond. The Court considered the issue of standing in this matter for the first time on review, *and* used it to summarily dismiss this matter in full, despite the existence of genuine issues of material fact.

Judge Fearing explained the conflicting lines of Washington authority underlying this issue:

> Washington decisions *conflict* as to whether standing looms as a prerequisite to superior court jurisdiction. Under one line of decisions, absent a party with standing, courts lack jurisdiction to consider a dispute…Other decisions stand for the proposition that plaintiff's lack of standing does not remove subject matter jurisdiction from the superior court…Similar to an *inconsistent line* of Washington authority on the question of whether standing implicates the court's subject matter jurisdiction, Washington courts have ruled *incompatibly* whether a party waives a challenge to the opponent's standing on appeal when failing to assert the defense in the superior court. (Appx. A at 20-21, 23-24).

(citations omitted; emphasis added). Yet the Court held that it *could* consider the new issue of standing for the first time on appeal despite these conflicts and despite the undeveloped record in this case.

The Court justified its decision alleging the parties have "already presented their arguments about standing, and the court asked questions during oral argument, about Williams' standing." *Id.* at 25. Unfortunately, the record is to the contrary. Williams fully redacted his rebuttal argument in compliance with the Commissioner's ruling, and counsel for ATS conceded at oral argument that it

was not contesting Williams' standing to bring his declaratory action. Williams' supplemental briefing also made this fact clear. *Id.* at 39-61.

IV. WHY REVIEW SHOULD BE GRANTED

This Court should accept review under RAP 13.4(b)(1), (2), and (4). First, there is a split in the Courts and Washington decisions conflict as to whether standing is a prerequisite to superior court jurisdiction and whether it can be raised for the first time on review. Second, this decision conflicts with *Orwick* and effectively shuts the door to class actions against municipalities when read in concert with a line of unpublished cases coming from the appellate courts. This decision essentially makes this Court's decision in *Orwick* dead law. Further, this decision ignores the logic and reasoning contained in *Hadley v. Maxwell,* by ordering each ticketed motorist to fully litigate a traffic citation. Third, this decision is in conflict with *Doe v. Fife* because the trial court has not been given the opportunity to determine the merits of the allegations in this case. In *Fife* the superior court had issued a decision on the merits. Finally, this decision implicates substantial public interest as it impacts tens of thousands of motorists in Washington. The decision runs afoul of the policies and purposes underlying CR 56 and RAP 9.12, effectively denying a potential class of litigants their day in court. The class and Williams are also denied an effective remedy for the damages caused by Spokane and ATS. The decision also violates the appearance of fairness doctrine.

This Court should accept review to resolve the many conflicts in Washington appellate decisions discussed in the appellate decision and *infra*. It should hold

that a standing issue turning on fact questions cannot be determined for the first time on appellate review. It should reverse and remand for trial.

A. This Court Should Accept Review and Address Washington Appellate Courts' Conflicting Lines of Authority as to Whether Standing is Prerequisite to Jurisdiction and Can Be Raised For the First Time on Appeal.

As the appellate court noted, many conflicts exist in the Washington law regarding whether a party waives a challenge to standing by failing to assert the defense in the trial court. *See* App. A at 24-26. One line of cases says the issue is waived and should not be considered first on appeal. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002); *Tyler Pipe Industries, Inc. v. Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), *vacated*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *Baker v. Teachers Insurance & Annuities Association College Retirement Equity Funds (TIAA-CREF)*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979); *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 340, 314 P.3d 729 (2013), *review granted and case dismissed*, 180 Wn.2d 1013, 327 P.3d 55 (2014); *Krause v. Catholic Community Services*, 47 Wn. App. 734, 748, 737 P.2d 280 (1987); *see also Bittrick v. Consolidated Improvement Co.*, 51 Wn. 469, 470, 99 P. 303 (1909) ("plaintiff's right to sue cannot be objected to for the first time on appeal").

Indeed, *Division Three itself* has recently held that standing could not be raised for the first time on appeal. *In re Estate of Reugh*, 110 Wn. App. 2d 20, 447 P.3d 544 (2019), *rev. denied*, 194 Wn.2d 1018 (2020).

But a conflicting line of cases says that the issue may be first raised on appeal. *Intern'l Assoc. of Firefighters, Local 1789 v. Spokane Airports*, 146

Wn.2d 207, 212-13 n.3, 45 P.3d 186, 50 P.3d 618 (2002); *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 433 n.1, 427 P.3d 675 (2018); *Jevne v. Pass, L.L.C*, 3 Wn. App. 2d 561, 565, 416 P.3d 1257 (2018); *In re Estate of Alsup*, 181 Wn. App. at 875(2014); *Roberson v. Perez*, 119 Wn. App. 928, 933, 83 P.3d 1026 (2004), *aff'd*, 156 Wn.2d 33, 123 P.3d 844 (2005); *Mitchell v. John Doe*, 41 Wn. App. 846, 848, 706 P.2d 1100 (1985).

Yet another line says the appellate court may even raise it *sua sponte*. *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006); *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004).

The appellate decision itself identifies the conflicting cases. This alone calls on this Court to grant review and clear up the many, many conflicts – including conflicts with unpublished decisions discussed *infra*. This in itself is an important issue that this Court should determine. Thus, this Court should grant review under RAP 13.4(b)(1), (2) & (4).

B. The Decision Conflicts With and Effectively Shuts the Door to the Class of Litigants Contemplated in *Orwick v. City of Seattle*.

The Court of Appeals determined that the Superior Court had jurisdiction over all of Williams' claims as he alleged equitable relief from system-wide violations of mandatory statutory requirements by a municipal court pursuant to *Orwick v. City of Seattle,* 103 Wn.2d 249 (1984). The Court of Appeals then contradicted itself and created a conflict with *Orwick* when it then held that despite this, Williams and the potential class had to vacate each ticket individually and seek a refund in Municipal Court.

The Court correctly noted that in *Orwick* it was the absence of a ticket or judgment that resulted in the dismissal of the matter because claims for relief were moot. If Williams was to individually seek a refund of his ticket and was successful, his claims for declaratory judgment and an injunction would be moot under *Orwick*. It is unclear how or when a plaintiff could bring a class action for system wide violation by a municipality under *Orwick* based on this decision. If the plaintiff is first required to vacate their ticket in municipal court as directed in this decision, then their claim for declaratory and injunctive relief would be moot. If the plaintiff brings a claim for declaratory and injunctive relief while a judgment still exists, then this decision states that the Superior Court can make a determination on the declaratory action, but cannot award effective and complete relief in equity. As a result, the plaintiff would then subsequently have to bring a *second* individual action for in municipal court for a refund. This cannot be what *Orwick* intended when it held that superior courts have broad and comprehensive jurisdiction over claims for equitable relief from alleged system-wide violations. *Id* at 251.

A careful reading of *Orwick* indicates that a ticket or a judgment is actually a *requirement* for a class action for system-wide violation because the absence of a pending or paid ticket (judgment) would result in the matter being moot to those petitioners. In fact, in *Todd v. City of Auburn,* the petitioners either paid or were subject to fines. 2010 WL 774135 *1 (W.D. Wash., March 2, 2010). The matter in *Todd* was not dismissed because of pending fines or paid fines (judgments), but dismissed on other grounds. *Todd* and *Orwick* read together state that in order

for a plaintiff to bring equitable claims against a municipality for system-wide violations, there must be a pending or paid fine. It seems absurd that a Superior Court in Washington cannot award a complete and effective remedy to a class, and require litigants to individually vacate their judgments in Municipal Court after a Superior Court determines there are system-wide violations committed by a municipality.

This decision has effectively shut the door to any class action under *Orwick:* if a plaintiff does not have a pending or paid fine (judgment), the matter is moot; if a plaintiff does have a judgment and alleged system wide violations by a municipality, this decision states the plaintiff *still* must go to municipal court for a "refund."

This decision adds to a line of unpublished Court of Appeals decisions that have confused and undercut *Orwick,* essentially turning *Orwick* into dead law. It is unclear when reading this decision (Div. III) in concert with *Boone v. City of Seattle,* 4 Wash. App. 2d 1038 (Div. I, July 9, 2018)(unpublished) and *Karl v. City of Bremerton*, 7 Wn. App. 2d 1047 (Div. II, February 20, 2019)(unpublished) when a plaintiff can effectively pursue a class action under *Orwick* for system-wide violations by a municipality and what relief is available. It is unclear how a class can effectively hold a municipality accountable through the Courts for system-wide violations. A traffic citation is a nominal fine, consequently, it is likely *only* through class actions that parties issued nominal fines are able to effectively challenge a municipality for system-wide violations. These unpublished decisions, including this one, have effectively cut off access

to the superior courts, and access to equitable remedies for class actions alleging system-wide violations by a municipality from a class of petitioners.

Furthermore, this decision it is in conflict with *Hadley v. Maxwell,* as it requires each ticked motorist to fully litigate the unlawful extension of the school speed zone in the Municipal Court in order to get a refund. As recognized by this Court in *Hadley v. Maxwell,* 144 Wn.2d 306 (2001), litigants are not likely to fully litigate disputes for a traffic fine, as the citation is nominal. *Hadley* was a case regarding estoppel, however, the Court's reasoning in *Hadley* directly conflicts with the Appellate Court's reasoning in this matter. This decision requires tens of thousands of motorists to individually take on the responsibility to litigate an unlawful extension of a school speed zone to vacate a $234.00 fine in Municipal Court, even when system wide violations are alleged. Even the Appellate Court believes this matter involves "difficult questions" to resolve; a plaintiff is not likely to litigate these difficult questions individually in municipal court over $234.00. *See* Appx. A at 25.

Therefore, this Court should accept review to determine and clarify when a class can bring an action against a municipality for system-wide violations and what remedies are available to the class in Superior Court. As the case law stands, there is no clear avenue for a cause of action of this nature as contemplated by *Orwick*.

C. <u>This Decision Directly Conflicts with and Misapplies ***Doe v. Fife Municipal Court.***</u>

This decision relied heavily on *Doe v. Fife Municipal Court,* 74 Wn. App. 444 (1994), to hold dismissal was appropriate on summary judgment because the

Doe Court held that the petitioners needed to appeal their fines or vacate them as provided in the Criminal Rules for Courts of Limited Jurisdictions. The *Doe* case is factually distinct from Williams, and reliance on *Doe* not only conflicts with *Doe* itself, but also misapplies the case. Unlike Williams, in *Doe* the claims for relief had already been adjudicated on the merits by the Superior Court. There was no dispute that the Does' claims had merit and portions of the orders imposing fines and costs were void as that issue had already been adjudicated and determined by the Superior Court *prior to* the *Does* filing suit. *Id.*

The *Does'*, like Williams, argued that the Courts of Limited Jurisdiction offer inadequate and ineffective relief for large numbers of people. The *Doe* court held that despite district and municipal courts not having jurisdiction to hear class action suits, it determined there was no barrier to the *Does* or a party similarly situated to obtaining effective relief from a Court of Limited Jurisdiction, even in the absence of a class action suit. But unlike Williams, each petitioner in *Doe,* and every potential class member there, could file a motion to vacate when seeking a refund and simply cite as binding authority that the Superior Court had already decided the merits and determined the fines were unlawful. No such determination has occurred in Williams and without a determination on the merits by a Superior Court, *Doe* is inapplicable. In *Doe*, all that was required of the Court of Limited Jurisdiction was to defer to the factual and legal determinations *already made* by the Superior Court and order a refund for the unlawfully imposed fines. "Indeed, the procedure each of the Does would have to follow to obtain relief is quite simple." *Id.* at 455. The effect of this decision by

the Court in Williams is to ask every potential class member to go argue the merits in Municipal Court of what would essentially be class claims. This Court has already acknowledged that class claims are not available to a litigant in Municipal Court.

In Williams, it is disputed whether the school speed zone was lawfully extended, and whether the tickets issued by the City and ATS were lawful. Every single individual motorist ticketed in the Longfellow school zone would need to present evidence and expert testimony at a hearing and argue the City failed to comply with RCW 46.61.440 and WAC 468-95-330 in 2008 when it unlawfully extended to school speed zone by installing the new flashing school speed zone sign. Each motorist would need to present evidence of the location of each piece of City and ATS equipment and have admissible evidence of measurements as well as information as to where the City and ATS are measuring motorists' speeds in relation to the designated crosswalk. Each case would have to provide evidence of the nature and method the ATS equipment was set up and operates. Every single individual motorist would be required to argue the nuances in the standards and requirements that distinguish engineering judgment, engineering studies, and traffic and engineering investigations. All issues that have been raised in this case.

To prevail and carry their burden, every individual motorist would need to retain an attorney and an expert in order to receive a refund for a $234.00 ticket. Indeed, the procedure each motorist would have to follow to obtain relief is complicated, expensive, inadequate and ineffective under the circumstances. *See*

Hadley v. Maxwell, 144 Wn.2d 306 (2001)(recognizing the incentive to litigate a traffic infraction is low).

Secondly, there is absolutely no evidence in the record that would allow this Court to make the same determination whether the lower courts would not be overburdened with litigants. The record has only two references to the potential class size in this case: 1) Williams alleged in his complaint that 500+ motorists were similarly situated and ticketed by the City and ATS at the school speed zone on Nevada at Longfellow Elementary (CP 1-11); and 2) in Williams' Appellate Response Brief, he cites to a Spokesman Review article that states the City and ATS have issued tickets to over 16,000 motorists for speeding in the Longfellow school speed zone in question and netted over $4 million in fines (Resp. Amended Brief, pg. 7, FN 1, Nov. 4, 2019). The City and ATS have neither contested nor controverted the class allegation or potential size in the tens of thousands for this class.

Despite not addressing the class size or status, this Court determined that Spokane's Municipal Court could handle the number of litigants that have been unlawfully ticketed without ever assessing the number of litigants. In *Doe* the potential class was much smaller. The only members of the potential class in *Doe* would have been criminal defendants in Pierce County who paid costs associated with the deferred prosecution program as assessed under RCW 10.05. Here, the class is alleged to be much larger, and taking all reasonable inferences in the light most favorable to Williams, the non-moving party, there are potentially *at least* 16,000 class members.

The Court of Appeals held that an adequate remedy for an alleged system wide violation is for 16,000 individual motorists is to bring individual motions to vacate and put on a full fledge evidentiary hearing on the merits of this lawsuit in order to obtain a refund on a $234 ticket. On summary judgment, the Court of Appeals should not have determined as a matter of law that the lower courts can provide adequate and effective relief in this case. Rather, the limited record supports a reasonable inference that the lower courts cannot provide adequate and effective relief to the class of litigants in question.

This decision conflicts with *Doe* and its reasoning. The misapplication of *Doe* could result in *Doe* being misapplied moving forward as authority to summarily dismiss potential class actions and limit remedies for future litigants. Therefore, review should be granted by this Court to resolve the conflict and misapplication of *Doe.*

D. The Decision Involves Several Issues of Substantial Public Interest that Should be Determined and Clarified by the Supreme Court.

This matter has substantial public interest for several reasons. First, over sixteen thousand motorists have been ticketed at this location. It literally impacts a large class of individuals, not just a single plaintiff. Second, whether a municipality is following and complying with state law and regulations prior to fining individuals constitutes a matter of substantial public interest. There must be an effective procedure for a class to challenge fines being unlawfully issued by a municipality. Third, the funds from the unlawful fines are being used to re-fund the city police, and employ additional officers in the area.

This matter also has substantial public interest because the decision conflicts with longstanding principles and policies relating to access to the courts and the appearance of fairness doctrine. This decision stands for the proposition that an issue which was not raised at the trial court, nor developed through discovery or litigation can be considered and be dispositive to a full dismissal on summary judgment. This decision runs afoul to CR 56, and the underling purpose and policy of summary judgment. Further, it conflicts with RAP 9.12. Despite Williams arguing the application of RAP 9.12 in his supplemental briefing (Appx A at 39-61), the Court did not even analyze RAP 9.12 when addressing the issue of standing for the first time on appeal on an order on summary judgment. The Court of Appeals decision takes the position that facts can be assumed *against* the non-moving party on summary judgment on an issue that was never before the trial court. This decision is contrary CR 56 and RAP 9.12, and violates longstanding, undisputed case law.

This decision also gives permission to appellate courts to ignore appellate commissioner's rulings that become the law of the case. Somehow, despite a clear and unambiguous order by Commissioner Wasson denying supplementation of the resolution on review, the Court still considered, referenced, and relied on the resolution to make its determination. This conflicts with longstanding case law on the appearance of fairness. Williams completely and fully removed his arguments in response to Spokane and ATS's arguments relating to the resolution. The Appellate Court ignored the Commissioner's

ruling by considering the resolution, and summarily dismissing the case based upon standing.

For these several reasons, this decision implicates substantial public interest and should be accepted for review.

V. CONCLUSION

This Court should accept review to resolve the many conflicts in Washington appellate decisions discussed in the appellate decision and *supra.* It should resolve the conflict and hold that standing issues cannot be determined for the first time on appellate review that turns on a factual questions or when the record is underdeveloped.

This Court should accept review to resolve the conflict this decision, and a line of unpublished decisions have created with *Orwick.* It should resolve the conflict and clarify that a class can bring an action against a municipality for system wide violations in Superior Court and that remedies in equity are available to the class as contemplated by this Court in *Orwick.*

This Court should accept review to resolve the conflict this decision creates with *Doe v. Fife,* and reverse the Court of Appeal's assumption on summary judgment that the class has adequate remedies in the lower courts.

This Court should accept review and address this decision as it impacts tens of thousands of motorists in the class, and involves several issues of substantial public interest.

Pursuant to RAP 13.4(b)(1), (2) and (4), this Court should accept review and reverse the Court of Appeals' decision and remand to the trial court.

Respectfully Submitted this 2nd day of November, 2020.

POWELL, KUZNETZ & PARKER, P.S.

By: */s/ Sarah N. Harmon*
Sarah N. Harmon, WSBA #46493
Attorney for Respondent, Chris Williams

Certificate of Service

I HEREBY CERTIFY that on the 2nd day of November, 2020, I caused a true and correct copy of Respondent Williams's Motion for Reconsideration to be e-filed and sent by the methods indicated below to:

Sam Faggiano Office of the City Attorney 808 W. Spokane Falls Blvd Spokane WA 99201 sfaggiano@spokanecity.org	___ U.S. Mail ___ Messenger ___ Facsimile Transmission _X_ Email
Vanessa Power Rachel Cox Stoel Rives 600 University St, Suite 3600 Seattle WA 98101 vanessa.power@stoel.com rhcox@stoel.com	___ U.S. Mail ___ Hand Delivery ___ Facsimile Transmission _X_ Email

DATED at Spokane, WA this 2nd day of November, 2020.

/s/ Ashley Sandaine
Ashley Sandaine

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHRIS WILLIAMS, individually and on behalf of all similarly situated, Respondent, v. CITY OF SPOKANE; and AMERICAN TRAFFIC SOLUTIONS, INC, a foreign corporation, Petitioners.	)	No. 36508-5-III UNPUBLISHED OPINION

FEARING, J. — This case presents the principal question of whether a citizen may later challenge, in a superior court action, a ticket for allegedly speeding within a school zone when the citizen paid the traffic fine but later contends that he had not yet entered a lawful school zone. Appellant Chris Williams sues for money damages for the amount of the ticket and for declaratory and injunctive relief to preclude the City of Spokane from

issuing speeding tickets outside the school zone. We reverse the superior court's denial of the City of Spokane's summary judgment motion to dismiss the lawsuit. We hold that, to obtain any monetary relief, Williams must seek to vacate the judgment for the ticketed amount in the municipal court. We further hold that, since Williams does not allege that he might drive near the school speed zone in the future, he lacks standing for declaratory and injunctive relief.

FACTS

This appeal arises from respondent City of Spokane issuing a speeding infraction to appellant Chris Williams as a result of respondent American Traffic Solutions, Inc. (ATS) capturing Williams on a photograph while Williams allegedly sped in a school zone. Years of facts precede the issuance of the infraction.

On May 18, 1989, the City of Spokane established a 20 m.p.h. school speed limit zone along Nevada Street and adjacent to Longfellow Elementary School. The zone extended 300 feet north of the location of a marked school crosswalk on Empire Avenue near its intersection with Nevada Street.

In 2008, the City of Spokane obtained a grant to install seventy twenty-mile-per-hour school speed limit signs with blinking lights, known as flashing beacons, throughout Spokane. Spokane chose to erect two of the new flashing beacons at Longfellow Elementary School including one along Nevada Street north of the school. Instead of installing the new flashing sign at the spot of the previously posted sign 300 feet from the

crosswalk at Empire Avenue, Spokane positioned the flashing beacon 385 feet from the marked school crosswalk. As a result, Chris Williams claims the city extended the school speed limit zone eight-five feet beyond its lawful boundary.

Robert Turner, a City of Spokane traffic operations engineer, decided to locate the flashing beacon in its current location 385 feet beyond the crosswalk. The installation foreman for the flashing signs, Bob Horrocks, assisted Turner in erecting the beacon.

Robert Turner avowed that he relied on his engineering judgment to determine the location of the Longfellow Elementary School flashing beacon, and he conducted a traffic and engineering investigation before erecting the beacon. Turner based his decision on a number of considerations, including access to power, future installation of photo enforcement equipment, proximity to the curb catch basin, visual obstructions, property owner objections and interests, safety of children, stopping distances before the cross walk, the size of the sign base, and property lines and driveways. Turner did not record these considerations.

Bob Horrocks testified that Robert Turner and he discussed the location for placement of the Longfellow Elementary School flashing beacon sign. Horrocks agreed that Spokane could have erected the new flashing sign at the former location of the sign where the school speed zone began. According to Horrocks, Turner and he chose the current location for the flashing sign because a location closer to the prior sign would have required excavating a portion of the sidewalk. Horrocks declared that Spokane

employees did not discuss other considerations for the location of the Longfellow Elementary School flashing sign.

In 2015, the City of Spokane installed photo-camera enforcement equipment operated by ATS at various locations throughout the city and in particular in school zones. The Spokane Police Department and ATS selected the sites of the cameras based on the number of violations in the speeding zones. Spokane located one of the cameras near the flashing beacon sign along Nevada Street north of Longfellow Elementary School.

On March 11, 2016, the City of Spokane issued Chris Williams a notice of infraction for speeding in the Longfellow Elementary School speed zone in violation of RCW 46.61.440. The notice alleged that, on March 1 at 3:16 p.m., Williams drove through the 20 m.p.h. school speed zone at 28 m.p.h. ATS' photo-camera enforcement equipment captured the purported infraction. Williams claims the photograph captured him driving within the eighty-five foot window, in which the City of Spokane unlawfully extended the school speed zone by reason of placing the flashing beacon sign beyond the three hundred foot zone.

The notice of infraction issued to Chris Williams afforded him the options to pay the fine, request a hearing to contest or mitigate the infraction, or submit an affidavit of non-responsibility. Williams initially requested a hearing, and the Spokane Municipal Court scheduled a hearing. The court then scheduled a new hearing date. Thereafter,

Williams paid the $234 fine established by the notice of infraction from fear of increased insurance premiums and worry about the revocation of his driver's license. As a result of Williams paying the fine, the Spokane Municipal Court entered a judgment against him.

PROCEDURE

On April 25, 2018, two years after the City of Spokane issued Chris Williams the notice of infraction, Williams filed a class action lawsuit in superior court against Spokane and ATS. He proposed a class of those issued speeding infractions, like himself, in the eighty-five foot area north of Longfellow Elementary School, beyond the three hundred foot limit permitted for school speed zones. He alleged that the infraction issued to him and others violated the law. Williams alleged:

> Defendants have ticketed plaintiff and over 500 similarly situated individuals who received tickets for alleged speeding in a school zone even though the individuals were not in a designated school zone when the photo was taken upon which the notice of infraction for speeding was based.

Clerk's Papers (CP) at 4. Williams further alleged:

> Defendants have engaged in, and continue to engage in, a common course of issuing notices of infraction to persons who are not speeding in a school zone when photographed by defendants' photo enforcement equipment.

CP at 7. He did not allege that he often travels in the Longfellow Elementary School speed zone or that he feared being ticketed again outside the confines of a three hundred foot zone.

Williams asserted a claim for unjust enrichment against the City and ATS for his $234 penalty payment, and he sought restitution of the payment. Williams also sought a judicial declaration that Spokane and ATS are unlawfully issuing speeding tickets in an area outside a school zone. Finally, Williams asked for an injunction precluding the unlawful conduct.

The City of Spokane and ATS filed a joint motion for summary judgment to dismiss all of Chris Williams' claims. The two defendants sought dismissal on four independent grounds. First, the superior court lacked subject matter jurisdiction because any refund must be sought from the Spokane Municipal Court. Second, the voluntary payment doctrine bars the claim for unjust enrichment. Third, the doctrine of res judicata bars all claims because Williams could have raised his contentions in the municipal court at the time of litigation over his infraction. Fourth, on the merits, Spokane acted lawfully when it extended the school speed zone beyond the three hundred foot line from the crosswalk because WAC 468-95-330 permitted a sign to be placed beyond three hundred feet "based on a traffic and engineering investigation." CP at 46. ATS asserted a fifth ground for summary judgment dismissal—that Williams' complaint failed to state a cause of action.

The superior court denied the City of Spokane's and ATS' summary judgment motion. The court ruled that it possessed subject matter jurisdiction over Chris Williams' claims. The court found an issue of fact existed as to whether Chris Williams voluntarily

paid his ticket. The court reasoned that the doctrine of res judicata did not preclude the superior court suit because the municipal court did not previously address the length of the speed zone and the propriety of the measurement or extension of zone. Finally, the trial court acknowledged that WAC 468-95-330 permitted a sign to be placed beyond three hundred feet "based on a traffic and engineering investigation." Nevertheless, the court questioned whether differences existed between an investigation and the engineering judgment exercised by Robert Turner for purposes of the regulation.

We granted discretionary review of the superior court's denial of the defendants' summary judgment motion. After granting review, the City of Spokane and ATS moved the court for an order taking judicial notice of Resolution No. 2019-0018, adopted by the Spokane City Council on March 11, 2019, after the denial of its summary judgment motion. The resolution confirmed twenty mile speed limit zones around numerous schools in Spokane, including Longfellow Elementary School. The resolution confirmed the Longfellow Elementary School limit as extending north on Nevada Street to the flashing beacon.

In an October 25, 2019 ruling, our court commissioner considered the motion for judicial notice to be a motion to supplement the record under RAP 9.11(a) and denied the motion. The city's motion did not seek to assert the defense of lack of standing, and the order did not preclude the City of Spokane or ATS from arguing lack of Chris Williams' standing on appeal.

LAW AND ANALYSIS

We distinguish, in our analysis, between Chris Williams' claim for unjust enrichment or damages, on the one hand, and his seeking of declaratory and injunctive relief, on the other hand. Although we hold that the superior court held subject matter jurisdiction to award both damages and equitable relief, we rule that Williams' claim for return of the fine must be brought as a motion to vacate the municipal court judgment in the Spokane Municipal Court. Williams could proceed with his request for equitable relief in the superior court except that he lacks standing. Therefore, we reverse for dismissal of all of Williams' claims.

Although ATS is also party to this appeal, all parties proceed on the basis that liability against the City of Spokane is a condition precedent to liability against ATS. Although ATS asserts the same arguments as Spokane on appeal, we write our opinion as if Spokane is the only appellant. Our rulings in favor of Spokane extend in favor of ATS.

On appeal, the City of Spokane claims, on numerous grounds, that the trial court erred when denying its summary judgment motion. First, the superior court lacked subject matter jurisdiction to entertain Chris Williams' claim for a refund of the ticket penalty. Second, Chris Williams must seek any ticket payment refund from the municipal court. Third, Chris Williams lacks standing to seek injunctive or declaratory relief. Fourth, all claims against the city should be dismissed because Williams voluntarily paid the fine. Fifth, the doctrine of res judicata precludes all claims of

Williams. Sixth, the City of Spokane lawfully extended the school speed zone three hundred and eighty-five feet beyond Longfellow Elementary School. We hold that the superior court possessed subject matter jurisdiction to entertain all claims for relief. Nevertheless, we dismiss Williams' suit because he must seek a refund from the municipal court and because he lacks standing for equitable relief. We do not address Williams' last three contentions.

Subject Matter Jurisdiction

Issue 1: Did the superior court possess subject matter jurisdiction over Chris Williams' cause of action for a refund of the fine he paid for the traffic ticket?

Answer 1: Yes.

The City of Spokane argues that the trial court lacked subject matter jurisdiction over Chris Williams' unjust enrichment claim because his sole recourse is to move to vacate the judgment for the traffic infraction in municipal court. Spokane does not contend that the superior court lacked subject matter jurisdiction for Williams' claims for declaratory and injunctive relief.

Before asking if Chris Williams can otherwise sustain a claim for a refund of his ticket fine, we must decide if the superior court holds subject matter jurisdiction over the claim. We lack authority to address the other defenses of Spokane if we lack subject matter jurisdiction. A court must have subject matter jurisdiction in order to decide a case. *Eugster v. Washington State Bar Association*, 198 Wn. App. 758, 774, 397 P.3d

131, 139-40 (2017). Subject matter jurisdiction is the indispensable foundation on which valid judicial decisions rest, and, in its absence, a court has no power to act. *Eugster v. Washington State Bar Association*, 198 Wn. App. at 774. Nevertheless, a court always has jurisdiction to determine whether it has jurisdiction over a particular case. *Schwartz v. State*, 136 Haw. 258, 262-63, 361 P.3d 1161 (2015).

A court possesses subject matter jurisdiction when it holds authority to adjudicate the type of controversy involved in the action. *In re Marriage of McDermott*, 175 Wn. App. 467, 480-81, 307 P.3d 717 (2013). We conclude that the Washington Constitution affords the superior court subject matter jurisdiction to entertain not only Chris Williams' equitable causes of action, but also his request for a monetary award.

The Washington State Constitution vests original jurisdiction with the superior court, Washington's court of general jurisdiction, unless the claim is within the exclusive jurisdiction of another court. *Orwick v. City of Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). The Washington State Constitution states:

> Superior courts and district courts have concurrent jurisdiction in cases *in equity*. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, *or municipal fine* . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.

WASH. CONST. art. IV, § 6 (emphasis added).

Chris Williams brings a challenge involving the legality of a municipal fine. He seeks a refund in addition to suing in equity based on Spokane's purported unlawful extension of a school speed zone in violation of statutory requirements. He also alleges a continuous practice of Spokane in issuing traffic infractions for speeding in a school zone for traveling above 20 miles per hour in an area beyond a permissible 300 foot school speed zone. The superior courts have original jurisdiction over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court. *Orwick v. City of Seattle*, 103 Wn.2d 249, 251 (1984). We agree with Williams that the superior court holds subject matter jurisdiction to hear all of his claims.

Spokane references chapter 46.63 RCW and court rules for infractions, when arguing that the superior court lacks subject matter jurisdiction to hear Chris Williams' cause of action for a refund of his traffic fine. We add to this list RCW 35.20.030. The latter statute reads, in pertinent part:

> The municipal court shall have jurisdiction to try violations of all city ordinances and all other actions brought to enforce or recover license penalties or forfeitures declared or given by any such ordinances. . . . All civil and criminal proceedings in municipal court, and judgments rendered therein, shall be subject to review in the superior court by writ of review or on appeal: PROVIDED, That an appeal from the court's determination or order in a traffic infraction proceeding may be taken only in accordance with RCW 46.63.090(5).

The legislature enacted chapter 46.63 RCW "to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions."

RCW 46.63.010. RCW 46.63.070(3) provides in part:

> If the person determined to have committed the infraction wishes to contest the determination the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to *the court specified on the notice*.

Under RCW 46.63.090, a challenge to a notice of an infraction "shall be without a jury," and a subsequent "appeal from the court's determination or order shall be to the superior court." RCW 46.63.090(5).

RCW 46.63.080 authorizes the state Supreme Court to establish rules for the conduct of traffic infraction hearings. In 1992, the high court adopted the Infraction Rules for Courts of Limited Jurisdiction (IRLJ). IRLJ 1.1 states:

> (a) Scope of rules. These rules govern the procedure in courts of limited jurisdiction for all cases involving "infractions." Infractions are noncriminal violations of law defined by statute.
> (b) Purpose. These rules shall be construed to secure the just, speedy, and inexpensive determination of every infraction case.

According to the infraction rules, "[a] motion to waive or suspend a fine, or to convert a penalty to community restitution, or to vacate a judgment is governed by CRLJ 60(b)." IRLJ 6.7(a). The Civil Rules for Courts of Limited Jurisdiction, section 60(b) permits relief from a judgment for a number of reasons including when "[t]he judgment is void." CRLJ 60(b)(5).

We reject the City of Spokane's argument that chapter 46.63 RCW and IRLJ 1.1 remove subject matter jurisdiction from the superior court to hear Chris Williams'

complaint. We also rule that RCW 35.20.030 does not rid the superior court of jurisdiction to entertain a request for a refund of a ticket fine or to challenge ongoing enforcement of an ordinance. A municipal court does not have exclusive jurisdiction merely because the factual basis for the claim relates to enforcement of a municipal ordinance. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252 (1984). The legislature cannot remove or modify the constitution's grant of original jurisdiction to the superior court.

Chapter 46.63 RCW and IRLJ address procedures to be followed when contesting a traffic ticket and seeking to vacate a judgment for an infraction. Recent decisions of the United States Supreme Court, the Washington State Supreme Court, and this court have recognized confusion resulting from earlier courts' use of the word "jurisdiction" or the phrase "subject matter jurisdiction" to extend to concepts other than subject matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994); *In re Estate of Reugh*, 10 Wn. App. 2d 20, 47-48, 447 P.3d 544, 560 (2019), *review denied*, 194 Wn.2d 1018, 455 P.3d 128 (2020); *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 208, 258 P.3d 70 (2011). Subject matter jurisdiction simply refers to the court, in which a party files a suit or a motion, being a correct court for the type of suit or character of a motion. *In re of Estate of Reugh*, 10 Wn. App. 2d at 48. The critical concept in determining whether a court has subject matter jurisdiction is the "type of controversy." *Marley v. Department of Labor &*

Industries, 125 Wn.2d at 539 (1994); *In re Marriage of McDermott*, 175 Wn. App. at 480-81 (2013). 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. *Marley v. Department of Labor & Industries*, 125 Wn.2d at 539. "Type" means the general category without regard to the facts of the particular case. *Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003). "Type" refers to the nature of a case and the kind of relief sought. *State v. Barnes*, 146 Wn.2d 74, 85, 43 P.3d 490 (2002).

Chris Williams' failure to follow the statutory procedures for seeking a refund of his traffic fine does not rid the superior court of subject matter jurisdiction of his cause of action. Jurisdiction of the superior court does not depend on compliance with all statutory procedural requirements. *Dougherty v. Department of Labor & Industries*, 150 Wn.2d at 315. Unless mandated by the clear language of a statute, Washington courts decline to interpret a statute's procedural requirements as jurisdictional. *Dougherty v. Department of Labor & Industries*, 150 Wn.2d at 317; *In re Estate of Reugh*, 10 Wn. App. 2d 20, 50 (2019).

We question whether Chris Williams' causes of action even arise from a City of Spokane ordinance. Williams' claims rely primarily on state statutes, RCW 46.61.050 and .440, that allow a school speed zone to extend only three hundred feet unless the city

complies with certain procedures. Williams also relies on the due process clause. He does not claim the city violated any of its ordinances.

Refund of Traffic Crime

Issue 2: Whether the superior court should entertain Chris Williams' demand for a refund of his traffic ticket fine?

Answer 2: No.

Our holding that the superior court holds subject matter jurisdiction to entertain Chris Williams' suit does not preclude us from dismissing the suit on other grounds. The City also contends that, even if the superior court holds original jurisdiction, the legislature adopted a procedure which Chris Williams must employ when seeking to vacate his fine. We agree. This argument would not, however, preclude Williams from pursuing his equitable relief.

The legislature may enact statutory procedures diverting the superior courts' jurisdiction into an alternative procedure that a party must use to challenge a municipal fine. *New Cingular Wireless PCS v. City of Clyde Hill*, 185 Wn.2d 594, 600, 374 P.3d 151 (2016). The legislature may restrict motions to vacate judgments in municipal courts to the court that issued the judgment. *Doe v. Fife Municipal Court*, 74 Wn. App. 444, 454, 874 P.2d 182 (1994). We follow these principles and hold that Chris Williams must follow the procedures for vacating a judgment found in chapter 46.63 RCW, IRLJ 1.1, and CRLJ 60(b). We already outlined those procedures.

We deem *Doe v. Fife Municipal Court*, 74 Wn. App. 444 (1994) dispositive. In *Doe v. Fife Municipal Court*, a gathering of anonymous plaintiffs sued, in superior court, numerous courts of limited jurisdiction for recovery of court costs they earlier paid as a condition of deferred prosecutions. To receive deferred prosecution, the Does paid court costs and entered alcohol treatment programs. None of the Does appealed the orders granting their petitions for deferred prosecution, which orders imposed the costs. When later filing suit in superior court, the Does argued that RCW 10.05 did not permit the imposition of the costs as a condition to deferred prosecution, and, therefore, the superior court should order refunds and impose injunctive relief precluding further collection of the costs. The superior court granted summary judgment to the courts of limited jurisdiction. According to the superior court, the Does needed to appeal the fines or move to vacate them pursuant to the Criminal Rules for Courts of Limited Jurisdiction, CrRLJ 7.8(b)(4). The court also denied the motion for injunctive relief as the courts of limited jurisdiction were already on notice, pursuant to recent case law, that imposition of such costs was impermissible.

On appeal, in *Doe v. Fife Municipal Court*, this court agreed with the Does that portions of the orders imposing costs were void. This reviewing court, however, agreed with the courts of limited jurisdiction that the Does' failure to appeal the costs barred them from bringing their claims in the superior court as an independent action. The exclusive remedy to attack the void judgment was to return to the respective courts of

limited jurisdiction pursuant CrRLJ 7.8(b)(4), which addressed the method to vacate a void judgment. Judicial resources are employed more efficiently if the party who asserts a judgment as being void is first required to address its concerns to the court that issued the judgment. If the litigant is dissatisfied with the municipal court's refusal to vacate a judgment, the litigant may then appeal to the superior court.

The Does, in *Doe v. Fife Municipal Court*, argued that returning to the courts of limited jurisdiction would prevent large number of litigants who had also had similar costs imposed on them from obtaining effective relief. They argued, among other things, that the courts could not award injunctive relief or hear class action lawsuits. Chris Williams repeats these same arguments. The *Doe* court rejected these arguments by answering that the courts would be able to provide relief to each litigant even if a class action could not be maintained. Further the court rejected the argument that the numbers of litigants would overburden the courts.

Standing for Declaratory and Injunctive Relief

Issue 3: Whether the City of Spokane is precluded from arguing lack of standing because on our court commissioner ruling?

Answer 3: No.

In addition to seeking a refund of his fine, Chris Williams seeks a declaratory ruling that the issuance of tickets beyond the three hundred foot distance from Longfellow Elementary School is unlawful. In turn, Williams asks for an injunction

precluding Spokane from issuing tickets within the eighty-five foot zone extending to the flashing beacon. On appeal, the City of Spokane argues that Chris Williams lacks standing to seek equitable relief because he does not allege that he will travel through the Longfellow Elementary School speed zone nor alleges that he fears being ticketed again. In response, Williams contends that a ruling by the court commissioner precludes the raising of this defense and that the city did not raise this defense before the superior court such that it cannot raise the defense for the first time on appeal.

We reject Chris Williams' contention that the court commissioner's ruling precluded the raising of the defense of lack of standing. Williams references an October 25, 2019 ruling, we outlined above. The ruling denied Spokane's request to supplement the record with a recent Spokane City Council resolution that confirmed the extent of the twenty mile per hour school speed limit zone extending north of Longfellow Elementary School on Nevada Street to the flashing beacon. We agree that the court commissioner ruling bars the City of Spokane from relying on the city council resolution in this appeal, but Spokane can argue lack of standing without referring to the resolution.

Issue 4: Whether the claimant must hold standing for the courts to possess subject matter jurisdiction?

Answer 4: No.

The City of Spokane concedes it did not argue before the superior court that Chris Williams lacked standing to seek declaratory or injunctive relief. RAP 2.5(a) declares, in material part:

> *Errors Raised for First Time on Review.* The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of *trial court jurisdiction*. . . . A party or the court may raise at any time the question of *appellate court jurisdiction*. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

(Emphasis added.)

A party may generally not raise a new argument on appeal that the party did not present to the trial court. *In re Detention of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). To avoid the application of this rule, the City of Spokane contends that lack of standing rids the court of subject matter jurisdiction. RAP 2.5(a) does not expressly allow the Court of Appeals to review a standing argument for the first time on appeal. The rule, however, permits the Court of Appeals to review a claimed error asserted for the first time on appeal if the error relates to the trial court's jurisdiction. We hold that standing does not implicate either the superior court's or this court's subject matter jurisdiction.

The concept of standing arises from the context of federal courts. The United States Constitution limits the jurisdiction of federal courts. Philip A. Talmadge,

Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems, 22 SEATTLE U. L. REV. 695, 718 (1999). Article III, section 2 of the federal constitution lists limited types of cases to be heard by the federal judiciary. Therefore, standing, in federal courts, is always required for subject matter jurisdiction, and a federal court must examine jurisdiction if the parties fail to raise the issue. *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990).

Washington courts do not face such constitutional limitations. Washington Constitution article IV, section 6 affords state superior courts with jurisdiction, not only in certain types of cases but "in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." Thus, superior courts and, in turn, Washington appellate courts hold general jurisdiction. The only limit to Court of Appeals' jurisdiction is the controversy exceeding $200. Washington Constitution article IV, section 4; RCW 2.06.030; *City of Spokane v. Wardrop*, 165 Wn. App. 744, 746, 267 P.3d 1054 (2011).

Washington decisions conflict as to whether standing looms as a prerequisite to superior court jurisdiction. Under one line of decisions, absent a party with standing, courts lack jurisdiction to consider a dispute. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d

411 (1986); *In re Estate of Alsup*, 181 Wn. App. 856, 875, 327 P.3d 1266 (2014); *Postema v. Snohomish County*, 83 Wn. App. 574, 579, 922 P.2d 176 (1996).

Other decisions stand for the proposition that a plaintiff's lack of standing does not remove subject matter jurisdiction from the superior court. *Trinity Universal Insurance Co. of Kansas v. Ohio Casualty Insurance Co.*, 176 Wn. App. 185, 198-99, 312 P.3d 976 (2013); *Donlin v. Murphy*, 174 Wn. App. 288, 293 n.7, 300 P.3d 424 (2013). Whether a court has authority to act is determined independent of any inquiry into a petitioner's standing to initiate judicial review. *Durland v. San Juan County*, 175 Wn. App. 316, 325 n.5, 305 P.3d 246 (2013), *aff'd*, 182 Wn.2d 55, 340 P.3d 191 (2014). Article IV, section 6 of the Washington Constitution does not exclude any sort of causes from the jurisdiction of its superior courts, leaving Washington courts, by contrast with federal courts, with few constraints on their jurisdiction. *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406 (2011). Therefore, a defendant may waive the defense that a plaintiff lacks standing. *Ullery v. Fulleton*, 162 Wn. App. at 604.

In *In re Estate of Reugh*, 10 Wn. App. 2d 20 (2019), this court reviewed the contrary lines of authority on standing being an element of subject matter jurisdiction. We concluded that, because of the nature of state courts, standing is not a prerequisite for subject matter jurisdiction. We abide by this holding.

Issue 5: Whether this court should entertain the city's defense of standing notwithstanding the defense not impacting the court's jurisdiction?

Answer 5: Yes.

Chris Williams asks this court, even if we hold subject matter jurisdiction, to still refuse review of the City of Spokane's assertion of lack of standing since Spokane never raised the defense before the superior court. RAP 2.5(a) begins our review of Williams' request to deny review. To repeat, the first sentence of the rule declares:

> Errors Raised for First Time on Review. The appellate court *may refuse* to review any claim of error which was not raised in the trial court.

(Emphasis and boldface omitted.)

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a); *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). Good sense lies behind this requirement. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials. *State v. Strine*, 176 Wn.2d at 749-50; *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The rule also facilitates appellate review by ensuring that a complete record of the issues will be available. *State v. Strine*, 176 Wn.2d at 749-50; *State v. Scott*, 110 Wn.2d at 688.

While appellate courts normally decline to review issues raised for the first time on appeal, RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealable as a matter of right. *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015); *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Appellate courts hold discretion to review new issues. *State v. Blazina*, 182 Wn.2d at 835. RAP 2.5(a)'s use of the term "may" indicates that it is a discretionary decision to refuse review. *State v. Russell*, 171 Wn.2d at 122; *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

Similar to an inconsistent line of Washington authority on the question of whether standing implicates the court's subject matter jurisdiction, Washington courts have ruled incompatibly whether a party waives a challenge to the opponent's standing on appeal when failing to assert the defense in the superior court. The following decisions hold or mention that the challenger to standing may raise the challenge for the first time on appeal. *International Association of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212-13 n.3, 45 P.3d 186, 50 P.3d 618 (2002); *Forbes v. Pierce County*, 5 Wn. App. 2d 423, 433 n.1, 427 P.3d 675 (2018); *Jevne v. Pass, LLC*, 3 Wn. App. 2d 561, 565, 416 P.3d 1257 (2018); *In re Estate of Alsup*, 181 Wn. App. at 875(2014); *Roberson v. Perez*, 119 Wn. App. 928, 933, 83 P.3d 1026 (2004), *aff'd*, 156 Wn.2d 33, 123 P.3d 844 (2005); *Mitchell v. John Doe*, 41 Wn. App. 846, 848, 706 P.2d 1100 (1985). Under this line of cases, an appellate court can even raise the issue on its own. *In re Recall of*

West, 156 Wn.2d 244, 248, 126 P.3d 798 (2006); *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004).

Other Washington cases hold that standing is waived and should not be considered for the first time on appeal. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002); *Tyler Pipe Industries, Inc. v. Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), *vacated*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *Baker v. Teachers Insurance & Annuities Association College Retirement Equity Funds (TIAA-CREF)*, 91 Wn.2d 482, 484, 588 P.2d 1164 (1979); *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 340, 314 P.3d 729 (2013), *review granted and case dismissed*, 180 Wn.2d 1013, 327 P.3d 55 (2014); *Krause v. Catholic Community Services*, 47 Wn. App. 734, 748, 737 P.2d 280 (1987). A plaintiff's right to sue cannot be objected to for the first time on appeal. *Bittrick v. Consolidated Improvement Co.*, 51 Wn. 469, 470, 99 P. 303 (1909). Presumably this line of authority would still permit the appellate court, at its discretion, to review the defense of standing asserted for the first time on appeal.

Recently in *In re Estate of Reugh*, 10 Wn. App. 2d 20 (2019), this court refused to review co-personal-representatives' challenge to the moving party's standing to seek removal of the personal representatives because the co-personal-representatives failed to raise the question with the superior court. We deemed the policies behind demanding that a litigant assert an argument in the trial court before raising the contention on appeal

applied with force in the appeal. Assuming the co-personal-representatives were correct, the superior court could have summarily dismissed the motion for removal. A timely assertion of the contention would have conserved resources.

Countervailing considerations control our decision whether to review standing in the City of Spokane's appeal. Assuming we refused to address Chris Williams' standing to assert equitable relief, we would need to decide other difficult questions on appeal. Assuming we reviewed the other issues and affirmed the superior court, this proceeding would return to the superior court for additional hearings, if not a trial. On remand to the superior court, Spokane could likely assert the defense of lack of standing because the proceeding was in its initial stages when the trial court denied the defense's summary judgment motion. Whatever ruling the superior court issued on the merits as to standing, that ruling would return to this appellate court for a decision on the merits. The parties have already presented their arguments about standing, and the court asked questions, during oral argument, about Williams' standing. After oral argument, this court asked additional questions concerning standing. For these reasons, we exercise our discretion to review for the first time on appeal whether Chris Williams possessed standing to seek declaratory and injunctive relief.

Issue 6: Does Chris Williams hold standing to assert his request for declaratory relief?

Answer 6: No.

The City of Spokane contends that Chris Williams lacks standing for his claim for declaratory relief for several reasons. First, he lacks standing because he cannot sustain a claim for monetary damages in this suit. Second, because the Spokane City Council has since adopted Resolution No. 2019-0018 that extends the school speed zone the additional eighty-five feet, the city has corrected any legal impediment to enforcing the speed limit north to the flashing beacon. This second contention falls more under the rubric of mootness, not standing. Third, Williams does not allege that he ever drives through the Longfellow Elementary School school speed zone anymore. We reject the second argument because our court commissioner previously precluded the contention. We adopt the city's third argument.

To state a claim for declaratory judgment, Williams must show:

> "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

League of Education Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (alteration in original) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)). Thus, the traditional limiting doctrines of standing, mootness, and ripeness apply to declaratory claims. *To-Ro Trade Shows v. Collins*, 144 Wn.2d at 411 (2001). The standing doctrine enforces elements two and three of the four-part test.

To possess standing for declaratory relief against conduct of a municipal corporation, the claimant must show he will suffer "injury in fact," economic or otherwise, by the challenged action. *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004); *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). Chris Williams does not allege in his complaint, nor contend on appeal, that he will ever again drive along Longfellow Elementary School, let alone within the alleged eighty-five foot unlawful extension of the school speed zone. Thus, he does not show any potential injury.

Chris Williams relies on *Orwick v. City of Seattle*, 103 Wn.2d 249 (1984), when arguing that he possesses standing to seek declaratory relief. In *Orwick v. City of Seattle*, three motorists brought claims for declaratory and injunctive relief as well as damages in superior court stemming from traffic citations issued by the city. The motorists alleged that the procedures used by the municipal court to adjudicate the citations violated RCW 46.63 and that poorly trained officers using inaccurate radar equipment ticketed motorists. The municipal court dismissed the traffic citations before any hearing. The superior court dismissed the civil suit, including the claims for declaratory and injunctive relief, in part for lack of jurisdiction. The Supreme Court disagreed with this ruling. Because system-wide violations as well as alleged violations of constitutional rights were at issue, the superior court enjoyed jurisdiction over the equitable claims. The Supreme Court dismissed the claims anyway because of mootness.

Orwick v. City of Seattle does not aid Chris Williams in arguing standing. In *Orwick*, the Supreme Court did not address whether the plaintiffs held standing. Nevertheless, if anything, the *Orwick* decision harms Williams. The Supreme Court dismissed the ticketed plaintiffs' claims for declaratory and injunctive relief because the city had dismissed the notices of infractions such that the claims for relief were moot. Williams pled guilty to the traffic infraction such that he no longer has an active dispute with the City of Spokane, or, at least, any active dispute must be resolved in municipal court.

Chris Williams suggests that the fact that he paid his ticket gives him standing to seek a declaratory judgment. We reject this argument because the contention conflicts with our decision that Williams must reverse any ticket penalty by bringing a motion to vacate in the municipal court judgment. Suing for declaratory relief that the fine was unlawful is an indirect attack on the municipal court judgment. Williams cannot assert any legal harm that would give him standing unless and until he shows that the judgment should be vacated. Williams cites no authority that one has standing to sue for a declaration that his ticket was void when he has a pending judgment in another court that declares he owed the penalty attended to the ticket.

Chris Williams cites *New Cingular Wireless, PCS v. City of Clyde Hill*, 185 Wn.2d at 606-07 (2016), to argue that pursuant to RCW 7.24.010 superior courts have "the power to declare rights, status, and other legal relations *whether or not further relief*

is or could be claimed." (Emphasis added). In *New Cingular Wireless*, the city did not assert the defenses of mootness or standing. New Cingular Wireless sought a refund of taxes paid, not the refund of a judgment paid.

Issue 7: Does Chris Williams hold standing to assert his request for injunctive relief?

Answer 7: No.

Standing requirements for injunctive relief parallel standing rules for declaratory relief. One seeking an injunction must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right. *Osborn v. Grant County By & Through Grant County Commissioners*, 78 Wn. App. 246, 248, 896 P.2d 111 (1995), *aff'd in part, rev'd in part on other grounds*, 130 Wn.2d 615, 926 P.2d 911 (1996).

Chris Williams does not allege any immediate invasion of a right to be charged for speeding only in a lawful school speed zone. He fails to assert that he often travels in the Longfellow Elementary School speed zone or that he fears being ticketed again outside the confines of a three hundred foot lawful zone.

CONCLUSION

We reverse the superior court's denial of the summary judgment motion brought by the City of Spokane and ATS. We grant dismissal of all claims asserted against both defendants.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, C.J.

Renee S. Townsley
Clerk/Administrator

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October 25, 2019

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CASE # 365085
Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
SPOKANE COUNTY SUPERIOR COURT No. 182018298

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling, **November 25, 2019.** The answer, if any, to a Motion to Modify will be due **10 days** after the motion is served on the answering party. The moving party may submit a written reply to the answer to the motion to modify no later than **3 days** (excludes Saturdays, Sundays, and legal holidays) after the answer is served on the moving party. RAP 17.4(e)

Please file the original; serve a copy upon the opposing attorney and file proof of such service with this office.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:bar

The Court of Appeals
of the
State of Washington
Division III

CHRIS WILLIAMS, Respondent, v. CITY OF SPOKANE and AMERICAN TRAFFIC SOLUTIONS, INC., Appellants.	)	No. 36508-5-III COMMISSIONER'S RULING

The City of Spokane and American Traffic Solutions, Inc. (the City) have appealed the Spokane County Superior Court's November 27, 2018 Order that denied its motion for summary judgment of Chris Williams' action for declaratory relief and unjust enrichment. The City now moves this Court to add to the appellate record pursuant to

RAP 9.11 a March 11, 2019 Spokane City Council resolution that affirmed the establishment of the school speed zone at issue in this case as having been determined by the Spokane City/Traffic Engineer "in the exercise of professional engineering judgment after performing an engineering and traffic investigation."[1] Motion, App. A at 1.

The City argues the resolution is relevant to Mr. Williams argument in his respondent's brief in this appeal that the speed zone was not lawfully established, in part because the City never adopted it by resolution. ("There was no evidence presented to the Trial Court that a traffic regulation, *resolution*, or ordinance preceded the placement of the flasher as was required in order to extend the school speed zone. CP 195-96." Respondent's Brief at 3.)

Mr. Williams counters that the Court should not consider the resolution (1) because the council entered it after he had been ticketed for having violated the speed limit in 2008 and after he filed this action, and also (2) because the resolution does not cite the bases for the City/Traffic Engineer's determination. If the Court decides to add the 2019 resolution to the record on appeal, Mr. Williams moves to also add the declaration of Sarah Harmon that the City's response to her public records request did not

[1] The City styles its motion as one for the Court to take judicial notice under ER 201, but it bases its argument in support of its motion on RAP 9.11(a) which sets forth the criteria for this Court to consider in ruling on a motion to add evidence to the appellate record that was not before the trial court.

return any documents that related to "an engineering and traffic investigation . . . conducted in conjunction with or prior to passing the resolution." Declaration at 2.

RAP 9.11(a) provides that

> [t]he appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

The resolution fails the second of RAP 9.11(a)'s criteria. Specifically, this Court cannot say that consideration of the resolution "would probably change the decision being reviewed." Specifically, the resolution does not necessarily change the decision of whether the school speed zone was lawfully established because it does not resolve the question of whether a traffic investigation is required before the City Engineer recommends an expansion of the zone. And, it creates an additional issue of whether the Court should apply the resolution retroactively to persons who, like Mr. Williams, received tickets before the date of the resolution.

Accordingly, IT IS ORDERED, the City's motion to add evidence to the appellate record is denied. Mr. Williams' motion to add Sarah Harmon's declaration to the appellate record is also denied. The City and Mr. Williams filed their opening briefs

before they filed their motions. Both briefs address the 2019 resolution. The parties are therefore directed to file in this Court amended briefs deleting that material within 10 days of the date of this ruling.

Monica Wasson
Commissioner

Renee S. Townsley
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May 5, 2020

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CASE # 365085
Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
SPOKANE COUNTY SUPERIOR COURT No. 182018298

Counsel:

The judicial panel has determined supplemental briefing is needed on the above referenced case heard on April 28, 2020. Please answer for following questions:

1. Did Spokane and ATS assert, before the superior court, that Chris Williams lacked standing to seek equitable relief?
2. If the answer to question 1 is "no," may Spokane and ATS assert the defense of lack of standing for the first time on appeal?
3. May this appeals court address Spokane's and ATS' defense of lack of standing for the first time on appeal because Williams did not argue to the contrary in his responding brief?
4. Should this court address lack of standing regardless if the general rule is that standing cannot be raised for the first time on appeal, because Spokane and ATS could assert the defense on remand and the superior court could then dismiss the claims for equitable relief based on lack of standing?

The supplemental briefing from petitioner and the respondent is now due in 14 days, **May 19, 2020**.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST/bar

No. 36508-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

CHRIS WILLIAMS,

Plaintiff/Respondent,

vs.

CITY OF SPOKANE and AMERICAN TRAFFIC SOLUTIONS, INC,

Defendants/Appellants.

RESPONDENT WILLIAMS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

On May 5, 2020, this Court requested supplemental briefing regarding whether it should consider an argument raised by Appellants for the first time on appeal: that Respondent Williams' lacks standing to bring a declaratory action claim. This issue has actually already been litigated by the parties, argued, and decided by Court of Appeals' Commissioner Wasson in her October 25, 2019 Ruling. In fact, Commissioner Wasson ordered that the parties remove the argument from their briefing so it would not be a consideration on appeal. Therefore, it was improper and in violation of the Commissioner's Ruling for the Appellants to have not deleted this argument in its entirety from its briefing.

It would also work an injustice and prejudice Williams if this Court were to now consider this argument, after Williams complied with the Commissioner's Ruling and submitted his Amended Response Brief with all of his arguments addressing that issue fully deleted as ordered. Consideration now by this Court would punish Williams for complying with the Commissioner's Ruling and, in fact, would only *benefit* the Appellants for failing to comply with the Commissioner's Ruling.

II. ISSUES PRESENTED FOR SUPPLEMENTAL BRIEFING

1. Did Spokane and ATS assert, before the superior court, that Chris Williams lacked standing to seek equitable relief?

Short answer: No, this argument was never raised nor argued before the trial court. It was only raised for the first time on appeal.

2. May Spokane and ATS assert the defense of lack of standing for the first time on appeal?

Short answer: No, Spokane and ATS were previously ordered to delete this

argument and other arguments related to the 2019 Resolution from their opening and reply briefs and the parties were ordered to file amended briefing deleting reference or argument on this issue pursuant to Commissioner Wasson's Ruling filed October 25, 2019. Further, RAP 2.5 and 9.12 limit this court's review to the claims and issues that were before the superior court and waiving this general rule would work an injustice against Williams.

3. May this appeals court address Spokane's and ATS' defense of lack of standing for the first time on appeal because Williams did not argue to the contrary in his responding brief?

Short Answer: No. The inclusion of this argument in Appellant's brief was likely inadvertent as the parties were ordered to remove reference and arguments related to the standing issue. The Court is under the misimpression that Williams did not argue to the contrary regarding the standing issue in his response brief which is because although it was directly addressed, it was deleted from his original response brief upon order by Commissioner Wasson for the parties to file amended briefs. Williams had initially responded to these arguments in his responding brief, but subsequently deleted those arguments in compliance with Commissioner Wasson's Ruling when he filed his amended response brief. Considering this issue now by the Court would prejudice Williams for complying with a valid Court Order.

4. Should this court address lack of standing regardless if the general rule is that standing cannot be raised for the first time on appeal, because Spokane and ATS could assert the defense on remand and the superior court could then dismiss the claims for equitable relief based on lack of standing.

Short Answer: No, the Court at this time should not address the standing issue based on the assumption that ATS and the City could raise the issue before the

trial court. It should be kept in mind that this matter has been the subject of extremely limited discovery and an underdeveloped record. It would be improper to consider these issues for the first time on appeal of a summary judgment order without giving Williams an opportunity to utilize CR 56(f) and/or develop and dispute facts related to these issues before the trial court.

III. STATEMENT OF THE CASE

Respondent Chris Williams ("Williams") filed a lawsuit alleging that the Appellants City of Spokane ("City") and American Traffic Solutions, Inc. ("ATS") were being unjustly enriched by issuing to motorists thousands of speeding tickets utilizing automated camera equipment for "speeding in school zone." CP 1-11. ATS's automated equipment measures vehicle speeds *outside of the statutorily designated school zone. Id.* The motorists are not actually in the school zone when vehicle speeds are measured. Accordingly, the City and ATS are unlawfully issuing tickets for speeding in a school zone. *Id.* In order for these tickets to be lawfully issued, the City would have had to have lawfully extended the school speed zone by a minimum of 85 feet. RCW 46.61.440 and WAC 468-95-330 are the controlling statutory and regulatory requirements that the City must abide by in order to change and extend a school speed zone. The only basis upon which a school speed zone may be extended is "by a traffic regulation based upon a traffic and engineering investigation." *Id.*

Prior to filing a lawsuit, Williams could not find any evidence whatsoever through his public records requests that the City had passed a traffic regulation of any kind before extending the school speed zone in question, or that any traffic

and engineering investigation was ever undertaken. (Resp't Answer to Mot. For Discretionary Review, Appx. 33-38). Accordingly, he filed suit alleging a potential class action for both Unjust Enrichment/Restitution and for Declaratory Relief. CP 1-11. He asked that the trial court determine whether the school speed zone was unlawfully extended and whether the ATS camera equipment was measuring vehicles' speeds *outside* of the school speed zone and then automatically issuing tickets to motorists. *Id.* If the trial court were to determine that the school speed zone was not lawfully extended and vehicles' speeds were being measured and motorists were being issued speeding tickets despite being outside the school speed zone, then the trial court was asked for the following relief: 1) to use its equitable and injunctive powers to prohibit the City and ATS from continuing to issue unlawful tickets in the future, and, 2) restitution to the motorists who were unlawfully ticketed. *Id.* This action was brought as a class action. *Id.*

However, the City and ATS pursued an aggressive motion practice. Within 20 days after suit was filed, they moved for Summary Judgment requesting the Court dismiss all claims with prejudice. CP 52-54. This was before any discovery and any record had even been developed.

The trial court granted Williams' CR 56(f) motion to continue the matter to conduct further discovery, but only insofar as to allow Williams to conduct a single, limited deposition of City Traffic Engineer Robert Turner. Following that single deposition, which was limited to what the City did to "extend" the school speed zone, the parties briefed and argued the issues on summary judgment. The

City and ATS did not contend in either their initial brief in support of summary judgment or their supplemental brief on summary judgment that Williams' Declaratory Action claim should be dismissed for lack of standing. CP 36-51, 73-88.

Following Honorable Judge Fennessy's denial of Appellants Motion for Summary Judgment on November 16, 2018, the City and ATS filed for discretionary review on December 13, 2018. CP 398-405. There was no opportunity prior to review by this Court for Williams to move for class action status with the trial court. Williams was a representative class member who had been ticketed and suffered injury as a result of the unlawful extension of the school zone and receipt of an automated ticket for purportedly speeding outside of the properly designated school speed zone. CP 1-11.

Williams objected to Appellant's Petition for Discretionary Review, and the matter was considered and determined by Commissioner Wasson, granting discretionary review on March 8, 2019. Following acceptance of discretionary review, the City and ATS submitted their opening brief on August 26, 2019, and attempted to improperly supplement the record with what they deemed "highly relevant" information that went to the very crux and threshold issues in this case. (App. Mot., Oct. 16, 2019, pg. 4-5). The City and ATS filed along with their opening brief a pleading entitled "Request for Judicial Notice" attaching several documents that were not included in the record on review and were not provided to or reviewed and considered by the trial court. Included in the attachment was a "City Resolution 2019-0018" ("2019 Resolution") which appears to be a

resolution adopted by the City in an attempt to eliminate Williams's argument that the City had failed to adopt by traffic regulation, the extension of the speed zone. The Resolution purportedly modified 141 different school, park and playground speed zones that had never been previously addressed by the City Council, including the Longfellow School speed zone in question in this case, at 54 different locations within the city limits. (App. Req. for Judicial Notice, August 26, 2019, Ex. A). The Resolution was allegedly passed on March 11, 2019, which was not only several months *after* the City and ATS requested discretionary review and after the trial court ruled on summary judgment, but just days *after* Commissioner Wasson granted discretionary review. *Id.*

The City and ATS never brought a formal motion to supplement this information for the record on review, yet argued the 2019 Resolution throughout it's opening brief, *raising for the first time on appeal* the argument the Williams declaratory action claim was *now* moot and that he had no standing following the passing of the Resolution. The City and ATS alleged that since the school speed zone was now "lawfully extended," there was no longer an actual controversy between the parties with a genuine claim for relief.

Williams' Response Brief fully addressed this new argument noting that the 2019 Resolution actually further supported Williams' claim in two ways. First, there was still absolutely zero evidence that the extension of the Longfellow School speed zone and the 2019 Resolution was based on a traffic and engineering investigation. Second, the 2019 Resolution was simply additional evidence in the record confirming the system-wide violations by the City of

RCW 46.61.440 because the City was now trying to remedy their defect in procedure and modify 140 *additional* school speed zones, not just the one at issue in this suit. Before this Resolution, none of the additional speed zones identified had been previously extended by a traffic regulation based on traffic and engineering investigations. The 2019 Resolution was evidence of the City and ATS placing a Band-Aid on a very large systemic problem.

Williams' Response Brief additionally noted that the Resolution was not properly before this Court, but still argued in the alternative its application so that the City and ATS's new arguments were addressed, including the City and ATS's argument that Williams lacked standing to bring a declaratory action.

On September 25, 2019, which is the same date he filed his initial Response Brief, Williams moved to supplement the record with a Declaration of Sarah N. Harmon, one of the Williams' attorneys, which disputed the validity and effect that the 2019 Resolution had on the issues in this case in response to the arguments raised for the first time by Appellants in their initial brief. The motion to supplement was conditioned on whether the Court would accept the 2019 Resolution as properly supplemented to the record on appeal for consideration by this Court. Appellants' responded and thereupon filed their own motion to supplement the record on appeal with the 2019 Resolution, despite relying on it throughout their initial opening brief and their initial reply. The parties fully briefed and argued before Commissioner Wasson whether the 2019 Resolution and either party's arguments relating to it should be before this Court

On October 25, 2019, Commissioner Wasson issued a very clear ruling

denying the Appellants Motion to Supplement the record with the 2019 Resolution reasoning the Resolution failed under RAP 9.11(a)'s criteria:

> Specifically, the resolution does not necessarily change the decision of whether the school speed zone was lawfully established because it does not resolve the question of whether a traffic investigation is required before the City Engineer recommends an expansion of the zone. And, it creates an additional issue of whether the Court should apply the resolution retroactively to persons who, like Mr. Williams, received tickets before the date of the resolution.

Having denied the City and ATS' motion to supplement, the Commissioner also denied Williams' motion to do the same. At the same time, Commissioner Wasson then ordered the parties to submit amended briefs *deleting any material relating to the 2019 Resolution* within 10 days of the date of the ruling, which would have included any argument related to the standing and mootness issues.

Accordingly, 10 days later, the parties filed their amended briefs. However, despite being ordered to do so, Appellants failed to delete the arguments that Williams' declaratory relief action was moot, and he now lacked standing to bring this claim despite it being directly related to the 2019 Resolution. Williams fully complied and completely deleted and redacted from his amended brief all of his arguments addressing and relating to the 2019 Resolution, including his argument directly in opposition to the Appellants' new argument on appeal that he lacked standing to bring his declaratory action claim on behalf of the potential class.

Oral argument before this Court was held on April 28, 2020. At that time counsel for Appellant ATS conceded on behalf of ATS and the City that the basis for its dismissal of Williams' declaratory action claim was not on the grounds of

standing or jurisdiction. Rather, the basis was that the record was undisputed that the school speed zone was lawfully extended.

On May 5, 2020, the parties received a letter from this Court, requesting supplemental briefing on whether the Court should consider for the first time on appeal the City and ATS's argument that Williams lacks standing to seek equitable relief. The Court should not as that issue was already fully litigated and determined by Commissioner Wasson.

IV. ARGUMENT

A. This Court Should Not Consider Appellants' Argument on Appeal because Appellants Violated the Commissioner's Ruling by Failing to Redact that Argument from Its Briefing.

In its initial brief and for the first time on appeal, the City and ATS alleged "Williams Lacks Standing for Declaratory Relief" (App. Brf. Aug. 26, 2019, pg. 35). The City and ATS argue that Williams declaratory action cannot result in monetary *or* injunctive relief, and he therefore lacks standing to assert any remaining claims for declaratory relief. *Id.* at 34-36. However, the argument that Williams cannot now be the recipient of injunctive relief is new on appeal and based solely upon the argument by the City and ATS that the 2019 Resolution has now fully cured and made lawful the extension of the school speed zone. *Id.* When referencing the 2019 Resolution, the Appellants initial brief expressly states that, "[T]he Spokane City Council has approved the Longfellow Elementary School speed zone. Therefore, there is no live claim for injunctive relief remaining in this case." *Id.* at 34.

It is clear that this new argument that Williams does not have standing to bring his injunctive relief claim relies exclusively on the 2019 Resolution.

However, the Commissioner clearly ordered the parties to delete from their briefs any argument or reference that addresses the 2019 Resolution. Appellant's argument should have been deleted. It was not. Failure to delete this argument was a clear violation of and a failure to comply with Commissioner Wasson's express order in her October 25, 2019 Ruling. Including and arguing it in their amended briefing was a failure to comply with and a violation of Commissioner Wasson's Ruling. This Court should not now consider this argument when the intention was for the parties to remove it. The Commissioner's Ruling is controlling, and it is the law of this case. *State v. Roy,* Wash. App. 309, 315 (2008)(A commissioner's ruling is the law of the case as long as legal authority does not change between proceedings). There was no motion to modify the Commissioner's ruling by either party. As a result, the argument should not now be considered by this Court.

Further, this Court should not consider this argument based on the equitable doctrine of estoppel. *Christensen v. Grant Co. Hosp. Dist. No. 1,* 152 Wn.2d 299, 306 (2004)(The doctrine of estoppel bars and prevents relitigating an issue involving the same parties). The Commissioner has already decided that this new argument on appeal was improper, as it relied on evidence that was not in the record on appeal. The evidence could not be supplemented on appeal under RAP 9.11 as it did not help this Court resolve any of the issues. Further, it created additional issues that were not previously before the trial court. The City and ATS should be estopped from being allowed to take the position that this Court may readdress an issue that was already argued, considered, and fully adjudicated

by the Commissioner. To do so would reward Appellants for having failed to comply with a lawful Court order that Williams complied with in good faith.

Whether by inadvertence or not, including this argument in their amended briefing was in violation of the Commissioner's Ruling as Williams relied on the Commissioner's Ruling that these new arguments were not before this Court, and amended his brief as ordered accordingly. The Commissioner already determined after the parties had a full and fair opportunity to brief this issue that this argument and arguments relating to and relying upon the 2019 Resolution were improper and to be struck. Accordingly, consideration of this argument now would likewise be improper.

B. It Would be Prejudicial to Williams For the Court to Now Consider this Argument as he Redacted the Argument on that Issue in his Response Brief in Compliance with the Commissioner's Ruling.

When the issue was raised for the first time in Appellant's opening brief, Williams fully responded to the City and ATS's argument. (Resp't. Brf. Sept. 25, 2019). Williams argued that the 2019 Resolution did not have the effect of eliminating a case and controversy between the parties, but actually raised more genuine issues of material facts as it was simply further evidence of a system wide violation of RCW 46.61.440. *Id.* 23-26. It further supported the trial court's decision to deny summary judgment. *Id.*

Furthermore, Williams argued in the alternative, that assuming *arguendo* that the 2019 Resolution made his declaratory action moot, that it should still be considered as Williams raised important issues of public law. *Id.* pg. 26-28. In compliance with the Commissioner's Ruling, Williams fully deleted these two

arguments as it was clear that they related to the 2019 Resolution. (*See generally,* Pet. Amended Brf., Nov. 4, 2019). All amended briefs were due and filed on the same date, November 4, 2019, 10 days following the Commissioner's Ruling. The parties did not have any opportunity to directly respond to the amended briefing in anyway as they were all submitted together after the initial briefing had been completed.

This Court's request for supplemental briefing to answer the third question presented: "May this appeals court address Spokane's and ATS' defense of lack of standing for the first time on appeal because Williams did not argue to the contrary in his responding brief?" does not consider the procedural posture that led to the amended briefing filed by the parties. The reason no argument was set forth in Williams Amended Response Brief was because it had been deleted as ordered. Williams *did* in fact argue to the contrary in his initial briefing. However, he complied with the Commissioner's Ruling and deleted his arguments to the contrary as they related directly to the 2019 Resolution.

To now consider this argument would prejudice Williams for complying with the Commissioner's Ruling. It would have the effect of punishing him for complying in good faith and reward the City and ATS for failing to comply. Considering this argument now without Williams' arguments to the contrary before this court would work a grave injustice under these circumstances.

C. The City and ATS Conceded at Oral Argument that William's Standing was not an Issue or Basis for Dismissal of his Declaratory Relief Claim.

At oral argument, this Court asked counsel for both party's questions about

Williams' standing and the trial court's authority to hear his Declaratory Relief claim. Williams argued that he did have standing the bring his Declaratory Relief. The City and ATS conceded that the basis for dismissing Williams' Declaratory Relief action was that as a matter of law, the school speed zone was lawfully extended. Dismissal was not argued or claimed to be based on any facts related to Williams alleged lack of standing. The City and ATS conceded at oral argument that in order to dismiss Williams' claim for declaratory relief this Court would need to determine that no genuine issue of material fact exists. The City and ATS waived and abandoned the argument on standing as it relates to his declaratory relief claim. *See In re Prins' Estate,* 33 Wn. 2d 831, 836 (1949)(Court did not need to consider and determine an issue specifically waived in oral argument).

Further, the Appellant's concession supports the conclusion that the standing argument was related to the 2019 Resolution as the Resolution was not argued by either party at oral argument before this Court, consistent with the Commissioners ruling that it had no bearing on the issues in the case. Since the City and ATS acknowledged that their grounds to dismiss Williams' Declaratory Relief claim was not based on standing, the Court should not now consider this argument.

D. Considering New Arguments on Appeal not Previously Argued at Summary Judgment Would be Improper.

The City and ATS's argument regarding Williams' standing to bring a cause of action for declaratory relief was not raised before the trial court on Summary Judgment. Nor was the 2019 Resolution considered or a part of the record as it

was passed on March 11, 2019, several months *after* the trial court denied the City and ATS' Motion for Summary Judgment, and after discretionary review was granted. No discovery whatsoever was conducted relating to the 2019 Resolution. Nor could Williams have asked Mr. Robert Turner, City Engineer, anything regarding the 2019 Resolution, as it was passed nine months *after* his deposition was conducted.

Appellate courts limit review to claims argued before the trial court pursuant to RAP 2.5(a). "This is especially true for summary judgment proceedings." *Nhuyen v. Sacred Heart Med. Cnt.,* 97 Wn. App. 728, 733 (1999) *citing* RAP 9.12. Appellate courts review summary judgment orders de novo and perform "the same inquiry as the trial court." *Id. citing Kruse v. Hemp,* 121 Wn.2d 715, 722 (1993). To allow for a new theory on appeal of a summary judgment order that has not been argued and briefed by the parties before the trial court is generally improper as it denies the responding party the right to develop and dispute the facts material to the new theory. *Bernal v. American Honda Motor Co.,* 87 Wn.2d 406, 414-15 (1976). Further, the Courts are cautioned against and should be hesitant to cut litigants off from their right to a trial by means of summary judgment when they have had neither the opportunity nor the occasion to take advantage of CR 56(f). *Id.* The only exception to the rule that appellate review is limited to the claims argued before the trial court, is when it is appropriate and necessary to serve the ends of justice. *Kruse,* 121 Wn.2d at 721. However, waiver of this rule in this case would work an injustice and would not serve the ends of justice.

Here, there was no opportunity for Williams to develop and dispute facts relating to either Williams' standing to bring his declaratory action claim or the 2019 Resolution. The fact that the 2019 Resolution would only create additional issues for the trial court was one of the grounds stated in the Commissioner's Ruling when she denied supplementing the record with the 2019 Resolution. (Comm. Ruling, at 3, Oct. 25, 2019).

It was the City and ATS that elected to move for summary judgment before any discovery was undertaken whatsoever and any record was developed. On appeal, they subsequently attempted to develop a record that was not previously before the trial court, one that Williams would have absolutely no opportunity to either further develop or dispute. When this attempt to supplement the record was determined to be improper by the Commissioner after analyzing RAP 9.11, all the City and ATS did was to delete from their brief the references to the 2019 Resolution, but not their arguments related thereto. Permitting these arguments to now be considered after Williams redacted his arguments to the contrary, would work an injustice and prejudice Williams; it does not serve the ends of justice. Accordingly, the exception to RAP 2.5(a) and 9.12 does not apply here. This Court should limit its review to the issue before the trial court.

The fact that the City and ATS can assert this same defense on remand is likewise not grounds for this Court to consider this argument now because the record on this issue had not been developed by either party, and Williams has had no opportunity to develop or dispute any facts raised by the City and ATS relating to his declaratory relief action. Had the City and ATS moved for

summary judgment on these grounds before the trial court, Williams' CR 56 motion, which was granted in part, would have been materially different. (Resp't Answer to Mot. For Discretionary Review, Appx 1-4, 8-12). He at least would have had the opportunity to argue for greater latitude in discovery so that he could have addressed this issue. But that was not the issue before the trial court. The issues raised by Appellants and what was before the trial court were limited. Accordingly, Williams CR 56(f) motion to continue was limited and tailored to the claims before the Court. *Id.* The Court granted Williams' CR 56(f) motion and limited discovery even further to the narrow issue to whether the City Traffic Engineer, Robert Turner's conduct constituted a traffic investigation for purposes of the City's claimed lawful extension of the school speed zone. At no point was Williams' standing to bring his declaratory action claim on behalf of a potential class ever raised or even considered by the trial court. The principle issue presented by the City and ATS at summary judgment was that the school speed zone as a matter of law had been lawfully extended. CP 36-51, 73-88. The trial court found issues of fact in that regard. CP 394-97.

Further, the City and ATS as the moving parties at summary judgment should not benefit from filing their motion 20 days after the initiation of a lawsuit, which directly limited Williams' ability to conduct discovery and develop the record, yet be able to raise new arguments on appeal. This is especially true when Williams has had no opportunity to develop the factual record in order to respond to that issue.

Standing to bring a declaratory judgment action for purposes of the Uniform

Declaratory Judgments Act is set forth in RCW 7.24.020. Courts employ a two part "standing test" to determine whether a party has standing. A party has standing when (1) the interest asserted is arguably within the zone of interests to be protected or regulated by the statute in question, and (2) the challenged action must have caused injury in fact, economic or otherwise, to the party seeking standing. *Grant Co. Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802 (2004).

An "argument should not be addressed when, as here, the opposing party does not have an opportunity to develop the record in order to defend the new theory presented on appeal." *State v. Houvener,* 145 Wn. App. 408, 421 (Div III, 2008) *citing In re Det. Of Ambers,* 160 Wn.2d 543, 557 n. 6 (2007).

Neither of the parties, let alone Williams as the opposing party, have fully developed the record on this issue so that so that it could be fully and fairly briefed and argued. The Court should not determine this issue on summary judgment against Williams without him having any opportunity whatsoever to develop and dispute the facts and fully argue his position to the contrary.

V. CONCLUSION

The City and ATS's argument that Williams does not have standing to bring his declaratory action claim is not properly before this Court. It was submitted by Appellants in their amended briefing in violation of the Commissioner's Ruling. To consider this argument now, after Williams deleted his responsive arguments in compliance with the Commissioner's Ruling would be prejudicial and work a grave injustice against Williams. It would punish him for complying

with a Court Order and benefit the City and ATS for violating that same Court Order. Further, the City and ATS expressly waived this argument during oral argument when it conceded that it was moving to dismiss Williams' declaratory action claim not based on standing, but that the school speed zone as a matter of law had been lawfully extended in compliance with RCW 46.61.440.

Finally, considering new arguments on appeal, especially orders on summary judgment, is generally improper as RAP 2.5(a) and RAP 9.12 limit this Court's review to the issues raised before the trial court. To waive this rule would not serve the ends of justice but work an injustice against Williams as he has had no opportunity to develop a record or fully and fairly respond to this issue. For these reasons, Williams respectfully requests that this Court not consider this new argument on appeal.

Respectfully Submitted this 19th day of May, 2020.

POWELL, KUZNETZ & PARKER, P.S.

By _____ for
Larry J. Kuznetz, WSBA #8697

By _____
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Certificate of Service

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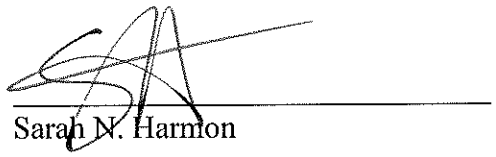

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No. 36508-5-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CHRIS WILLIAMS,

Respondent,

v.

THE CITY OF SPOKANE and

AMERICAN TRAFFIC SOLUTIONS, INC.,

Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS

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Appellants the City of Spokane (the "City") and American Traffic Solutions, Inc. ("ATS") submit this supplemental brief in response to the Court's May 5, 2020 order. The Court's questions are answered in turn.

1. The City and ATS are Not Precluded from Asserting Williams' Lack of Standing to Seek Equitable Relief on Appeal.

The City and ATS did not assert Williams' lack of standing to seek equitable relief before the superior court. As set forth below, however, because standing is jurisdictional, the City and ATS are not precluded from asserting the defense on appeal. Indeed, this Court can and does address standing *sua sponte*. *See Jevne v. Pass LLC*, 3 Wn. App.2d 561, 565, 416 P.3d 1257 (2018) (citing *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006); *Branson v. Port of Seattle*, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004)).

2. The City and ATS May Assert the Defense of Lack of Standing for the First Time on Appeal.

The City and ATS may, as they did, assert the defense of Williams' lack of standing for the first time on appeal. Washington law is clear that standing is a jurisdictional requirement and can be raised at any time during the life of a case. *See Jevne v. Pass LLC*, 3 Wn. App.2d 561, 565, 416 P.3d 1257 (2018) (citing RAP 2.5(a)(1); *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212–13 n.3, 45 P.3d 186 (2002)). This is an exception to the general rule that

"[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal." *See In re Det. of Ambers*, 160 Wn.2d 543, 158 P.3d 1144 (2007) (*quoting Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

3. This Court May, and Should, Address the City's and ATS' Defense of Williams' Lack of Standing Because Williams Did Not Argue to the Contrary in his Responding Brief on Appeal.

This Court may, and should, address on appeal Williams' lack of standing to seek equitable relief. Here, the City and ATS argued in their opening brief on appeal that Williams lacked standing to bring his declaratory relief claim. *See* Appellants' Opening Brief at pp. 35-36. As set forth briefly below, Williams lacks standing to bring the claim.

A claimant must present a justiciable controversy to obtain a declaratory judgment under the Uniform Declaratory Judgment Act, chapter 7.24 RCW. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). The claimant must show:

> (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic,

> and (4) a judicial determination of which will be final and conclusive.

League of Educ. Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (alteration in original; internal quotations marks omitted) (quoting *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)).

To have standing a party must (1) be within the zone of interest protected by statute, and (2) suffer an injury in fact, economic or otherwise. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). "Stated another way, a party has standing if it demonstrates 'a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.'" *Timberlane Homeowners Ass'n v. Brame*, 79 Wn. App. 303, 308, 901 P.2d 1074 (1995) (quoting *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992)).

Assuming this Court agrees that the superior court lacks subject matter jurisdiction over Williams' request for a refund of his traffic fine, no monetary relief is available to Williams. As a matter of law, Williams' remaining declaratory relief claim concerning the validity of the Longfellow Elementary School speed zone is not part of an actual

controversy between parties with a genuine claim for relief. Williams' Complaint does not allege any present harm he suffers from as a result of the allegedly invalid school speed zone. *See* CP 3-11 (Complaint). As such, Williams' claim for declaratory relief fails on its face for lack of standing. Accordingly, Williams lacks standing to assert the remaining declaratory relief claim.

This Court may, and should, address whether Williams lacks standing because Williams had full and fair opportunity to address it, but declined to do so, in his response brief. Williams' failure to present persuasive argument in response to the City and ATS' opening brief do not preclude this Court's consideration of standing.

4. The Court Should Address Williams' Lack of Standing Now as Expressly Permitted as a Matter of Law and in the Interest of Judicial Economy.

The Court should address Williams' lack of standing now. Williams' lack of standing may be raised by the City and ATS for the first time on appeal, just as it may be addressed by this Court *sua sponte*, because it is a jurisdictional matter. There is nothing to be gained and much to be lost by deferring addressing Williams' lack of standing.

This case was filed in superior court over two years ago, in April 2018, challenging a speeding violation issued two years before that, in 2016. The City and ATS promptly moved for summary dismissal, then

sought and received discretionary review of the superior court's ruling. While this Court could remand with direction to the superior court or to allow the City and ATS to amend their defenses below, the legal analysis would not change. There is no need, in particular during this time of COVID-19 crisis and limitations, to unnecessarily incur additional process or judicial resources. Nor is there any basis to give Williams a potential second bite at the apple by allowing him an opportunity to seek leave to amend his claim on remand. A plaintiff is the master of his complaint. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91, 126 S.Ct. 606, 163 L.Ed.2d 415 (2005). As the master of his Complaint, Williams had full opportunity to determine the full nature and scope of his claims and allegations, or to amend them below. He did not. *See* CP 3-11. Williams' failure to sufficiently allege facts to support standing for his equitable claim should be addressed now as a matter of law and in the interest of judicial economy.

For the foregoing reasons, because Williams did not allege facts establishing standing and because standing may be properly raised and addressed on appeal, in the first instance or *sua sponte*, this Court should reverse the superior court's ruling on summary judgment and find that Williams lacks standing to assert his declaratory judgment claim.

DATED: May 19, 2020.

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No. 36508-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

CHRIS WILLIAMS,

Plaintiff/Respondent,

vs.

CITY OF SPOKANE and AMERICAN TRAFFIC SOLUTIONS, INC,

Defendants/Appellants.

RESPONDENT CHRIS WILLIAMS' MOTION FOR RECONSIDERATION

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WASHINGTON ADMINISTRATIVE CODE

COURT RULES

I. INTRODUCTION

This Court reversed the trial court's determination denying defendants motion for summary judgment. The Court should reconsider its ruling for several pragmatic reasons: 1) this Court made unreasonable assumptions about plaintiff's lack of standing in this matter which was a defense never raised by the defendants before the trial court at summary judgment. Had the issue been raised, plaintiff would have produced his declaration as attached hereto and incorporated by reference, that addresses the Court's concern regarding plaintiff's standing in this matter. Plaintiff does, in fact, travel that stretch of road both directions where he was ticketed as he has rental property less than three blocks from the school zone where he was ticketed. This Court drew inaccurate assumptions about his failure to provide such facts when it was not an issue raised as a defense by defendants, nor addressed by the trial court.

2) This Court has second guessed what the trial court would do or could do with the standing issue in its attempt to save the parties another trip to the Court of Appeals. While understanding the Court's desire to avoid litigation, this Court is a reviewing court for error attributed to the trial court. And while this Court has the ability to review the evidence and make its own independent decision, it should not make assumptions without at least offering plaintiff the opportunity to address the Court's concern. On the minimal record that existed below, the trial court was correct in denying summary judgment so all the issues could be flushed out by the parties. A bedrock principle of our judicial system and what every trial court desires, is to determine matters on the merits. Or at least allow the parties the opportunity to develop their case and then test the

sufficiency of the evidence through summary judgment. This should not be a motion by ambush without giving plaintiff the opportunity to make his record and present his position. Considering minimal discovery had been conducted and not on the factual issues assumed and determined by this Court, it was premature to terminate this case. This is especially so considering the equities involved. When Commissioner Wasson ordered the parties to remove the standing argument raised by the defense in their motion for discretionary review, the defense did not remove that which they were ordered to remove and plaintiff did. The panel then ran with an argument raised by the defense that should not have been presented and that plaintiff was unable to address.

3) This is a case riddled with questions, assumptions with conclusions, and devoid of the requisite facts for this Court to make a proper determination to dismiss without violating the purposes, policies, and principles that underly summary judgment. This is not a case where there are undisputed facts, making trial unnecessary. This is a case full of unknowns because it is without a developed and complete record. This is a case that alleges the City and ATS have refused to comply with state laws and regulation to modify and extend school speed zones for profit. This is a case where a single, limited deposition was the only allowed discovery. No other discovery has been conducted. This is a case with such an undeveloped and incomplete record, that it creates more questions and material issues of facts than it resolves. Defendants' employed an aggressive and suffocating motion practice because they could not otherwise provide any evidence that they lawfully extended the school speed zone in question, or any

modified park, playground, or school speed zone for that matter.

This is not a case that should be determined at this point on summary judgment, as there are a multitude of material issues of fact. The only possible way a decision maker could grant summary judgment in favor of Defendants at this point in this lawsuit would be to construe facts and inferences against Williams, the non-moving party, that the Court well knows are all to be construed in his favor. This Courts' decision construes facts and inferences in favor of the moving party in this instance by weighing evidence and facts about plaintiff's standing. We respectfully object as the Court denied plaintiff and the class a reasonable opportunity to complete the record prior to ruling on this matter.

II. STATEMENT AND DESIGANTION OF MOVING PARTY

Plaintiff-Respondent Williams moves this Court to reconsider its opinion issued on June 18, 2020 in this matter pursuant to RAP 13.3.

III. ISSUES PRESENTED

A. Whether the Court of Appeals erred when it failed to consider the facts and reasonable inferences in the light most favorable to plaintiff, the non-moving party, on summary judgment.

B. Whether the Court of Appeals erred when it considered the issue of standing that was raised by Defendants for the first time on appeal by making a factual determination that Williams did not have standing.

C. Whether the Court of Appeals erred when it granted summary judgment without giving Williams an opportunity to respond and make his record before making such a ruling.

D. Whether the Court of Appeals violated the underlying policies of Summary Judgment, Due Process and Fundamental Fairness when it ruled on an issue Williams did not have an opportunity to respond to because he complied with Commissioner Wasson's ruling.

E. Whether the Court of Appeals erred when it failed to analyze Williams claims

and allegations in the context of a class action as was pled in the Complaint.

IV. PROCEDURAL POSTURE

Respondent Chris Williams ("Williams") filed a lawsuit alleging that the Appellants City of Spokane ("City") and American Traffic Solutions, Inc. ("ATS") were being unjustly enriched by issuing to motorists thousands of speeding tickets utilizing automated camera equipment for "speeding in school zone." CP 1-11. ATS's automated equipment measures vehicle speeds *outside of the statutorily designated school zone. Id.* The motorists are not actually in the school zone when vehicle speeds are measured. Accordingly, the City and ATS are unlawfully issuing tickets for speeding in a school zone. *Id.* In order for these tickets to be lawfully issued, the City would have had to have lawfully extended the school speed zone by a minimum of 85 feet. RCW 46.61.440 and WAC 468-95-330 are the controlling statutory and regulatory requirements that the City must abide by in order to change and extend a school speed zone. The only basis upon which a school speed zone may be extended is "by a traffic regulation based upon a traffic and engineering investigation." *Id.*

Williams pled in his complaint for a determination whether the school speed zone was unlawfully extended and whether the ATS camera equipment was measuring vehicles' speeds *outside* of the school speed zone and then automatically issuing tickets to motorists. *Id.* If the trial court were to determine that the school speed zone was not lawfully extended and vehicles' speeds were being measured and motorists were being ticketed despite being outside the school speed zone, then the trial court was asked to provide the following relief: 1) to use its equitable and injunctive powers to prohibit the City and ATS from

continuing to issue unlawful tickets in the future, and, 2) restitution to the plaintiff and to that class of motorists who were unlawfully ticketed at that location. *Id.* This action was brought as a class action. *Id.*

However, the City and ATS pursued an aggressive motion practice. Within 20 days after filing suit, defendants moved for Summary Judgment requesting dismissal of all claims with prejudice. CP 52-54. This was before any discovery and any record had even been developed. The City and ATS did not raise standing as an issue in its original motion for summary judgment before the trial court. *See Id.* The trial court granted Williams' CR 56(f) motion to continue the matter to conduct further discovery, but only allowed Williams the opportunity to conduct a single, limited deposition of City Traffic Engineer Robert Turner. That single deposition was limited to facts surrounding what the City did to "extend" the school speed zone. Promptly after that deposition, the City and ATS filed an amended joint motion for summary judgment and supplemental declaration of Mr. Turner. They did not contend in their *second* supplemental brief on summary judgment that Williams' Declaratory Action claim should be dismissed for lack of standing. CP 73-88. They did not raise the issue of standing whatsoever before the trial court.

The Honorable Judge Fennessy denied Summary Judgment on November 16, 2018, and the City and ATS filed for discretionary review on December 13, 2018. CP 398-405. There was no opportunity prior to review by this Court for Williams to move for class action status with the trial court. Besides, Williams is not obligated to move the trial court for class action status until he has conducted

discovery to determine the scope and breadth of the number of tickets issued. While he had some indication through a public disclosure request to the City, he had no obligation to move for class status until he had conducted discovery.

What is clear is that Williams was a viable representative class member who had been ticketed and suffered injury as a result of the unlawful extension of the school zone and receipt of an automated ticket for purportedly speeding outside of the properly designated school speed zone. CP 1-11. He can also show that his injury and/or likelihood of injury is ongoing since he travels that stretch of road and enters the school zone multiple times per month as he maintains and monitors his rental property located within three blocks from where he was ticketed. *See generally* Declaration of Chris Williams.

Following acceptance of discretionary review, the City and ATS submitted their opening brief on August 26, 2019 and attempted to improperly supplement the record with what they deemed "highly relevant" information that went to the very crux and threshold issues in this case. (App. Mot., Oct. 16, 2019, pg. 4-5). Included in the supplement was a "City Resolution 2019-0018" ("2019 Resolution") which appeared to be a resolution adopted by the City *after* this lawsuit was filed, in an attempt to rebut Williams's argument that the City had failed to adopt by traffic regulation, the extension of the speed zone. The Resolution purportedly modified 141 different school, park, and playground speed zones at 54 different locations within the city limits that had never been previously addressed by the City Council, including the Longfellow School speed zone in question in this case. (App. Req. for Judicial Notice, August 26,

2019, Ex. A). The Resolution was allegedly passed on March 11, 2019, which was not only several months *after* the City and ATS requested discretionary review and after the trial court ruled on summary judgment, but just days *after* Commissioner Wasson granted discretionary review. *Id.*

Although the City and ATS never brought a formal motion before this Court to supplement this information for the record on review, it still argued the 2019 Resolution throughout it's opening brief, *raising for the first time on appeal* the argument that Williams declaratory action claim was *now* moot and that he had no standing following the passing of the Resolution. The City and ATS alleged that since the school speed zone was now "lawfully extended," there was no longer an actual controversy between the parties with a genuine claim for relief. In its initial brief and for the first time on appeal, the City and ATS alleged "Williams Lacks Standing for Declaratory Relief." (App. Brf. Aug. 26, 2019, pg. 35). The City and ATS argued that Williams declaratory action could not result in monetary *or* injunctive relief, and he therefore lacked standing to assert any remaining claims for declaratory relief. *Id.* at 34-36. When referencing the 2019 Resolution, the defendants initial brief argues that, "[T]he Spokane City Council has approved the Longfellow Elementary School speed zone. Therefore, there is no live claim for injunctive relief remaining in this case." *Id.* at 34. This Resolution of course begs the question which continues to be a material and key factual dispute in this case which is whether the City conducted an "investigation" before extending any of the school zones identified in its resolution. The point is, this new standing argument arose and expressly relied

upon the 2019 Resolution as the basis for this new claim. Williams' Response Brief addressed this new argument. His Response Brief additionally noted that although the Resolution was not properly before this Court, he still argued in the alternative to Commissioner Wasson its application so that the City and ATS's new arguments were addressed, including the City and ATS's argument that Williams lacked standing to bring a declaratory action.

In response and recognizing that they had not properly supplemented the record with the Resolution, Appellants' thereupon filed their own motion to supplement the record on appeal with the 2019 Resolution. This was despite having already relied on it throughout their initial opening brief and their reply brief. The parties fully briefed and argued to Commissioner Wasson whether the 2019 Resolution and either party's arguments relating to it should be before this Court.

On October 25, 2019, Commissioner Wasson issued a very clear ruling denying the Appellants Motion to Supplement the record with the 2019 Resolution reasoning that the Resolution failed under RAP 9.11(a)'s criteria:

> Specifically, the resolution does not necessarily change the decision of whether the school speed zone was lawfully established because it does not resolve the question of whether a traffic investigation is required before the City Engineer recommends an expansion of the zone. And, it creates an additional issue of whether the Court should apply the resolution retroactively to persons who, like Mr. Williams, received tickets before the date of the resolution.

Commissioner Wasson ordered the parties to submit amended briefs *deleting any material relating to the 2019 Resolution* within 10 days of the date of the ruling, which would have included any argument related to the standing and mootness

issues.

However, despite being ordered to do so, Appellants failed to delete the arguments that Williams' declaratory relief action was moot, and that he now lacked standing to bring this claim despite such a claim being directly related to the 2019 Resolution which Commissioner Wasson had just ordered removed from the briefing. Williams fully complied and completely deleted and redacted from his amended brief all of his arguments addressing and relating to the 2019 Resolution, including his argument directly in opposition to the Appellants' new argument on appeal that he lacked standing to bring his declaratory action claim on behalf of the potential class. This Court erred in considering the Appellant's improper argument that was ordered removed from consideration as it related to the 2019 Resolution.

Oral argument before this Court was held on April 28, 2020. At that time counsel for Appellant ATS conceded on behalf of ATS and the City that it was not requesting dismissal of Williams' equitable claims on the grounds of standing. On May 5, 2020, the parties received a letter from this Court, requesting supplemental briefing on whether the Court should consider for the first time on appeal the City and ATS's argument that Williams lacks standing to seek equitable relief. The parties complied. On June 18, 2020, this Court issued an unpublished opinion reversing the trial court decision and granting summary judgment, including for the first time holding the Williams had no standing to bring an equitable claim.

So, Williams complies with Commissioner Wasson's order and the

defendants do not. Williams removes his arguments and defendants do not. Williams is now prejudiced by this Court's consideration of the arguments from defendants' brief that were never removed. The Court's decision in this matter violates notions of due process and fundamental fairness. Williams respectfully asks this Court to reconsider, and deny summary judgment on all grounds, affirm the trial court and permit the parties to develop a factual record on the issues prior to any Court making a determination on summary judgment.

V. GROUNDS FOR RELIEF/ARGUMENT

A. The Court of Appeals Erred When It Considered the Standing Issue Raised by Appellants' for the First Time on Appeal *After* Williams Redacted His Response to this Argument in Compliance and in Conformance with Commissioner Wasson's Ruling.

Allowing a moving party to raise a new issue is improper when the nonmoving party has no opportunity to respond. *Admasu v. Port of Seattle*, 184 Wn. App. 1016 (2014). This Court held that the City and ATS were not precluded from raising standing for the first time on appeal based on Commissioner Wasson's October 25, 2019 ruling. What the Court ignored was that in compliance with Commissioner Wasson's ruling, Williams' redacted and removed from the record his response to the City and ATS's standing argument raised in connection with the 2019 Resolution. In fact, it was the precluded 2019 Resolution that gave rise to the City and ATS's standing argument for the first time on appeal. Essentially, by complying with Commissioner Wasson's Ruling, Williams was ordered to remove his only response to the issue of standing. This Court thereupon not only considered the issue for the first time on appeal but did so without giving or allowing Williams an opportunity to respond to the

argument.

Due process requires that the Courts provide adequate notice and give an opportunity for parties to be heard. *Kustura v. Dept' of Labor and Indust.* 142 Wn. App. 655, 674 (2008). Due process requires procedural protections as the situation demands to ensure notice and the opportunity to be heard. *Id.* Due process and notions of fundamental fairness demand that procedural irregularities do not undermine the fairness of proceedings and a litigant's rights and access to the courts. *Id.* The procedural posture and irregularities of this case, including the Appellants' attempt to improperly supplement evidence on appeal, the Appellants failure to fully comply with Commissioner Wasson's ruling, Williams' compliance with the ruling, and this Court considering the issue of standing for the first time on appeal without giving Williams an opportunity to respond were all violations of due process and fundamental fairness.

B. The Court of Appeals Erred When It Held Williams Did Not Have Standing on Summary Judgment as Williams had no Opportunity to Develop the Record on the Issue of Standing.

In addition to having no opportunity whatsoever to reply to the standing issue on appeal, Williams likewise had no reasonable opportunity to develop the record on this issue. The factual record is silent because the issue of standing was not raised before the trial court. Since it was not an issue prior Appellant's appeal, there was neither a need nor an opportunity to develop the record on this issue. The court has a **duty** to provide a party with a reasonable opportunity to complete the record before ruling on summary judgment in a case. *Coggle v. Snow,* 56 Wn. App. 499, 507 (1990); *see also Vant Leven v. Kretzler,* 56 Wn.App 349, 352 (1973)(the Court "has a duty to provide a party with a reasonable

opportunity to complete the record prior to ruling on the summary judgment motion."). In fact, making a determination on summary judgment without an opportunity to develop the record before ruling would be a violation of the underlying policy and purpose of CR 56(f). *Id.* In reviewing a summary judgment order, Appellate Courts "***must** consider the **precise record** that was before the trial court." Vant Leven v. Kretzler,* 56 Wn. App. 349, 353 (1989)(emphasis added) *citing American Universal Ins. Co. v. Ranson,* 59 Wn.2d 811 (1962). In reviewing a trial court's decision on summary judgment, this Court does not have the discretion to either assume facts or change or challenge the facts and record as developed before the trial court. *Id.* But that is exactly what this Court did here.

Further, it is "the responsibility of the moving party to raise in its summary judgment motion **all of the issue on which it believes it is entitled to summary judgment.**" *Admasu v. Port of Seattle,* 184 Wn. App. 1016 (2014)(emphasis added). If a moving party fails to do so, it would be improper for the Court to grant summary judgment on the newly raised issues, but the moving party may raise the new issues in a new filing on a later date, "but the moving party cannot prevail on the original motion based on issues not raised therein." *Id.*

Williams was not given an opportunity to develop the record on the issue of standing. It was not in the Appellants' original motion for summary judgment.[1]

[1] Appellants' conceded at oral argument that they were not contesting Williams' standing to bring his equitable claims. This was not a disputed issue, but the Court granted summary judgment to the Appellants on this issue regardless, despite no factual record on this issue, no reasonable opportunity to develop the record, and no opportunity for Williams to respond to the argument.

But this Court still determined that Williams had no standing by assuming facts and inferences that were not in the record. Williams never received the benefit of the presumption on summary judgment that the facts and inferences that were in the record should have been construed in his favor.

Had the issue of standing been raised before the Superior Court, Williams would have included in his CR 56(f) motion to continue for further discovery a request to develop the facts as it relates to standing. Further, Williams would have included the facts as set forth in his Declaration, made as an offer of proof to this Court, in support of his factual claim that he had standing and was a proper class representative. The record on appeal would then have provided a factual basis to deny summary judgment on the issue of standing, since the facts taken in a light most favorable to Williams demonstrate justiciability of his claims, that he falls within a zone of interest, shows injury in-fact (which can be economic or otherwise), that he is presently subject to current speeding violations in the ticketed location and harm to him as a result. *See Nelson v. Appleway Chevrolet, Inc.,* 129 Wn. App. 927, 938-41 (2005) aff'd 160 Wn.2d 173 (2007); *Braam ex rel. Braam v. State,* 150 Wn.2d 689, 708-09 (2003).

Furthermore, the Court erred when it failed to acknowledge and analyze standing under the framework of the class action as pled by Williams. Although Williams would have developed the record to show he, individually, was entitled to equitable relief for current and future violations and harms, the class action certainly supports a determination that injunctive relief is appropriate as the City and ATS continue to ticket motorists at the location in question. What little

record we have in this case, when taken in the light most favorable to Williams, certainly supports an inference of harm that is presently existing, threatening, and since he travels through the school zone frequently, is subject to future harm for tickets there. *Id.* What the record lacks is evidence that it is "absolutely clear" that the unlawful behavior and conduct alleged against the City and ATS will not reoccur. *See State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.,* 87 Wn.2d 298, 312 (1976)(Cautioning Courts to beware of efforts to defeat injunctive relief on justiciability when determining whether a violation shows an ongoing or future likelihood of harm).

On summary judgment, this Court made an incorrect determination. It assumed facts in a light most favorable to the moving party while abandoning the unmistakable obligation to construe the facts in a light most favorable to Williams and to thereupon give Williams a *reasonable opportunity to develop the record* prior to making a determination. This Court's decision was not saving the trial court time or being judicially efficient. When you look at the equities involved and the prejudice to Williams, the Court should reconsider this decision and remand this matter to the trial court. This Court should remain mindful of the fact that the defense motion to dismiss was brought on the pleadings. And the pleadings at the time of its motion was only the plaintiff's complaint. And all inferences in the complaint should have been construed in favor of Williams. The matter has mushroomed to allow the defense to litigate and prevail on issues not envisioned at the time of their motion before the trial court. The defense claims have shifted shapes from its original motion before the trial court which

plaintiff successfully defended, to new claims, issues, and evidence that the trial court had not been given the opportunity to address.

This Court's position after Commissioner Wasson's decision placed plaintiff in an untenable position. The trial court's decision denying summary judgment has now been reversed based on evidence weighed by the Court of Appeals that was not before the trial court based upon assumptions that plaintiff factually presented no evidence of standing which is correct, because it was never an issue he had to provide evidence regarding until it was raised by this Court. Plaintiff's Declaration controverts the Court's assumption that plaintiff had no standing. Plaintiff is subject to future or further injury because he does drive through the school zone and is subject to still being ticketed. This Court erred by weighing the so-called lack of evidence on standing, under the mistaken impression that plaintiff had no standing.

Plaintiff had not produced any evidence of standing because that was never an issue. If it had been, he would have produced it for the record. At oral argument, defendants conceded it was not even a contested issue. Plaintiff's declaration creates a justiciable issue in controversy that should be remanded to the trial court for trial. The act of weighing evidence not before it on summary judgment should have prohibited any reversal of the trial court decision.

C. The Court of Appeals Erred when It Held that Williams' Was Required to Seek a Refund in Municipal Court Despite Finding Jurisdiction for System Wide Violations.

Like the Trial Court, this Court rejected the City and ATS's argument that the Superior Court lacked jurisdiction to hear Williams' restitution claim. Both this Court and the Trial Court clearly and expressly recognized that Williams' causes

of action were not simply those contesting an infraction that arosefrom a City ordinance, but were rooted in the allegation that the City and ATS failed to follow statutory and regulatory procedures to lawfully extend a school speed zone under RCW 46.61.440. This Court determined that the Superior Court had jurisdiction over all of Williams' claims, holding "[t]he superior courts have original jurisdiction over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court." *Williams v. City of Spokane*, No. 36508-5-III, 11 (June 18, 2020) *citing Orwick v. City of Seattle*, 103 Wn.2d 249, 251 (1984).

However, the Court then contradicted itself when it eliminated Williams' restitution claim and now forces him to vacate his ticket by seeking an individual refund of the traffic infraction in Municipal Court. Williams' restitution claim as pled is a class action claim alleging system wide violations, brought on behalf of numerous persons other than himself. Williams had no time or an opportunity to conduct the necessary discovery to move to certify his restitution claim as a class action, but that is in fact what he pled and how this Court should have construed his claim on summary judgment. On one hand this Court found that the Superior Court had jurisdiction of his claims because Williams alleged system-wide violations of RCW 46.61.440; but on the other hand in analyzing the very next issue, this Court denied Williams' claim for restitution to the potential class by limiting any claim for restitution to an individual claim for a refund. This ignored the class action claims that exist for restitution and is inherently inconsistent as well as improper on summary judgment.

This Court relied on *Doe v. Fife Municipal Court,* 74 Wn. App. 444 (1994) finding it dispositive because the *Doe* Court held that the Petitioners needed to appeal their fines or vacate them as provided in the Criminal Rules for Courts of Limited Jurisdictions. But the *Doe* case is demonstrably different than Williams. Unlike Williams, in *Doe,* the claims for relief had already been adjudicated on the merits. There was no dispute that the Does' claims had merit and portions of the orders imposing fines and costs were void as that issue had already been adjudicated and determined by the Superior Court *prior to* the *Does* filing suit.

The *Does',* like Williams, argued that the Courts of Limited Jurisdiction offer inadequate and ineffective relief for large numbers of people. Although the *Doe* court held that despite district and municipal courts not having jurisdiction to hear class action suits, it determined there was no barrier to the *Does* or a party similarly situated obtaining effective relief from a Court of Limited Jurisdiction, even in the absence of a class action suit. But unlike Williams, each petitioner in *Doe,* and every potential class member there, could file a motion to vacate and simply cite as binding authority when seeking a refund, that the Superior Court had already decided the merits and determined the fines were unlawful. No such determination has occurred in Williams and without such a finding on the merits, *Doe* is inapplicable. In *Doe*, the Court of Limited Jurisdiction would be required to defer to the factual and legal determinations *already made* by the Superior Court without any re-litigation of the issues, and then order a refund for the unlawfully imposed fines. "Indeed, the procedure each of the Does would have to follow to obtain relief is quite simple." *Id.* at 455. The effect of this decision by

the Court in Williams is to ask every potential class member to go argue the merits in Municipal Court of what would essentially be class claims. And this Court has already acknowledged that class claims are not available to a litigant in Municipal Court.

In Williams, it is disputed whether the school speed zone was lawfully extended, and whether the tickets issued by the City and ATS were lawful. Every single individual motorist ticketed in the Longfellow school zone would need to present evidence and expert testimony at a hearing and argue the issue of whether the City complied with RCW 46.61.440 and WAC 468-95-330 in 2008 when installing the new flashing school speed zone sign. They would need to present evidence of the location of each piece of City and ATS equipment and have admissible evidence of measurements as well as information as to where the City and ATS are measuring motorists' speeds in relation to the designated crosswalk. Each case would have to provide evidence of the nature and method the ATS equipment was set up and operates. Every single individual motorist would need to argue the nuances in the standards and requirements that distinguish engineering judgment, engineering studies, and traffic and engineering investigations. In order to prevail and carry their burden, every individual motorist would need to retain an attorney and an expert in order to receive a refund for a $234.00 ticket. Indeed, the procedure each motorist would have to follow to obtain relief is complicated, expensive, inadequate and ineffective under the circumstances. *See Hadley v. Maxwell,* 144 Wn.2d 306 (2001)(recognizing the incentive to litigate a traffic infraction is low).

Secondly, there is absolutely no evidence in the record that would allow this Court to make the same determination that the *Doe* court made that the lower courts would not be overburdened with litigants. The record has only two references to the potential class size in this case: 1) Williams alleged in his compliant that 500+ motorists were similarly situated and ticketed by the City and ATS at the school speed zone on Nevada at Longfellow Elementary; and 2) in Williams' Appellate Response Brief, he cites to a Spokesman Review article that states the City and ATS have issued tickets to over 16,000 motorists for speeding in the Longfellow school speed zone in question and netted over $4 million in fines. The City and ATS have neither contested nor controverted the class allegation or potential size in the tens of thousands for this class.

Despite not addressing the class size or status, this Court determined that Spokane's Municipal Court could handle the number of litigants that have been unlawfully ticketed without ever assessing the number of litigants. In *Doe* the potential class was much smaller – in fact, the matter was not before the Court as a class action but was brought by several individual plaintiffs whose petitions were consolidated for argument. The only members of the potential class would have been criminal defendants in Pierce County who paid costs associated with the deferred prosecution program as assessed under RCW 10.05. Here, the class is alleged to be much larger, and taking all reasonable inferences in the light most favorable to Williams, the non-moving party, there are potentially *at least* 16,000 class members.

This Court has essentially held that 16,000 individual motorists will all need

to bring individual motions to vacate, put on a full fledge evidentiary hearing on the merits in order to obtain a refund on a $234 ticket, and that is both an adequate remedy and effective relief. On summary judgment, this Court should not have determined as a matter of law with undisputed facts that the lower courts can provide adequate and effective relief. Rather, the limited record supports a reasonable inference that the lower courts cannot provide adequate and effective relief to the class of litigants in question.

VI. CONCLUSION

The Court erred when it dismissed Williams' claims in equity for lack of standing when it assumed facts not in the record in favor of the moving party on summary judgment. The Court erred when it dismissed Williams' restitution claim. Williams' restitution claim should proceed, and Williams' should be afforded the opportunity to conduct discovery and move to certify this as a class action. Otherwise, this Court has just summarily denied Williams and 16,000 other motorist any opportunity for adequate and effective judicial relief for the City and ATS's unlawful conduct for which they have profited. Accordingly, Williams respectfully requests this Court reconsider its June 18, 2020 decision and affirm the Trial Court's order denying summary judgment, and remanding for further proceedings.

Respectfully Submitted this 8th day of July, 2020.

POWELL, KUZNETZ & PARKER, P.S.

By:*/s/ Larry J. Kuznetz*
Larry J. Kuznetz, WSBA #8697

By:*/s/ Sarah N. Harmon*
Sarah N. Harmon, WSBA #46493
Attorneys for Respondent, Chris Williams

Certificate of Service

I HEREBY CERTIFY that on the 8th day of July, 2020, I caused a true and correct copy of Respondent Williams's Motion for Reconsideration to be e-filed and sent by the methods indicated below to:

Sam Faggiano Office of the City Attorney 808 W. Spokane Falls Blvd Spokane WA 99201 sfaggiano@spokanecity.org	___ U.S. Mail ___ Messenger ___ Facsimile Transmission _X_ Email
Vanessa Power Rachel Cox Stoel Rives 600 University St, Suite 3600 Seattle WA 98101 vanessa.power@stoel.com rhcox@stoel.com	___ U.S. Mail ___ Hand Delivery ___ Facsimile Transmission _X_ Email

DATED at Spokane, WA this 8th[h] day of July, 2020.

/s/ Ashley Sandaine
Ashley Sandaine

POWELL, KUZNETZ, AND PARKER, PS

July 08, 2020 - 2:12 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36508-5
Appellate Court Case Title:	Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
Superior Court Case Number:	18-2-01829-8

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No. 36508-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

CHRIS WILLIAMS,

Plaintiff/Respondent,

vs.

CITY OF SPOKANE and AMERICAN TRAFFIC SOLUTIONS, INC,

Defendants/Appellants.

RESPONDENT CHRIS WILLIAMS' DECLARATION IN SUPPORT OF RESPONDENT'S MOTION FOR RECONSIDERATION

Larry J. Kuznetz
Sarah N. Harmon
POWELL, KUZNETZ & PARKER, P.S.
316 W. Boone, Ste. 380
Rock Pointe Tower
Spokane, WA 99201-2346
(509) 455-4151
ATTORNEYS FOR RESPONDENT

I, CHRIS WILLIAMS, state and declare:

1. I am a resident of Spokane County, State of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and make this declaration based upon personal knowledge.
2. I am the Plaintiff in the above entitled matter.
3. I was ticketed on March 1, 2016 for speeding in the unlawfully extended school speed zone while traveling southbound on Nevada Street in Spokane, north of the Empire intersection and crosswalk on March 1, 2016. I was ticketed for travelling 28 mph, despite it truly being a 30 mph speed zone.
4. On April 25, 2018, by and through counsel, suit was filed with my permission in Spokane County Superior Court. The lawsuit was a class action brought against the City of Spokane and ATS requesting equitable relief by way of restitution and declaratory relief for unlawfully ticketing myself and the class of motorists in what was claimed to be a properly designated school zone.
5. On May 15, 2018, just 20 days after suit was filed, the named Defendants filed a joint motion for summary judgment. The motion for Summary Judgment did not raise any issues relating to whether I had standing to bring equitable claims as an individual or on behalf of the class.
6. I prepared and submitted a declaration in response to Defendants' joint motion for summary judgment that was filed. I did not include the

following facts in my declaration as they were not relevant to address the issues raised by the defendants, nor were they at issue before the Superior Court. The following facts were true in March of 2016 when I was ticketed, were true on April 25, 2018, when I filed my lawsuit, and are true today:

a. I am a resident of Spokane, Washington.

b. I have a valid driver's license and travel within city limits frequently and on a regular basis.

c. Although I reside on the South Hill, my work frequently and repeatedly brings me to north Spokane. I restore homes, shop for residential property, am a landlord and invent new mechanical devices.

a. I am a landlord with several properties and have one property in North Spokane. That property is located at 603 E. Rich, which is two blocks north and three blocks west of the Longfellow school speed enforcement zone. That property requires continual monitoring, maintenance, rent collection, watering of the bushes, outside paint work, considerable cleaning, considerable repair and showing the property to re-rent when a tenant vacates. The obvious route between my lower south hill home and the rental (603 E. Rich) is/ has been north on Hamilton, which converts to Nevada, past the Longfellow speed enforcement and two blocks later left turn onto Rich. The reverse route, which goes through

the Longfellow school speed zone with ATS's automated camera enforcement equipment, is taken upon returning home.

b. Most of the time whenever I head north, my travel includes a drive by of the 603 E. Rich property. My wife likes to shop at Northtown which is located just five blocks west of the Rich property. I drive her there about twice a month, typically past the Longfellow school speed zone and past the Rich property, or past the Rich property and through the Longfellow school speed zone southbound on the way home. I also head north to visit the Rodda Paint store which is located northwest of the Longfellow school speed zone. I also go up that way to a tire store for all my tire needs. Sometimes I go bike riding at Riverside State Park so then go past the Longfellow school speed zone, turn left on Rich and past the rental property or return past the Rich property and southbound through the Longfellow speed enforcement zone, typically stopping to handle whatever the present issue may be at the property.

c. I travel southbound on Nevada St. through the unlawfully extended school speed zone multiple times per month at a minimum. Presently, I plan to paint the rental house on Rich. Between all of the prep work and painting, the Rich job is expected to take about seven weeks comprising an estimated 35

round trips total between my home on the South hill and the Rich rental via the Longfellow school speed zone.

d. Based on my work and rental locations, I routinely travel through the unlawfully extended school speed zone on Nevada where I had been ticketed. In order to avoid receiving another $234.00 ticket from defendants, I reduce my speed to 20mph, even though it is technically a 30mph zone as I don't believe it was extended in accordance with the applicable statutes and regulations necessary to lawfully extend a school zone. I am concerned about receiving another ticket in this location so since being ticketed, I try to carefully watch my speed to avoid another ticket.

7. Had standing been an issue before the trial court, I would have responded and submitted the facts above.

8. Further, had standing been an issue before the trial court, I would have requested the Court allow me to develop the factual record on this issue for myself and on behalf of the class and would have requested counsel to incorporate this information into counsel's motion to continue pursuant to CR 56(f).

9. I was unable to contest the ticket I received on March 1, 2016, due to the Court moving my hearing to a date I was unavailable (and the City did not provide the materials I requested in a public records request until some two weeks or so after the hearing date), and the court would not allow me to further reschedule it. I was forced to pay the traffic infraction

fine of $234.00 or my driver's license would be in jeopardy and the ticket would go into collections.

10. The City and ATS continue to ticket at the Nevada Street school speed zone in question. The continued unlawful ticketing there by the City and ATS has not only cost me hundreds of dollars for the original ticket, but it has impacted my driving speeds and routes around the north side of town for the last 4 years. Due to the frequency in which I travel throughout Spokane for work, this is more than just a mere inconvenience. Travelling through the school zone on Nevada Street is the most direct route for me to go to and from my home to the rental property to do work. The City's unlawful actions and failure to comply with state laws and regulations has impacted me for 4 years since receiving the ticket. I try as hard as humanly possible to avoid being ticketed there.
11. Tens of thousands of other motorists have been ticketed by defendants exactly as I was at the exact same location by defendants with use of ATS's automated camera equipment.
12. The City of Spokane, per their 2019 Resolution that was at issue before Commissioner Wasson in her October 25, 2019 Ruling, has also modified fifty-four different locations in the City: forty-nine (49) schools and five (5) parks and/or playgrounds. The Resolution modified a total of 141 speed zones from the 300 foot statutorily designated school speed zone at 54 different school, park, or playground locations including the Nevada

Street/Longfellow Elementary school zone. There is no evidence in the record before the Court or that I was able to find based upon my public records request that *any* of these speed zones were properly modified by the City in compliance and as required by state laws and regulations.

13. The City of Spokane as a whole is riddled with unlawfully modified school and playground 20 mph speed zones.

I declare under penalty of perjury that the foregoing is true and correct.

Signed and dated on this 8th day of July, 2020, in Spokane, Washington.

/s/ Chris Williams
Chris Williams

Certificate of Service

I HEREBY CERTIFY that on the 8th day of July, 2020, I caused a true and correct copy of Respondent Chris Williams's Declaration in Support of Respondent's Motion for Reconsideration to be e-filed and sent by the methods indicated below to:

Sam Faggiano Office of the City Attorney 808 W. Spokane Falls Blvd Spokane WA 99201 sfaggiano@spokanecity.org	___ U.S. Mail ___ Messenger ___ Facsimile Transmission _X_ Email
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DATED at Spokane, WA this 8th day of July, 2020.

/s/ Ashley Sandaine
Ashley Sandaine

POWELL, KUZNETZ, AND PARKER, PS

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Division III

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September 1, 2020

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CASE # 365085
Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
SPOKANE COUNTY SUPERIOR COURT No. 182018298

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Attachment

FILED
SEPTEMBER 1, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHRIS WILLIAMS, individually and on behalf of all similarly situated, Respondent, v. CITY OF SPOKANE; and AMERICAN TRAFFIC SOLUTIONS, INC, a foreign corporation, Petitioners.	)	No. 36508-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 18, 2020 is hereby denied.

PANEL: Judges Fearing, Lawrence-Berrey, Pennell

FOR THE COURT:

REBECCA L. PENNELL, Chief Judge

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
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The Court of Appeals of the State of Washington
Division III

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September 1, 2020

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CASE # 365085
Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
SPOKANE COUNTY SUPERIOR COURT No. 182018298

Dear Counsel and Mr. Lukashin:

Enclosed is your copy of this Court's Order Denying the Motion to Publish this Court's Opinion of June 18, 2020 which was filed today.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh

FILED
SEPTEMBER 1, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHRIS WILLIAMS, individually and on behalf of all similarly situated, Respondent, v. CITY OF SPOKANE; and AMERICAN TRAFFIC SOLUTIONS, INC, a foreign corporation, Petitioners.	)	No. 36508-5-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered the non-party's motion to publish the court's opinion of June 18, 2020, and the record and file herein and is of the opinion the motion to publish should be denied. Therefore,

IT IS ORDERED, the motion to publish is hereby denied.

PANEL: Judges Fearing, Lawrence-Berrey, Pennell

FOR THE COURT:

REBECCA L. PENNELL, Chief Judge

SUSAN L. CARLSON
SUPREME COURT CLERK

ERIN L. LENNON
DEPUTY CLERK/
CHIEF STAFF ATTORNEY

THE SUPREME COURT
STATE OF WASHINGTON

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September 29, 2020

LETTER SENT BY E-MAIL

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Hon. Renee Townsley, Clerk
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

Re: Supreme Court No. 99071-9 - Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
Court of Appeals No. 36508-5-III

Clerk and Counsel:

The Court of Appeals forwarded to this Court the "RESPONDENT CHRIS WILLIAMS' EMERGENCY MOTION TO EXTEND THE TIME TO FILE A PETITION FOR REVIEW". The matter has been assigned the above referenced Supreme Court case number. The Supreme Court Deputy Clerk entered the following ruling regarding the motion on September 29, 2020:

> **In light of the Court's order No. 25700-B-611 suspending the provisions of RAP 18.8(b) during the COVID-19 public health emergency, the motion for extension of time is granted pursuant to the provisions of RAP 18.8(a).**
>
> **Therefore, the Petitioner is granted an extension of time to November 2, 2020, to serve and file the petition for review and pay the $200 filing fee.**
>
> **If additional time is needed, another motion for extension may be filed.**

The parties are advised that upon receipt of the petition for review and filing fee, a due date will be established for the filing of any answer to the petition for review. The petition for review will be set for consideration by a Department of the Court without oral argument on a yet to be determined date.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:ejn

POWELL, KUZNETZ, AND PARKER, PS

November 02, 2020 - 2:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36508-5
Appellate Court Case Title:	Chris Williams v. City of Spokane and American Traffic Solutions, Inc.
Superior Court Case Number:	18-2-01829-8

The following documents have been uploaded:

- 365085_Petition_for_Review_20201102145150D3804651_0506.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review FINAL with TOC.pdf

A copy of the uploaded files will be sent to:

- Mike@pkp-law.com
- ashley@pkp-law.com
- dstragier@spokanecity.org
- larry@pkp-law.com
- leslie.lomax@stoel.com
- rachel.cox@stoel.com
- rhcox@stoel.com
- sfaggiano@spokanecity.org
- vanessa.power@stoel.com

Comments:

Sender Name: Mary Zanck - Email: mary@pkp-law.com
Filing on Behalf of: Sarah Nicole Harmon - Email: sarah@pkp-law.com (Alternate Email:)

Address:
316 W Boone Ave Suite 380
Spokane, WA, 99201
Phone: (509) 455-4151

Note: The Filing Id is 20201102145150D3804651