

NO. 42302-2-II

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**COURT OF APPEALS FOR DIVISION TWO  
STATE OF WASHINGTON**

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ANTHONY R. GORDON,

Petitioner,

vs.

THE CITY OF TACOMA,  
a Washington municipal corporation,

Respondent.

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**RESPONDENT CITY OF TACOMA'S BRIEF**

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## I. INTRODUCTION

Appellant Anthony Gordon is an experienced landlord, both personally and professionally. He is aware, and experienced with, the City of Tacoma's Minimum Buildings and Structures Code, Tacoma Municipal Code (TMC) 2.01.060, and he knows how to work with the City and to quickly repair a house to make it habitable. Nonetheless, Mr. Gordon asserts that the City unconstitutionally prevented him from renting his house for three years.

The City of Tacoma concedes that it violated Mr. Gordon's rights to procedural due process when the City imposed civil penalties against Mr. Gordon for his failure to maintain his property in compliance with TMC 2.01.060, the City's Minimum Buildings and Structures Code, but did not provide Mr. Gordon with an opportunity to appeal those penalties.<sup>1</sup> However, as the trial court correctly determined, Mr. Gordon failed to show the procedural due process violation caused anything more than the nominal damages awarded.

While Mr. Gordon did, as the trial court noted, experience "inconvenience and frustration" as the result of the procedural due

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<sup>1</sup> TMC 2.01.060 was amended in 2010. All cites in this brief are to the former TMC 2.01.060 in effect during the pendency of this case.

process violation, Mr. Gordon is an experienced landlord, aware of the TMC 2.01.060, and knows how to work with the City to quickly repair a house to make it habitable. It was his own actions, not the City's, which prevented Mr. Gordon from renting his house for a three year period.

Further, although Mr. Gordon experienced a great deal of marital, personal and financial stress in his life, that stress long predated and was unrelated to the City's actions related to the condition of his property. Thus, the trial court agreed with the City that Mr. Gordon was entitled to only nominal damages stemming from the violation of his procedural due process rights, with a total award of \$11,250.00.

Mr. Gordon presents no evidence or issue on appeal to demonstrate entitlement to damages beyond those awarded by the trial court and the City of Tacoma respectfully requests this Court to affirm the trial court.

## **II. ASSIGNMENT OF ERROR**<sup>2</sup>

Assignment of Error: There is no evidence in the record to support Finding of Fact 41: "Plaintiffs' counselor testified the financial issues most significantly involved the imposition of the fines."

Issue: Does the evidence support the finding that "financial issues most significantly involved the imposition of the fines" when the trial court stated in its oral ruling that "Literally, there is no mention of the City of the fining process" and when the testimony of Mr. Gordon's psychologist shows the Gordon's financial issues stem from causes other than the civil penalties imposed by the City?

## **III. STATEMENT OF THE CASE**

Mr. Gordon did not specifically assign error to any finding of fact. See Opening Brief of Appellant, pages 2-3.<sup>3</sup> The trial court's findings of fact are therefore verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). In order to aid the

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<sup>2</sup> Although the City requests the Court to affirm the judgment of the trial court, the City nonetheless has identified one finding which it believes was made in error. The City's assignment of error is appropriate although the City did not cross-appeal. Burt v. Heikkala, 44 Wn.2d 52, 54, 265 P.2d 280 (1954).

<sup>3</sup> Gordon did not provide page numbers in his brief. Therefore the City will number his brief with page 1 as the Table of Contents.

Court, however, the City provides this statement of facts and procedural history.

**A. Mr. Gordon's claims.**

Mr. Gordon initially asserted that the City violated his procedural due process rights when it imposed a penalty for Mr. Gordon's violations of the City's Minimum Building and Structures Code, TMC 2.10.060, without offering a right to appeal, and sought damages under 42 U.S.C. § 1983. CP 149; 150-151; 178-183. In October 2009, the Washington State Supreme Court issued its opinion in Paul Post v. City of Tacoma, 167 Wn.2d 300, 217 P.3d 1179 (2009). The Court held in the Post case that a penalty imposed against Mr. Post by the City under TMC 2.01.060, without a corresponding appeal right, violated Mr. Post's procedural due process rights. No damages—other than the return of penalties paid—were awarded in the Post case.<sup>4</sup>

Following Post, the City conceded that the failure to include appeal rights in the penalty notices to Mr. Gordon constituted a violation of his procedural due process rights. The parties proceeded to trial on the sole issue of damages. Mr. Gordon

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<sup>4</sup> Pierce County Cause No. 05-2-06544-9.

requested \$350,000.00 in general damages, claiming the procedural due process violation caused him “great mental and emotional distress leading to [his] divorce...not being promoted at work, not being able to rent the property [at 1643 South 84<sup>th</sup> Street] from April 2003 through May 2008....” RP 315. CP 177.

**B. The property at 1684 South 84<sup>th</sup> Street, Tacoma.**

Anthony and Britt Gordon married in 1976.<sup>5</sup> They divorced in 2009.<sup>6</sup> Together, they bought the property at 1643 South 84<sup>th</sup> Street, Tacoma in the 1980s (hereinafter “the Property”). FOF 1. They used it, and many other properties, as a rental.<sup>7</sup> FOF 30. Mr. Gordon is a sophisticated, experienced real estate manager, both professionally in his career with the Federal Government, and also personally as a result of his numerous rental properties. FOF 30.

In the late 1990s, the Property was found by the City to be uninhabitable and deemed “derelict” by the City pursuant to TMC 2.01.060. FOF 2. Mr. Gordon worked with the City and made repairs to the house over a four to five month period (FOF 30) just as he had worked in the past to make repairs to another of his rental

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<sup>5</sup> RP 137, lines 16-17.

<sup>6</sup> Pierce County Cause No. 07-3-03774-7.

<sup>7</sup> RP 115, lines 17-22; RP 139, line 6.

properties the City had also deemed derelict.<sup>8</sup> Mr. Gordon understood the City process related to TMC 2.01.060. FOF 2, 30.<sup>9</sup>

In October 2001, the City turned off power and water at the Property because a tenant was not paying the utility bill. FOF 7.<sup>10</sup> The tenant had also removed the back deck from the Property leaving a second story door with no proper exit, causing a dangerous condition. The tenant left the bathroom in disrepair, which caused water damage in the bottom story, rendering the property virtually uninhabitable. FOF 8.<sup>11</sup> The condition of the Property was a stress for Mr. Gordon and he left the Property vacant from October 2001 until August 2002. FOF 10, 35.

On July 29, 2002, the City received a complaint that the house at 1643 South 84<sup>th</sup> Street was open to third-party entry. FOF 3. Shortly thereafter, Mr. Gordon learned from the City that the house was open to third-party entry and that the City had concerns about the condition of the Property. FOF 4, 6. The City boarded up the house. FOF 5. The City again inspected the property and

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<sup>8</sup> RP 142, lines 1-9; RP 292, lines 4-5.

<sup>9</sup> RP 136, lines 10-21; RP 199, lines. 12-14.

<sup>10</sup> RP 237, lines 22-23.

<sup>11</sup> RP 143, lines 13-21; RP 200, lines 13-22.

determined it was “derelict” under TMC 2.01.060. FOF 11 and 12.<sup>12</sup>

After the Gordons failed to repair the Property, the City began to impose penalties against them. The first five penalty notices (from October 2, 2002 through March 14, 2003) were inadvertently sent to the wrong address. FOF 11-18.<sup>13</sup> However, Mr. Gordon received the February 28, 2003 letter—Mr. Gordon signed for it on or about March 1, 2003. FOF 16.<sup>14</sup> The Gordons’ son signed for the March 14, 2003 letter. FOF 18.<sup>15</sup> All letters sent after April 15, 2003 were sent to the correct address. FOF 19, 20.

Beginning early March 2003, Mr. Gordon had knowledge of the condition of the Property and the actions of the City. At this point, \$875.00 in penalties was owing to the City. FOF 17.<sup>16</sup> The Property had been vacant for almost 7 months. FOF 17.

From October 2002 through September 2003, the City imposed \$2,375.00 worth of penalties against the Gordons.<sup>17</sup>

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<sup>12</sup> Exh. 25; RP 67, lines 23-25; RP 68, lines 1-5; RP 69, lines 3-11.

<sup>13</sup> Exh. 26-30.

<sup>14</sup> RP 149, lines 15-11; Exh. 29.

<sup>15</sup> RP 150, lines 16-25; RP 151, line 1; Exh. 30.

<sup>16</sup> Exh. 26-29.

<sup>17</sup> From August 2002 until approximately April 2003, the City sent the Gordons notices to a 58<sup>th</sup> Street address. However, the correct address was on 59<sup>th</sup> Street. As discussed below, this court has already held that the Gordons are

Because the Gordons did not pay those penalties, a default judgment issued in the amount of \$3,649.35. The Gordons did not appeal that judgment. FOF 45. The trial court previously held that the Gordons were collaterally estopped from challenging, or seeking recovery for, those penalties. FOF 45; Exh. 143.

Between 2002 and 2007 the Property was vandalized four times causing significant damage. FOF 27.<sup>18</sup> Also over the years, Mr. Gordon's design plans for restoration of the house changed.<sup>19</sup> From early 2003 to 2006, Mr. Gordon spent time sheet-rocking the house. FOF 26. In 2004, he tore out the kitchen. FOF 24<sup>20</sup> In 2005, all the fixtures in the bathrooms and kitchen were removed.<sup>21</sup> In October 2007, Mr. Gordon gutted the interior. FOF 28. Even though permits were required, all the work done at that time was without permits, including electrical work, framing, new windows, and a new deck.<sup>22</sup> Two City staff testified the Property was still uninhabitable even in October 2007.<sup>23</sup>

Prior to gutting the house, Mr. Gordon could have made the

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collaterally stopped from challenging notices issued from August 2002 to September 2003.

<sup>18</sup> RP 165, lines 22-25; Exh. 66-67.

<sup>19</sup> RP 165, lines 15-18.

<sup>20</sup> RP 165, lines 1-6.

<sup>21</sup> RP 167, lines 10-14.

<sup>22</sup> RP 102, lines 17-24; RP 103, lines 3-4.

<sup>23</sup> RP 103, lines 21-23.

house habitable with minor repairs. FOF 25. However, the house remained derelict and unfit for human occupancy for many years, at least through 2007.<sup>24</sup>

The Gordons refinanced at least three properties in and around 2005, and took cash out for various reasons, but they chose not to spend any of that money on repairing the house at 1643 South 84<sup>th</sup> Street.<sup>25</sup> In 2004 or 2005, Mr. Gordon's wife, Britt, inherited \$550,000.<sup>26</sup> Again, they chose not use any of that money to repair the Property at issue.

As a result of the Gordons' failure to repair the Property, from October 2004 through April 2006, the City imposed penalties under TMC 2.01.060 totaling about \$20,000.00. FOF 21. The Gordons never paid any of these penalties.

Mr. Gordon called the City only two times over the years, once in 2003 and once in 2006 (FOF 44), and never submitted a repair schedule to the City.<sup>27</sup> Had the Gordons submitted a repair schedule, the City would have stopped imposing the penalties.<sup>28</sup>

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<sup>24</sup> RP 74, lines 17-18; RP 76, lines 18-20; RP 94, lines 7-11.

<sup>25</sup> RP 129, lines 1-5.

<sup>26</sup> RP 130, lines 4-12.

<sup>27</sup> RP 61, lines 11-24; RP 73, lines 18-21; RP 96, lines 15-17; RP 100, lines 11-13; RP 202-03, lines 18-25 and 1.

<sup>28</sup> RP 97, lines 5-7; RP 74, lines 10-12.

**C. Mr. Gordon experienced a great deal of stress in the early and mid 2000s.**

Mr. Gordon experienced an inordinate and significant amount of stress in the early and mid 2000's related to his son's deteriorating mental health, including a diagnosis of paranoid schizophrenia and attempted suicide in 2002 and hospitalization in 2003. FOF 29, 33.<sup>29</sup>

Mr. Gordon's other stressors included marital difficulties between 2000 and 2005 and long-term depression. FOF 34.<sup>30</sup> In addition, his grandmother died in 2003, his mother-in-law died in 2002, his brother-in-law had a major heart attack around the same time, and his father died in a violent home invasion in 2009. FOF 36.<sup>31</sup>

Mr. Gordon was reprimanded twice in his job (FOF 38) and was not showing up for work.<sup>32</sup> In March 2005, Mr. Gordon changed the terms of a lease with the federal government without authority. Mr. Gordon's supervisor stated Mr. Gordon did not take

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<sup>29</sup> RP 112, lines 5-10. RP 114, lines 21-22; RP 127, lines 10-12; RP 150, lines 10-12; RP 185, lines 19-22.

<sup>30</sup> RP 225, lines 6-7.

<sup>31</sup> RP 114, lines 20-25. RP 258, lines 5-13.

<sup>32</sup> RP 133, lines 10-15. The two written reprimands (Exh. 3 and 4) were admitted at trial. RP 286, lines 8-13. For some reason, the trial court did not include them in the Exhibit Record. RP 209.

responsibility for his actions and blamed others.<sup>33</sup> In December 2006, Mr. Gordon entered into a lease and committed the federal government to \$2 million, again without authority.<sup>34</sup>

Mr. Gordon and his wife, Britt, went into marriage counseling in 2005 to address problems between them that dated back to 2000. FOF 39.<sup>35</sup> Counseling records kept by Dr. Jodie Howell detail the most important topics the Gordons discussed in counseling and consistently describe relationship issues, lack of communication, significant financial issues, discussion about a significant inheritance Britt had received, that expenses were greater than their income, that they had to deal with the Internal Revenue Service, and that Britt was being excluded from management from their finances, including an instance when Mr. Gordon bought property without telling her.<sup>36</sup> Mr. Gordon was frequently gone, generally returning home only to sleep.<sup>37</sup>

The counseling records include no mention of the Gordons' issues with City relating to the Property; nor do the records mention the fines assessed by the City. FOF 41. Dr. Howell did not opine the

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<sup>33</sup> RP 263, lines 7-25; RP 264, lines 1-7.

<sup>34</sup> RP 264, lines 9-18.

<sup>35</sup> RP 127, 24-24; RP 128, line 1; RP 214, lines 19-22; Exh. 65.

<sup>36</sup> RP 217, lines 20-23, RP 227, lines 13-15.

<sup>37</sup> RP 127, lines 16-20; RP 227, lines 4-7; RP 254, lines 4-9.

marital breakup was caused by the Gordons' issues with City. FOF

42. Mr. Gordon was "not credible" when he stated that the City's actions caused his divorce. FOF 43.

**D. Mr. Gordon had financial problems for many years.**

Mr. Gordon has a history of serious financial problems. Key Bank obtained a judgment against him in 1996 for more than \$16,000.<sup>38</sup> The federal Internal Revenue Service garnished Britt's bank account in the early 2000s.<sup>39</sup> Mr. Gordon dealt with the Internal Revenue Service for about 5 years in the 2000s and was audited for a 9 year period.<sup>40</sup>

In 2007, a contractor filed a lien against another piece of property the Gordons owned.<sup>41</sup> In 2004 and 2005, Pierce County filed two liens against his home.<sup>42</sup> In addition, in 1999, the County filed a "certificate of noncompliance" on another property he owned because Mr. Gordon was again doing work without a permit.<sup>43</sup>

**E. Trial**

After a two day trial, the trial court found the City's actions caused the Gordons only inconvenience and frustration, and caused

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<sup>38</sup> RP 162, lines 8-9; Exh. 64.

<sup>39</sup> RP 126, lines 4-6.

<sup>40</sup> RP 128, lines 20-22; RP 183, lines 15-25. FOF 37.

<sup>41</sup> RP 194, lines 6-11; Exh. 60.

<sup>42</sup> Exh. 61-62.

<sup>43</sup> Exh. 59.

a delay of approximately five months in renting the property located at 1643 S. 84<sup>th</sup> Street at \$750 per month. FOF 47, 48. The trial court further awarded the Gordons general damages in the amount of \$7,500.00 for the inconvenience of the City's actions. Conclusions of Law (CoL) 6-7. The total amount awarded was \$11,250.00. The trial court found no evidence of costs or economic damages associated with or directly related to either the City's violation of the Gordons' procedural due process rights or assessment of monetary penalties. FOF 46.

Mr. Gordon timely appealed that trial court's judgment. His former wife, Britt, also a plaintiff in this case, did not appeal.

#### **IV. STANDARD OF REVIEW**

Although the City maintains Mr. Gordon failed to properly assign error to any conclusion of law, the City will nonetheless brief the issues as if error were properly assigned. See RAP 10.3 (g).

In this case the trial court's findings of fact are unchallenged and are therefore verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Accordingly, this Court's review is limited to a determination of whether substantial evidence, consisting of the unchallenged findings of fact, supports the

conclusions of law See, e.g., Keever & Assocs. v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). The appellate court will view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. Weyerhaeuser v. Tacoma-Pierce County Health Dep't, 123 Wn. App. 59, 65, 96 P.3d 460 (2004).

## **V. ANALYSIS**

The only issue at trial was whether the City's conceded procedural due process violation damaged the Gordons, and, if so, in what amount.<sup>44</sup> Nonetheless, Mr. Gordon raises three issues on appeal. First, he argues that the trial court erred in holding that Mr. Gordon had constructive notice of his appeal rights.<sup>45</sup> Second, he argues that he should be awarded damages for a period longer than five months. Third, he argues that he should not be collaterally estopped from recovering damages as a result of a prior district court judgment against him. Mr. Gordon should not prevail on any of the arguments. The trial court's determination that Mr. Gordon was entitled to damages in the \$11,250.00 is supported by

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<sup>44</sup> All other issues had been dismissed on summary judgment.

<sup>45</sup> In his Opening Brief, Mr. Gordon makes one mention of a "regulatory taking" and one mention of "capricious" and "arbitrary" actions. Opening Brief, p. 9. Mr. Gordon provided no argument for either assertion and did not assign error to any related findings or conclusions. Therefore, the City will not address these issues.

substantial evidence and should be affirmed.

**A. The trial court properly found that Mr. Gordon had constructive notice of the City's actions against him by March 2003.**

As stated above, Mr. Gordon did not assign error to any finding of fact, and therefore the findings are verities on appeal. Hill, 123 Wn.2d at 644. However, Mr. Gordon did assign error to an issue about "constructive notice" (Assignment of Error-2 [sic]<sup>46</sup>) and that issue was identified not in any trial court conclusion, but in one finding. Finding of Fact 17 states:

17. Between March 1, 2003 and March 4, 2003, Plaintiff Mr. Gordon had constructive knowledge of the condition of the property and the actions of the City. At this point, \$875.00 in penalties were owing to the City. At this point in time, the property at 1643 South 84<sup>th</sup> Street had been boarded up by the City for almost 7 months.

(The certified receipt in Exh. 29 is unclear about whether Mr. Gordon signed on March 1, 2003 or March 4, 2003. See RP 150, lines 1-7). Other than Finding of Fact 17, the trial court made no other finding or conclusion about Mr. Gordon having "constructive notice".

Mr. Gordon claims that this finding affected the trial court's award of damages or that the trial court should not have raised the

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<sup>46</sup> In two places in his Opening brief at page 3, Gordon states "Assignment of Error-2".

issue on its own. Opening Brief, p. 3, (Assignment of Error-2 “Did the trial court erred [sic] in introducing, sua sponte, the idea of constructive notice into their assessment of damages” and “Issue-2<sup>47</sup> There was no evidence presented to support the use of constructive notice. Further its application is used improperly in determining damages.”)

Contrary to Mr. Gordon’s claims, the trial court did not rely on “constructive notice” to find that Mr. Gordon was aware “of the appellants [sic] right to appeal” (Opening Brief, p. 16) or to somehow limit the damages awarded to Mr. Gordon. There is nothing in the trial court’s oral ruling or Findings of Fact and Conclusions of Law to support either assertion.

Even if the trial court raised the issue of “constructive notice” sua sponte, the issue is moot.<sup>48</sup> Mr. Gordon concedes that he had actual notice of the City’s concerns about the property by early March 2003. Opening Brief, p. 16.

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<sup>47</sup> Gordon also raises “Issue-1 The court acted improperly using constructive notice, sua sponte, in her final ruling denying the parties due process to argue for or against its application.” Opening Brief, p. 3. The City is unclear as to what this means. Other than finding that Gordon had constructive notice in early March 2003 of the City’s actions against him—because he admittedly signed the certified receipt for the City’s notice (FOF 16)—the trial court made no other holding or finding about constructive notice.

<sup>48</sup> Moreover, MR. Gordon fails to cite any authority for the proposition that the trial court cannot raise an issue, or make an appropriate finding, on its own.

In any event, the trial court properly held that Mr. Gordon had constructive notice in early March 2003 of the City's actions against him. The trial court made this finding as it reviewed the City's notices to Mr. Gordon to determine which notices the City addressed correctly, and which ones Mr. Gordon received even though they were addressed incorrectly. The trial court found that although addressed incorrectly, Mr. Gordon received the City's notice dated February 28, 2003 because Mr. Gordon signed the certified receipt in early March 2003. FOF 16.<sup>49</sup>

Q: I'm showing you what's been marked as Defendant's Exhibit 29. Is that a letter directed to you on February 28, 2003?

A: It's directed to me.

Q: And I'm going to show you your signature or the signature on that receipt. Is that your signature?

A: That is my signature.

Q: Okay. And the dates of that certified copy receipt is what?

A: It looks like March or a 3 number. It looks like a "3" or "4" and then that's all I can make out.

RP 149-150, lines 15-3. Moreover, FOF 16 states:

The fifth notice was dated February 28, 2003. See Exhibit Number 29. This notice was sent to the same incorrect address. This notice included a fourth fine of \$250.00. There were no appeal rights outlined in the letter. Plaintiff Mr. Gordon received this notice, signed the certified mail receipt, but did not open the letter due to severe trauma involving his son's illness resulting in his hospitalization.

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<sup>49</sup> Exh. 29.

As a result of Mr. Gordon's testimony and Finding of Fact 16, substantial evidence supports the trial court's Finding of Fact 17 that by early March 2003, Mr. Gordon had constructive notice of the City's concerns about the property.

**B. Substantial evidence supports the trial court's conclusion that Mr. Gordon was entitled to loss of rent at \$750.00 per month for only five months and for general damages in the amount of \$7,500.00.**

1. The trial court found that Mr. Gordon was entitled to nominal damages under 42 U.S.C. § 1983.

In order to obtain any damages from the City on his 42 U.S.C. §1983 claim, Mr. Gordon needed to show that the problem with the *process* caused him harm and he needed to "convince the trier of facts that he actually suffered distress because of the denial of the procedural due process itself." Carey v. Piphus, 435 U.S. 247, 263, 98 S. Ct. 1042 (1977).

The "causation element demands that the plaintiff show that the objectionable municipal policy was the 'moving force' behind the plaintiff's injury." Board of the Cty. Commr's v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382 (1997). "[W]here a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies

in procedure.” Carey, 435 U.S. at 263. However, no compensatory damages will be awarded in a §1983 lawsuit absent proof of actual injury. Id. Moreover, while there is no precise valuation of awarding general damages, such damages are generally related to the actual damages. E.g. Lian v. Stalick, 106 Wn.App 811, 825, 25 P.3d 467 (2001).

There is no finding that the City’s designation of his property as “derelict” violated Mr. Gordon’s constitutional rights, as he claims. Opening Brief, p. 10. In fact, the trial court held years ago that Mr. Gordon was collaterally estopped from challenging the underlying violations. CP 143. Mr. Gordon did not assign error or appeal that ruling.

The trial court heard the testimony, reviewed the evidence and determined that under 42 U.S.C. §1983 an award of \$11,250.00 was appropriate in recognition of the actual lost rent and frustration and inconvenience caused by the procedural due process violation.

2. The trial court properly held that Mr. Gordon was entitled to damages in the amount of \$11,250.00.

Mr. Gordon argues, presumably, that Conclusions of Law 5, 6, and 8 were in error.<sup>50</sup> Essentially, Mr. Gordon asks the Court to weigh the evidence, to believe his version of the evidence, and to award him “legitimate” general damages. Opening Brief, p. 7. Mr. Gordon’s contentions are without merit.

The conclusions Mr. Gordon appears to challenge provide:

5. Based on the evidence presented, that is not more than a five-month window for lost of rental, for the period of May 2003 through September 2003.

6. A reasonable value for that five-month loss of rent is \$750.00 a month for a total economic loss of \$3,750.00.

...

8. The City’s actions caused plaintiffs only inconvenience and frustration for a delay of approximately five months in renting this property. General damages for this inconvenience and frustration amount to \$7,500.00.

The trial court’s award of \$11,250.00 is based on its findings as to the nature and extent of Mr. Gordon’s injuries or suffering caused by the City’s actions. In its conclusions, the trial court concluded that “There is no evidence of costs or economic damages associated with or directly related to the fines.” CoL 4.

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<sup>50</sup> In his Opening Brief, pages 7-10, Mr. Gordon argues he is entitled to additional damages. However, he does not specifically identify to which findings or conclusions he believes are in error.

Significantly, the trial court did not find Mr. Gordon to be credible. Finding of Fact 43 states:

43. The Court finds that the plaintiffs are not credible in their claim that the City's actions caused their divorce.

Moreover, the trial court found Mr. Gordon could have easily fixed the Property in a five-month period. FOF 47, CoL 6. The trial court rejected his argument that the City's actions caused his marriage to end, finding that his psychologist, Dr. Howell, "never opined that more probably than not, the marital breakup was caused by the City." FOF 42. Given Dr. Howell's testimony, the trial court could not have reasonably reached any other conclusion.

On cross-examination, Dr. Howell, who met with Mr. Gordon in 2005 and 2006, testified that Mr. Gordon never really talked specifically about the rentals as being a problem in his marriage<sup>51</sup>, and that over the course of 24 sessions, Dr. Howell noted that they mentioned the "City of Tacoma" only one time in reference to a different City action.<sup>52</sup> In fact, Dr. Howell did not remember the Gordons ever talking about the City's penalties issued against them:

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<sup>51</sup> RP 229, lines 20-21

<sup>52</sup> RP 232, lines 15-18.

Q: And your notes over the 25 – excuse me, the 24 sessions; there is one mention of the City of Tacoma in those notes; is that right?

A: There is one overt mention and then there is just references [sic] without coming out and saying the City of Tacoma.

Q: But the one overt mention has to do with that he missed a court date with the City of Tacoma?

A: That's correct.

Q: And there's nothing in there in your notes indicating that the City of Tacoma had issued penalties against the Gordons?

A: Not that I saw.<sup>53</sup>

Mr. Gordon has simply failed to identify any portion of the record which supports his argument that the trial court's conclusions are not support by substantial evidence. Nor has he presented argument as to why the findings behind these conclusions are inadequate.

Mr. Gordon is asking, apparently, for this Court to adopt his view of the evidence—that it was the City's fault that he could not rent the property for years and that he could not get a loan to finance the repairs. Opening Brief, p. 8. There is no evidence to support his claims.

In addition to Dr. Howell's testimony, there is ample evidence to support the trial court's conclusions about the mere "inconvenience" Mr. Gordon experienced and for the amount of

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<sup>53</sup> RP 232, lines 15-25; RP 233, line 1.

damages. Mr. Gordon previously worked with the City to correct the problem on his derelict home over a four to five month period. FOF 30<sup>54</sup>. Mr. Gordon himself left the house vacant from October 2001 until August 2002. FOF 10, 35.

Mr. Gordon alone made the house uninhabitable for many years, as evidenced by his sheet-rocking the house (FOF 26), tearing out the kitchen (FOF 24), gutting the interior (FOF 28) and basement, and removing all the bath, kitchen and laundry fixtures.<sup>55</sup>

Mr. Gordon also had a great deal of family and financial stress in his life, which were unrelated to the City's actions against him. His son's deteriorating mental health and his own depression (FOF 29<sup>56</sup>), along with the deaths of his grandmother, his mother-in-law, and father were all significant stressors for Mr. Gordon. FOF 36.<sup>57</sup> On the financial side, Mr. Gordon had many judgments and liens against him—again unrelated to his interactions with City.

From all this testimony, the trial court decided the City's procedural due process violations only amounted to "frustration and inconvenience" and awarded damages for loss of rent at \$750.00 per

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<sup>54</sup> RP 136, lines 10-21; RP 199, lines 12-14.

<sup>55</sup> RP 81, lines 10-13; RP 103, lines 21-23.

<sup>56</sup> RP 112, lines 5-10. RP 114, lines 21-22; RP 127, lines 10-12; RP 150, lines 10-12; RP 225, lines 6-7.

<sup>57</sup> RP 114, lines 20-25; RP 258, lines 5-13.

month for only five months and for general damages in the amount of \$7,500.00. The trial court questioned, many times, why Mr. Gordon did not just make the minor repairs and rent the house.<sup>58</sup> He did not do so, and as a result, the trial court found that Mr. Gordon was not entitled to damages for the entire period of time the Property was not rented.

As the trier of fact, the trial court was free to give little or no weight to Mr. Gordon's testimony when he claimed the City caused his marriage to end, particularly given that his testimony was contrary to his psychologist and his former wife, Britt. Significantly, the trial court questioned Mr. Gordon's credibility. FOF 43. The trial court's conclusion that Mr. Gordon failed to prove the amount of damages he was seeking is supported by substantial evidence, as was the corresponding damage award.

**C. The trial court properly held that Mr. Gordon was collaterally estopped from recovering fines as a result of the district court judgment.**

Mr. Gordon argues that the trial court erred when it held that collateral estoppel applies in this case. Assignment of Error 2.

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<sup>58</sup> RP 319, lines 8-10, 16. Gordon was required, but failed, to mitigate his damages. The doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, prevents recovery for those damages the injured party could have avoided by reasonable efforts taken after the wrong was committed. The doctrine applies to tort cases. Bernsen v. Big Bend Elec. Coop., 68 Wn. App. 427, 433, 842 P.2d 1047 (1993). Failure to mitigate damages is an affirmative defense (Id.), which the City raised in its answer. CP 160.

This appears to be a challenge to Conclusion of Law 2:

2. Plaintiffs are collaterally estopped from seeking recovery of the fines subject to the district court judgment (October 2002 through September 2003) obtained in June 2005. See Exhibit 58. However, plaintiffs are not collaterally estopped from economic loss and/or general damages for that same period of time.

1. Mr. Gordon appears to appeal an issue for which he already prevailed.

As stated above, the trial court held that Mr. Gordon was “collaterally estopped<sup>59</sup> from seeking recovery of the fines subject to the district court judgment (October 2002 through September 2003) obtained in June 2005.” CoL 2.<sup>60</sup> However, the trial court went on to hold that Mr. Gordon is “*not* collaterally estopped from economic loss and/or general damages for that same period of time. CoL 2 (emphasis added). This holding reiterates that Mr. Gordon was not prevented from claiming, and being awarded, general damages for the period of October 2002 to September 2003. Being awarded damages appears to be Mr. Gordon’s

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<sup>59</sup> The parties have long argued about the application of collateral estoppel in this case. However, res judicata may also bar Mr. Gordon's request for the return of penalties paid under the district court judgment. Res judicata applies where the subsequent action involves (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

<sup>60</sup> The trial court also found that it had “previously held that the Gordons are collaterally estopped from challenging, or seeking recovery for, those penalties.” FOF 45.

concern. (Opening Brief, p. 3, Assignment of Error-2 "Did the trial court err in allowing the application of collateral estoppel thereby denying the plaintiff recovery of damages based on the entry of a default judgment in the district court.")

So the City is uncertain what Mr. Gordon means when he argues that the trial court erred in "allowing the application of collateral estoppel thereby denying [sic] the plaintiff recovery of damages based on the entry of a default judgement in district court." Assignment of Error-2. The City can only assume he misunderstood or misread the trial court's ruling.

Mr. Gordon could perhaps be requesting the return of the penalties paid under the district court judgment from June 2005. Opening Brief, p. 7 (stating that "Appellant was deemed collaterally estopped from challenging or being granted recovery for those earlier District Court default judgment recovering the city's fines [sic] for the purposes code violations that has accrued through September 2003.") But it is unclear as to whether he has ever requested the return of those monies. CP 145-154. In any event, this issue was not raised at trial and is not properly before this Court. CP 174-183.

Even if Mr. Gordon is entitled to argue that the City should return any penalties paid under the district court judgment—and there is no evidence that he paid any—he should not prevail. Collateral estoppel prevents Mr. Gordon from recovering on any penalties paid as a result of a June 2005 district court judgment from which he did not appeal.

2. Mr. Gordon is collaterally estopped from recovering any penalties paid under the district court collections judgment.

In June 2005, the City's collection agency obtained a judgment for penalties the City issued against Mr. Gordon for the period of October 2002 through September 2003. Exh. 58. Mr. Gordon did not appeal that judgment. In 2007, the trial court held that Mr. Gordon was collaterally estopped from "contesting...the civil penalties that were the subject of a judgment in Pierce County District Court Cause # 745211." CP 143-44. The trial court made the same conclusion. CoL 2.

Collateral estoppel prevents Mr. Gordon from collecting on any penalties he paid under the district court judgment.<sup>61</sup> In order for collateral estoppel to apply here, four elements must be met:

(1) the issue decided in the prior adjudication is identical to the one presented in the current action,

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<sup>61</sup> There is no evidence in the record about whether Gordon paid any or all of that judgment.

(2) the prior adjudication must have resulted in a final judgment on the merits,

(3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and

(4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

In re Det. of Stout, 159 Wn.2d 357, 378, 150 P.3d 86 (2007). Mr.

Gordon does not challenge element three<sup>62</sup>, that he was the same party in the district court case as in this one. Therefore, Mr. Gordon challenges only elements one, two and four.

a. The issue in the prior case is identical to the present one.

In his complaint in this case, Mr. Gordon argued that he did not owe the fines the City imposed against him from October 2002 through April 2006. CP 147 (“During the period of October 2002 through April 2006, Plaintiff (Gordon) was fined in excess of \$18,000.”); CP 148-151 (seeking to invalidate the penalties).

Similarly, in the district court case, the City sought to collect the penalties imposed against him from October 2002 through September 2003. CP 38, 58. Both lawsuits directly involved the imposition of the City’s penalties for the same property and overlapped the same period of time. Mr. Gordon agrees. Opening Brief, p. 6 (“The fines and penalties [in the district court case] were

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<sup>62</sup> Opening Brief of Appellant, page 14.

the same fines and underlying code violations that were at issue in the present case.”)

Mr. Gordon’s reliance on Barnes v. State, 85 Wn.App 638, 932 P.2d 669 (1997) is misplaced. In Barnes, the court compared a prior civil forfeiture case to a later filed criminal case. In the civil case, the purpose was to obtain from the defendant any financial gains traceable to the criminal profiteering conduct. Id. at 651. In the criminal case, the State need only prove that the defendant sought to obtain financial gains; it need not prove that the defendant actually obtained that goal. Id. As such, the Court found that there was no identity of issues.

In this case, both lawsuits deal directly with the imposition of the fines—in one, the City sought a judgment for payment of the penalties; in the other, Mr. Gordon sought to essentially vacate the same penalties. As a result, the issues are identical.

b. The prior adjudication resulted in a final judgment on the merits.

Mr. Gordon does not dispute that the 2005 district court case ended with a default judgment against him. CP 58. But Mr. Gordon claims there was no final judgment on the merits.

Mr. Gordon's reliance on Barnes is again misplaced when he argues there is no record of what was adjudicated in the district court case. In Barnes, the record of the summary judgment proceeding below was not provided to the Court, and so the Court could not rule on whether there was a final judgment on the merits. Here, there was no summary judgment proceeding in the district court case. Because of Mr. Gordon's failure to appear, the City obtained a default against him. The record is clear that the City sought payment of penalties it imposed from October 2002 through September 2003 and obtained a judgment for them. CP 38, 58. With the default judgment itself, coupled with the evidence about the penalties at issue in that case, the trial court held that there was a final judgment on the merits and collateral estoppel applied.

Mr. Gordon seems to suggest that a default judgment cannot be used as a basis to claim collateral estoppel. Opening Brief of Appellant, p. 15. However, Washington courts have held that default judgments have preclusive effects for purposes of res judicata. See Lenzi v. Redland Insur. Co., 140 Wn.2d 267, 280-01, 996 P.2d 603 (2000). The argument about why default judgments are appropriate for purposes of res judicata holds true for collateral

estoppel as well. See In re Personal Restraint of Metcalf, 92 Wn. App. 165, 174, 963 P.2d 911 (1998) (stating that collateral estoppel and res judicata are similar). Consequently, the district court case resulted in final judgment on the merits.

c. Precluding Mr. Gordon from relitigating the issue about whether he should be reimbursed for any payments made under the district court judgment will not work an injustice on Mr. Gordon.

There is nothing unjust about enforcing a district court judgment against Mr. Gordon. It is possible that his employer required Mr. Gordon to be out of town at the time the default judgment was entered. It is likely Mr. Gordon faced “traumatic personal issues” when the judgment was entered. Opening Brief, p. 15. But Mr. Gordon had the option to either appear in the lawsuit or to request a continuance. He did neither. Nor did Mr. Gordon appeal the district court judgment.

Moreover, collateral estoppel only bars Mr. Gordon’s ability to challenge the judgment about the amount he owes; it does nothing to prevent him from challenging the process by which the City imposed later penalties.

The trial court did not err when it held, twice (CP 143; CoL 2), that Mr. Gordon is collaterally estopped from seeking recovery of the fines associated with the 2005 district court judgment.

**D. The trial court erred when it entered a finding that the “imposition of the fines” was a significant financial issue for Mr. Gordon.**

The trial court erred<sup>63</sup> when it found that the City's imposition of the fines was a significant financial issue for Mr. Gordon. Finding of Fact number 41 states:

41. The Court finds that there is no mention of the City or the fining process in the counseling records in Exhibit 65. *Plaintiffs' counselor testified the financial issues most significantly involved the imposition of the fines.* The most consistent issue in their counseling is the health issues of Anthony. That topic dominates the discussion and the concerns of both plaintiffs.

(Emphasis added.) The italicized sentence was entered in error and directly contradicts the other findings in Finding of Fact 41, as well as the testimony of Dr. Howell and the trial court's oral ruling.

In this Finding of Fact itself, the trial court found that “there is no mention of the City of the fining process in the counseling records in Exhibit 65.” Then the next sentence directly contradicts that and states that the “imposition of the fines” (perhaps meaning the City of Tacoma's fines) was the “most significant” financial issue. Such a finding is not supported by substantial evidence. In fact, it is

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<sup>63</sup> A respondent who seeks no affirmative relief in the appellate court, but who merely seeks to sustain the final order, judgment or decree of the trial court may assign error to factual findings entered by the trial court. Burt v. Heikkala, 44 Wn.2d 52, 54, 265 P.2d 280 (1954).

contradicted by the evidence.

Dr. Howell testified that there was one mention of the City of Tacoma in her counseling records, and that this reference was to something other than the fines:

Q: And your notes over the 25 – excuse me, the 24 sessions; there is one mention of the City of Tacoma in those notes; is that right?

A: There is one overt mention and then there is just references without coming out and saying the City of Tacoma.

Q: But the one overt mention has to do with that he missed a court date with the City of Tacoma?

A: That's correct.

Q: And there's nothing in there in your notes indicating that the City of Tacoma had issued penalties against the Gordons?

A: Not that I saw.<sup>64</sup>

The trial court heard this testimony, and reviewed every line of Dr. Howell's entire counseling record for the Gordons. Trial Court's oral ruling, page 13.<sup>65</sup> The trial court stated that "Literally, there is no mention of the City of the fining process." Id. at 14, lines 14-15. Therefore, substantial evidence does not support the finding in Finding of Fact 41 that "Plaintiffs' counselor testified the financial issues most significantly involved the imposition of the fines." The

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<sup>64</sup> RP 232, lines 15-25; RP 233, line 1.

<sup>65</sup> The City submitted a second supplemental designation of clerk's papers on June 14, 2012. That designation includes the Verbatim Report of the trial court's oral ruling dated March 24, 2011 and filed March 30, 2011. Gordon also cites to the trial court's oral ruling in his brief. Opening Brief, p. 2 "Record on Review."

trial court erred. The City requests this Court to find that substantial evidence does not support the statement – “Plaintiffs’ counselor testified the financial issues most significantly involved the imposition of the fines” – in Finding of Fact 41.

#### **VI. CONCLUSION**

The City of Tacoma respectfully requests this Court to affirm the trial court’s judgment in favor of Mr. Gordon in the amount of \$11,250.00.

DATED this 15 day of June, 2012

ELIZABETH PAULI, City Attorney

By: Debra Casparian  
DEBRA E. CASPARIAN, WSBA # 26354  
Deputy City Attorney

# TACOMA CITY ATTORNEY

**June 15, 2012 - 11:52 AM**

## Transmittal Letter

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No Comments were entered.

Sender Name: Debra E Casparian - Email: [dcasparian@ci.tacoma.wa.us](mailto:dcasparian@ci.tacoma.wa.us)

NO. 42302-2-II

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**COURT OF APPEALS FOR DIVISION TWO  
STATE OF WASHINGTON**

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ANTHONY R. GORDON,

Petitioner,

vs.

THE CITY OF TACOMA,  
a Washington municipal corporation,

Respondent.

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**AFFIDAVIT OF SERVICE OF  
RESPONDENT CITY OF TACOMA'S BRIEF**

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Debra E. Casparian, WSBA No. 26354  
Deputy City Attorney  
City of Tacoma  
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Tacoma, WA 98402  
(253) 591-5887

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF PIERCE )

KRISTINA KROPELNICKI, being first duly sworn on oath, deposes and states:

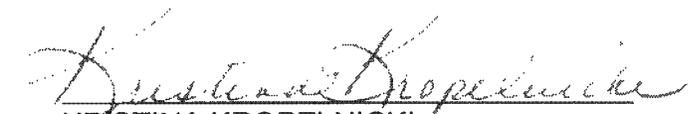
I am a citizen of the United States, over the age of eighteen and competent to be a witness herein.

On the 15 day of June, 2012, I electronically filed the *RESPONDENT CITY OF TACOMA'S BRIEF* and this *AFFIDAVIT OF SERVICE* with:

Court of Appeals  
Division II  
950 Broadway, #300  
Tacoma, WA 98402

A copy of the same were delivered, via U.S. Mail, postage pre-paid to:

Anthony R. Gordon  
121 165<sup>th</sup> Street East  
Spanaway, WA 98387

  
KRISTINA KROPELNICKI

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of June, 2012.

  
Printed name: Brian E. McAdoo



NOTARY PUBLIC in and for the State  
of Washington, Residing at King County  
My commission expires: 12/22/14

# TACOMA CITY ATTORNEY

## June 15, 2012 - 11:55 AM

### Transmittal Letter

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Court of Appeals Case Number: 42302-2

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#### Comments:

Affidavit of Service

Sender Name: Debra E Casparian - Email: [dcasparian@ci.tacoma.wa.us](mailto:dcasparian@ci.tacoma.wa.us)