

No. 49935-5-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

KYE S. BARKER, a single woman; and D-SONG LLC, a Washington limited liability
company,

Appellants,

vs.

TOWN OF RUSTON, a political subdivision of the State of Washington; the RUSTON
POLICE DEPARTMENT; BRUCE HOPKINS, the Ruston Town Mayor; JEREMY KUNKEL,
the Ruston Police Chief; JAMES KAYLOR, an officer of the Ruston Police Department;
VICTOR CELIS, an officer of the Ruston Police Department; and "JOHN DOE 1-5", officers
of the Ruston Police Department,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 14-2-10210-6

RESPONSE BRIEF OF RESPONDENTS

Patrick McMahon, WSBA #18809
David L. Force, WSBA #29997
Carlson McMahon & Sealby PLLC
37 S. Wenatchee Ave., Suite F
P.O. Box 2965
Wenatchee WA 98807-2965
(509) 662-6131

Attorneys for Respondents, Town of Ruston, et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

TABLE OF CONTENTS

	<u>Pages</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERRORS	1
III. STATEMENT OF THE CASE	1
IV. LAW AND ARGUMENT.....	4
A. Standard of Review	4
B. Summary Judgment Standard	5
C. The Plaintiffs Submitted, and Relied Upon, Inadmissible Evidence	6
D. The Plaintiffs Rely on Evidence Outside of the Statute of Limitations	8
E. Collateral Estoppel Precludes Relitigation of the Factual Findings from the Federal Court	9
F. Plaintiffs Fail to Identify Facts Sufficient to Evidence Negligent Infliction of Emotional Distress	10
G. No Evidence of Outrage Exists	14
H. Plaintiffs Fail to Establish the Elements of Interference With a Business Expectancy	15
I. Plaintiffs Waived Their Claim for Private Nuisance	17
V. CONCLUSION	18

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

Pages

State Cases

<u>Barber v. Bankers Life & Cas. Co.</u> , 81 Wn.2d 140 (1971)	5
<u>Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc.</u> , 112 Wn. App. 697 (2002)	5
<u>Bowman v. Webster</u> , 44 Wn.2d 667 (1954)	17
<u>Bunch v. King County Dept. of Youth Services</u> , 155 Wn.2d 165 (2005) ...	12
<u>Colbert v. Moomba Sport, Inc.</u> , 163 Wn.2d 43 (2008)	13
<u>Collinson v. John L. Scott, Inc.</u> , 55 Wn. App. 481 (1989)	18
<u>Crowe v. Gaston</u> , 134 Wn.2d 509 (1998)	12
<u>Dicomes v. State</u> , 113 Wn.2d 612 (1989)	14
<u>Dodge City Saloon, Inc. v. Washington State Liquor Control Board</u> , 168 Wn. App. 388 (2012)	11
<u>Folsom v. Burger King</u> , 135 Wn.2d 658 (1998)	6
<u>Grimsby v. Samson</u> , 85 Wn.2d 52 (1975)	14
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wn.2d 355 (1988)	5
<u>Havsy v. Flynn</u> , 88 Wn. App. 514 (1997)	15
<u>Hegel v. McMahon</u> , 136 Wn.2d 122 (1998)	13
<u>Hudson v. City of Wenatchee</u> , 94 Wn. App. 990 (1999)	15,16
<u>Iwai v. State</u> , 129 Wn.2d 84 (2001)	5
<u>Karasek v. Peier</u> , 22 Wn. 419 (1900)	18
<u>Keates v. City of Vancouver</u> , 73 Wn. App. 257 (1994)	10,11,12
<u>Kumar v. Gate Gourmet Inc.</u> , 180 Wn.2d 481 (2014)	11

TABLE OF AUTHORITIES (CONTINUED)

Pages

State Cases

1		
2		
3		
4		
5	<u>Lakey v. Puget Sound Energy, Inc.</u> , 176 Wn.2d 909 (2013)	18
6	<u>Life Design Ranch, Inc. v. Summer</u> , 191 Wn. App. 320 (2015)	16
7		
8	<u>Marshall v. Bally’s Pacwest, Inc.</u> , 94 Wn. App. 372 (1999)	5
9	<u>Miller v. Stanton</u> , 58 Wn.2d 879 (1961)	13
10	<u>Nielson By and Through Nielson v. Spanaway General Medical</u>	
11	<u>Clinic, Inc.</u> , 135 Wn.2d 255 (1998)	9-10
12	<u>Patterson v. Horton</u> , 84 Wn. App. 531 (1997)	13
13		
14	<u>Phillips v. Hardwick</u> , 29 Wn. App. 382 (1981)	14
15	<u>Pleas v. City of Seattle</u> , 112 Wn.2d 794 (1989)	15
16	<u>Rice v. Janovich</u> , 109 Wn.2d 48 (1987)	14
17	<u>Rodriguez v. Perez</u> , 99 Wn. App. 439 (2000)	12
18		
19	<u>Roger Crain & Assocs., Inc. v. Felice</u> , 74 Wn. App. 769 (1994)	5
20	<u>Schooley v. Pinch’s Deli Market, Inc.</u> , 134 Wn.2d 468 (1998)	12
21	<u>Seven Gables Corp. v. MGM/UA Entm’t, Co.</u> , 106 Wn.2d 1 (1986)	5
22		
23	<u>State Farm Mutual Automobile Insurance Co. v. Avery</u> , 114 Wn. App. 299 (2002)	9
24		
25	<u>Wallace v. Lewis Co.</u> , 134 Wn. App. 1 (2006)	5
26	<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216 (1989)	5

Civil Rules

27		
28	CR 56.....	13
29	ER 402	7
30	ER 602	6,8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

TABLE OF AUTHORITIES (CONTINUED)

Pages

Civil Rules

ER 702 7
ER 703 7
ER 802 7

Washington State Statutes

RCW 4.16.080 8
RCW 7.48.010 18
RCW 7.48.150 17
RCW 49.60 4
RCW 66.28.090 11
RCW 66.44.010 11,15

Miscellaneous

Town of Ruston Municipal Code 9.19.060 2

1
2
3
4
5
6
7
8
9
10
11
12
13

I. INTRODUCTION

This Court should affirm the Superior Court's dismissal of the Plaintiffs' case as there are no issues of material fact to prevent summary judgment dismissal. Throughout Plaintiffs' briefing before the Superior Court and this Court, the Plaintiffs have never identified any specific acts justifying their allegations of wrongdoing against the Town of Ruston and its police officers. With nothing more than vague allegations of wrongdoing against the Defendants, the Superior Court Summary Judgment dismissal was appropriate and should be affirmed.

II. ASSIGNMENT OF ERRORS

- 14 1. The Superior Court properly dismissed the Plaintiffs' claims as the Plaintiffs failed to
15 establish the required elements of each cause of action;
- 16 2. The Superior Court properly prohibited relitigation of the Plaintiffs' federal claims as
17 they were barred by the doctrine of Collateral Estoppel.
18

III. STATEMENT OF THE CASE

19
20 Plaintiffs, D-Song LLC and Kye S. Barker, own and operate the Unicorn Sports Bar in
21 Ruston, Pierce County, Washington. (CP 1-10), see also (CP 418, ln. 8). Plaintiffs have owned
22 the Unicorn Sports Bar since 2002. (CP 418, ln. 10). Plaintiffs also own the real property
23 where the Unicorn Sports Bar resides. (CP 419, ln. 12).
24

25
26 Generally, Plaintiffs allege that Defendants, Town of Ruston, Ruston Police
27 Department, Mayor Bruce Hopkins, Police Chief Jeremy Kunkel, and other officers of the
28 Ruston Police Department, including Officers James Kaylor, Victor Celis and John Doe 1-5,
29 unlawfully harassed and interfered with the business expectancy of Plaintiffs by entering the
30

1 Unicorn Sports Bar with the sole objective of engaging in intentional intimidation of patrons by
2 police officers. (CP 1-10).

3
4 More specifically, Plaintiffs allege police officers employed by the Town of Ruston
5 have entered the Unicorn Sports Bar on multiple occasions with the sole intent to intimidate
6 and harass the customers and the employees of the bar. (CP 1-10). Further, it is alleged that
7 Town of Ruston's police officers targeted patrons of the bar as they left the premises. (CP 1-
8 10).

9
10 Plaintiffs provide an example of police activity that occurred at the Unicorn Sports Bar
11 on December 17, 2011. (CP 1-10). It is alleged that on this date, Officer James Kaylor
12 engaged in conversation with a patron. (CP 1-10). Officer Kaylor observed the patron being
13 served a drink after an approximate 45 minute period by Darell Bone, an employee of the
14 Unicorn Bar and Grill. (CP 1-10). Officer Victor Celis, then issued a citation to Mr. Bone for
15 serving an apparently intoxicated person. (CP 1-10). This led to the Town of Ruston filing a
16 report with the Liquor Control Board. (CP 1-10).

17
18 Further, Plaintiffs allege that Defendant Town of Ruston cited Plaintiff Kye Barker with
19 a noise ordinance violation pursuant to the Town of Ruston Municipal Code 9.19.060. (CP 1-
20 10). Ms. Barker alleges that she was never given notice of noise coming from the premises or
21 an opportunity to correct it. (CP 1-10). This noise ordinance citation was eventually dismissed
22 on February 27, 2014. (CP 1-10).

23
24 Additionally, Plaintiffs allege that the Town of Ruston, by and through its employees,
25 continued to observe and harass patrons within Plaintiffs' establishment by frequently running
26 license plates of vehicles parked outside, following patrons to their cars, and "maintaining an
27 intimidating presence both inside and outside of the tavern." (CP 1-10).

1 However, there is no evidence provided to substantiate any of the allegations in the
2 Amended Complaint and, moreover, in Plaintiff Kye S. Barker's deposition, she states nothing
3 more than the mere presence of officers on her property. (CP 420-21). Plaintiff Barker can
4 allege nothing more than the fact that officers would stand around with their hands behind their
5 backs. (CP 421, ln. 17). Plaintiff Barker's allegations are nothing more than pure speculation
6 that people will choose not to enter her establishment because of the lawful presence of police
7 officers on her property. (CP 423, ln. 4-17). Plaintiff is also unable to establish specific
8 customers she has lost due to any police presence. (CP 423, ln. 25 and CP 424, ln. 1-9).

11 Additionally, the Plaintiff is unable to allege any facts showing how the City, the City's
12 police force, or any of the City employees are discriminating against her because of her Korean
13 ancestry. (CP 425, lns. 16-25 and CP 426, lns. 1-11).

15 The Ruston Police Department does not target any specific business when doing
16 business or social checks while on patrol. (CP 432-439). The police, on a typical patrol, will
17 check businesses throughout their shift to make sure everything is alright, nothing is getting out
18 of hand, or that overly intoxicated patrons are present. (CP 438-439).

21 Lastly, the evidence shows that Plaintiffs have lost zero business profits despite any
22 alleged wrongdoings by the Defendants. (CP 441-457). As evidenced by the report prepared
23 by Erick West, M.A., once the profits of the Unicorn Sports Bar are normalized, the profit
24 margin remains relatively constant over the last decade. (Id). Therefore, there is no evidence
25 that any of the activities of Defendants have damaged Plaintiffs' business.

27 Plaintiffs allege the following causes of action in their Complaint: (1) torts of
28 intentional and negligent infliction of emotional distress; (2) tort of interference of business
29 expectancy; (3) tort of harassment; (4) tort of private nuisance; (5) tort of defamation; (6) tort
30

1 of unlawful taking of property; and (7) discrimination and harassment pursuant to RCW 49.60.
2 (CP 1-10).

3
4 This case proceeded to Summary Judgment in the Western District of Washington
5 before the Honorable Benjamin H. Settle. (CP 458-471). The Court held that the Plaintiffs
6 failed to submit evidence of a Fourth Amendment illegal search and seizure claim. (CP 468).
7 The Court also dismissed the Plaintiffs' equal protection claims holding that the City of Ruston
8 police officers did not target the Unicorn Bar more often than any other bar and that the
9 Plaintiffs did not establish that the actions of the Ruston Police Department were motivated by
10 racial animus against the Plaintiff. (CP 469). Finally, the Court held that the Plaintiffs' due
11 process rights were not violated by the actions of the Ruston Police Department. (Id.). The
12 Court declined to exercise supplemental jurisdiction over the remaining state law claims and
13 removed them to this Court. (CP 470).

14
15
16 During the summary judgment argument to the Superior Court, the Plaintiffs conceded
17 that no facts exist to establish their claims of Harassment, Private Nuisance, Defamation and/or
18 Unlawful Taking. (RP 18, Ins. 15-21). Plaintiffs fail to provide the necessary evidence to
19 support any of the above causes of action. Accordingly, because such evidence is absent, this
20 Court should affirm the Superior Court's dismissal of the Plaintiffs' Complaint.
21
22

23 IV. LAW AND ARGUMENT

24 The Superior Court properly granted summary judgment in this case and the Plaintiffs
25 have provided no evidence nor legal argument that the Superior Court committed any errors.
26 Therefore, this Court should affirm the Superior Court's dismissal of the Plaintiffs' Complaint.
27

28 A. Standard of Review.

29 This case is before the Court on a summary judgment dismissal. The standard of review
30

1 is de novo. Wallace v. Lewis Co., 134 Wn. App. 1, 12 (2006).

2 **B. Summary Judgment Standard.**

3
4 In a summary judgment motion, the moving party bears the initial burden of showing
5 the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225
6 (1989). The burden is on the moving party for summary judgment to demonstrate that there is
7 no genuine dispute as to any material fact and all reasonable inferences from the evidence must
8 be resolved against him. Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971). The
9 facts required by CR 56(e) are evidentiary in nature and ultimate facts or conclusions of facts
10 are insufficient. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988).

11
12 A nonmoving party in a summary judgment cannot rely on speculation, argumentative
13 assertions that unresolved factual issues remain, or in having its affidavits considered at face
14 value; for after the moving party submits adequate affidavits, the nonmoving party must set
15 forth specific facts that sufficiently rebut the moving party's contentions and disclose that a
16 genuine issue as to a material fact exists. Seven Gables Corp. v. MGM/UA Entm't, Co., 106
17 Wn.2d 1, 13 (1986). Summary judgment is proper when the only question before the Court is
18 one of law. Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn. App. 697, 702-03
19 (2002).

20
21 To raise a genuine issue of material fact, the nonmoving party must allege evidentiary
22 facts as to "what took place, an act, an incident, a reality as distinguished from supposition or
23 opinion." Roger Crain & Assocs., Inc. v. Felice, 74 Wn. App. 769 (1994). The nonmoving
24 party must provide more than uncorroborated statements in a complaint. See, e.g., Iwai v.
25 State, 129 Wn.2d 84, 88 (2001). "A claim of liability resting only on a speculative theory will
26 not survive summary judgment." Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 381
27
28
29
30

1 (1999). Nonmoving parties will not withstand summary judgment should they fail to produce
2 evidence “explaining how the accident occurred.” *Id.* at 381. Here, Plaintiffs have provided no
3 evidence of the Defendant’s liability in this matter.
4

5 **C. The Plaintiffs Submitted, and Relied Upon, Inadmissible Evidence.**

6 The Trial Court Judge Eignore noted that the evidence submitted by the Plaintiffs was
7 improper; however, she did not set forth a basis for her decision nor identify the specific
8 evidence on the record which she excluded. (RP 20-21). This Court reviews all trial court
9 rulings in conjunction with a summary judgment motion de novo. *Folsom v. Burger King*, 135
10 Wn.2d 658, 663 (1998).
11

12 The Court should not consider portions of the Declaration of Wayne Fricke as they are
13 inadmissible. Mr. Bone’s Declaration (CP 488-491) is inadmissible. ER 602 requires a
14 witness to have personal knowledge. The following portions of Mr. Bone’s Declaration are
15 without personal knowledge and are speculative in their conclusions, therefore, they should be
16 stricken:
17
18

- 19 **1. Ruston police officers have targeted the business in a way that has made**
20 **the Unicorn lose many customers. I believe that officers are trying to be**
21 **imposing, and to bully customers. I believe that officers are so imposing**
22 **that Unicorn isn’t being allowed a fair chance to succeed at business.**
(CP 489, Lns. 3-7);
- 23 **2. I believe that the police department is singling out Kye Barker (CP 489,**
24 **Lns. 9-10);**
- 25 **3. Making customers uncomfortable. (Exhibit A, Ln. 2); and**
- 26 **4. The Ruston Police regularly come into the Unicorn without cause. (CP**
27 **490, Lns. 18-19).**

28 Additionally, several statements in Mr. Bone’s Declaration are inadmissible hearsay.
29
30 ER 802. The following statements should be stricken from the Declaration of Mr. Bone:

- 1 **1. A customer told me that on occasion, an officer touched a vehicle in**
2 **order to look inside the truck trailer. (CP 489, Lns. 17-18);**
- 3 **2. One woman customer told me Officer Miller has shown up at her house**
4 **without cause. Female customers say they have been followed home**
5 **and/or propositioned by officers they saw at the Unicorn. (CP 490, Lns.**
6 **6-9); and**
- 7 **3. Another Unicorn employee heard the Chief of Police say, "That boy's**
8 **going to jail." (CP 490, Lns. 23-24).**

9 The Court should also strike the Declaration of James Reinhold (CP 583-586) as it is
10 irrelevant. ER 402. All of the alleged facts stated by Mr. Reinhold occurred prior to 2008. Mr.
11 Reinhold testified about no occurrence after 2008 and has no personal knowledge of what
12 happened after 2008, according to his Declaration. The original Complaint in this matter was
13 filed in July of 2014. As such, all of the matters related by Mr. Reinhold occurred outside of
14 the three year statute of limitations and are irrelevant, as those actions cannot form the basis of
15 any violation in this case.

16 Additionally, Mr. Reinhold is not identified as an expert witness and has no basis or
17 foundation for offering an expert opinion. ER 702, 703. Therefore, the following statements
18 should be stricken:

- 19 **1. I found there was too much subjectivity when evaluating noise levels in**
20 **and around the bar. (CP 585, Lns. 1-2); and**
- 21 **2. I just did not believe it was right to station an officer outside the bar**
22 **with the sole intent of stopping customers as they got into their car, just**
23 **because they were coming from the Unicorn Bar. It was my impression**
24 **the pressure on Barker would not end until she changed the bar into a**
25 **different restaurant model or closed the bar. (CP 586, Lns. 6-10);**
26

1 Finally, Mr. Reinhold does not have personal knowledge and speculates as to many of
2 the statements he sets forth which are inadmissible pursuant to ER 602. The following
3 statements should be stricken from his Declaration:
4

- 5 **1. It was my opinion elected officials in Ruston did not want the Unicorn**
6 **Bar operating in the Town. Those officials did not want the bar**
7 **operating in a residential community where the business was located.**
8 **(CP 584, Lns. 1-4);**
- 9 **2. I believe based on Hopkins' personal complaints about the Unicorn Bar,**
10 **Mayor Transue began insisting the Ruston Police Department needed to**
11 **begin issuing citations to the bar for excessive noise violations. (CP 584,**
12 **Lns. 22-24); and**
- 13 **3. A possible fair and objective noise ordinance, however, was never**
14 **enacted by the Town Council. I continued to tell Town officials, that**
15 **without clear rules or laws governing noise levels within the Town, I**
16 **could not cite the bar. (CP 584, Lns. 7-10).**

17 For the reasons stated above, this Court should not consider those identified pieces of
18 evidence submitted improperly by the Plaintiffs, as they are inadmissible.

19 **D. The Plaintiffs Rely on Evidence Outside of the Statute of Limitations.**

20 The Court should not consider any alleged actions by the Defendants which occurred
21 outside of the statute of limitations. In Washington, the statute of limitations for these causes
22 of action is three years. RCW 4.16.080. The Plaintiffs originally filed their Complaint with the
23 Pierce County Superior Court on July 2, 2014. As a result, in order for this Complaint to be
24 timely, all actions alleged to have been the subject of their causes of action must have occurred
25 on or before July 2, 2011. As a result, all of the actions allegedly testified to by former Chief
26 Reinhold occurred prior to 2008, the date after which he was no longer the Police Chief. As
27 such, all of these alleged actions are untimely and cannot be considered by the Court in this
28 matter.
29
30

1
2
3 **E. Collateral Estoppel Precludes Relitigation of the Factual Findings from the**
4 **Federal Court.**

5 The Plaintiffs completely misunderstand the Defendants' collateral estoppel argument
6 and confuses it with the doctrine of *res judicata*. However, the Superior Court properly
7 understood the argument and properly applied collateral estoppel to the facts of this case.

8 Collateral estoppel precludes the Plaintiffs from re-arguing the findings contained in
9 Judge Settle's Order on Summary Judgment. The purpose of collateral estoppel is to encourage
10 respect for traditional determinations by ensuring finality. State Farm Mutual Automobile
11 Insurance Co. v. Avery, 114 Wn. App. 299, 304 (2002).

12 In order to establish collateral estoppel, a party must establish:
13

- 14
- 15 **1. That an issue decided in the prior action was identical to the issue**
16 **presented in the second;**
 - 17 **2. That the prior action ended in a final judgment on the merits;**
 - 18 **3. That the party estopped was the party in privity with the party in the**
19 **prior action; and**
 - 20 **4. That the application of the doctrine would not work in injustice.**
21 State Farm 114 Wn. App. at 304.

22 All of the elements of collateral estoppel are present. First, the issues are identical
23 between this lawsuit and the previous lawsuit. Specifically, these allegations were part of the
24 same Complaint. Secondly, a final judgment was issued by the Federal Court. (CP 458-471).
25 Thirdly, the parties are the same as in the federal case. Finally, the doctrine will not work in
26 injustice, as the Plaintiffs had a full and fair opportunity to argue their claims in the District
27 Court. Moreover, collateral estoppel will apply to a final judgment even if an appeal is
28 pending. Nielson By and Through Nielson v. Spanaway General Medical Clinic, Inc., 135
29
30

1 Wn.2d 255, 264 (1998). Therefore, this Court should apply the doctrine of collateral estoppel
2 and preclude re-argument of the issues ruled on by the federal court in this matter.
3

4 Here, the Court should apply collateral estoppel to the following factual issues:

- 5 1. The Town of Ruston police officers did not, illegally search or seize any of the
6 Plaintiffs' property, including:
7
8 a. Officer Celis standing at the front door for five minutes;
9
10 b. Officer Kaylor standing outside of the bar or looking into the windows;
11
12 c. Officer Kaylor sitting in the bar with no customers;
13
14 d. Officers standing in front of the doors with their guns;
15
16 e. On Friday or Saturday nights, officers standing in the door for five to ten
17 minutes and, in some instances, for twenty to thirty minutes;
18
19 f. Officers walking around the premises.

20 Further, the Federal Court held that there was no evidence that the Unicorn Bar was
21 targeted more than any other bars. (CP 469). Finally, the Court ruled that the Plaintiffs'
22 constitutional due process rights to pursue a chosen occupation were not violated. (CP 470).
23

24 Each of these factual findings by the Federal Court meet the requirements of Collateral
25 Estoppel and preclude relitigation of these factual findings before this Court. This Court, like
26 the Superior Court, should accept these facts as true and affirm the Superior Court's decision
27 applying Collateral Estoppel to these factual matters contained within the Federal Court's
28 Order dismissing the federal causes of action.

29 **F. Plaintiffs Fail to Identify Facts Sufficient to Evidence Negligent Infliction of
30 Emotional Distress.**

In Keates v. City of Vancouver, 73 Wn. App. 257, 269 (1994), the court ruled that
"there is no cause of action for inadvertent infliction of emotional distress in police

1 investigations.” The court ruled that, “because the utility of the law enforcement function
2 outweighs the criminal suspect’s interests in freedom from emotional distress, the law closely
3 circumscribes the types of causes of action which may arise against those who participate in
4 law enforcement activities.” Id. at 267. It is clear that the Plaintiffs complain solely of how
5 the Town of Ruston identified potential criminal activity.
6

7
8 Police investigation activities are not reachable in negligence. RCW 66.44.010 is the
9 statute charging county and municipal peace officers with the duty of investigating and
10 prosecuting all violations of Washington’s Alcoholic Beverage Control laws. Id. RCW
11 66.28.090 requires that “liquor establishments shall, at all times, be open for inspection by
12 any liquor enforcement officer, inspector, or peace officer. Liquor and law enforcement
13 entities are not prohibited from entering bars to enforce the law.” See Dodge City Saloon,
14 Inc. v. Washington State Liquor Control Board, 168 Wn. App. 388 (2012).
15

16
17 Washington does not allow a claim against police officers for negligently causing
18 emotional distress during the course of their police activities. The court in Keates precluded
19 this claim and this Court should also dismiss the Plaintiffs’ claim for Negligent Infliction of
20 Emotional Distress, as it is not a recognized cause of action against law enforcement officers.
21 Lastly, Plaintiffs provide no medical evidence that she has suffered any emotional distress
22 from the alleged acts of Defendants. A negligent infliction of emotion distress claim requires
23 “specific objective symptomatology” through medical evidence showing actual emotional
24 distress. Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 506 (2014). Here, as a matter of
25 law, Plaintiffs’ claim for negligent infliction of emotional distress cannot be brought against
26 the Town of Ruston and its police force for the police simply performing business or social
27 checks on the Unicorn Sports Bar.
28
29
30

1 Plaintiffs, throughout their briefing, fail to identify a duty of care owed by the
2 Defendants. The Superior Court, during argument, asked for the identification of a duty and
3 the Plaintiffs' attorney never identified one. (RP 15, lns. 15-20). Without a duty of care
4 applicable to the Defendants, this Court should affirm the lower court's dismissal of the
5 negligent infliction of emotional distress claim.
6

7 The Plaintiffs in this matter fail to address the most significant issue in a Negligent
8 Infliction of Emotion Distress cause of action, which is the identification of a duty. "The
9 existence of a legal duty is a question of law." Crowe v. Gaston, 134 Wn.2d 509, 515 (1998),
10 *citing* Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468 (1998). The Court in Keates, 73
11 Wn. App. at 269, held that there was no cause of action for Negligent Infliction of Emotional
12 Distress against law enforcement from negligently inflicting emotional distress on the subjects
13 of their investigation or as a result of law enforcement activities¹. Moreover, law enforcement
14 officials are not subject to Negligence actions or generalized claims for Negligence
15 investigations. *See, Rodriguez v. Perez*, 99 Wn. App. 439, 443 (2000).
16
17
18

19 In this case, the Plaintiffs have disregarded the identification of any duty that subjects
20 the Defendants to a Negligent Infliction of Emotional Distress claim. The Plaintiffs identify no
21 applicable duty of care owed by the Defendants. As such, this Court should grant Defendants'
22 Motion for Summary Judgment Dismissal.
23

24 The Plaintiffs' reliance upon Bunch v. King County Dept. of Youth Services, 155
25 Wn.2d 165 (2005) is misplaced. The Supreme Court in Bunch only dealt with a single cause of
26 action for racial employment discrimination. Bunch, 155 Wn.2d at 167. The Bunch Court did
27 not deal with the requirements of a Negligent Infliction of Emotional Distress cause of action
28
29

30

¹ See (CP 467-468).

1 and is, therefore, irrelevant in this matter. The Washington State Supreme Court has been clear
2 that a plaintiff must demonstrate objective symptoms of an emotional injury in order to recover
3 from a Negligent Infliction of Emotional Distress claim. See, Colbert v. Moomba Sport, Inc.,
4 163 Wn.2d 43 (2008) *citing* Hegel v. McMahon, 136 Wn.2d 122, 126 (1998).

6 In this case, the Plaintiffs have failed to set forth any evidence of objective
7 symptomology caused by a negligent act of the Defendants. The Plaintiffs submit documents
8 from the Plaintiff's medical provider without a declaration or medical testimony from the
9 medical provider. For a plaintiff to submit sufficient proof of a causal relationship of an
10 accident or an injury to a resulting physical or mental condition, it must be established by
11 medical testimony beyond speculation and/or conjecture. Miller v. Stanton, 58 Wn.2d 879, 886
12 (1961). The plaintiff must prove the medical costs were reasonable and, in doing so, cannot
13 rely solely upon medical records and bills. Patterson v. Horton, 84 Wn. App. 531, 543 (1997).
14 The Patterson Court went on to state "In other words, medical records and bills are relevant to
15 prove past medical expenses only if supported by additional evidence that the treatment and the
16 bills were both necessary and reasonable." Id. In this case, the Plaintiffs have submitted no
17 proof as required by CR 56 that is admissible at trial to establish that the Plaintiff suffered
18 objective symptomology as a result of the actions of the Defendants. Reliance on medical
19 records alone is insufficient, as an admissible medical opinion is required. No evidence from a
20 qualified physician was submitted by the Plaintiffs establishing that the conduct of the Town of
21 Ruston Defendants was the cause of any objective symptomology suffered by the Plaintiffs.
22 Without such evidence from a medical provider, this Court must find that the objective
23 symptomology requirement of a Negligent Infliction of Emotional Distress claim is absent and
24 this Court should grant Defendants' Motion for Summary Judgment Dismissal.
25
26
27
28
29
30

1 In this case, the Plaintiffs have not identified a duty of care applicable to law
2 enforcement officers that would allow the claim to proceed. Moreover, the Plaintiffs have
3 failed to provide objective symptomatology of injuries, as required, to establish a Negligent
4 Infliction of Emotional Distress claim. Therefore, this Court should affirm the lower court's
5 dismissal of the Plaintiffs' claim for Negligent Infliction of Emotional Distress.
6

7
8 **G. No Evidence of Outrage Exists.**

9 The Plaintiffs' briefing does not distinguish between the Negligent Infliction of
10 Emotional Distress claim and the Outrage claim, treating them as similar causes of action.
11 However, the Plaintiffs are mistaken as the legal requirements of Outrage differ drastically
12 from those of Negligent Infliction of Emotional Distress.
13

14 The elements for the tort of outrage are: 1) extreme and outrageous conduct, 2)
15 intentional or reckless infliction of emotional distress, and 3) actual results of the plaintiff of
16 severe emotional distress. Dicomes v. State, 113 Wn.2d 612, 630 (1989) (quoting Rice v.
17 Janovich, 109 Wn.2d 48, 61 (1987)). Conduct must go beyond all possible bounds of decency
18 and to be regarded as atrocious, and utterly intolerable in a civilized community. Grimsby v.
19 Samson, 85 Wn.2d 52, 59 (1975). The court must determine whether or not reasonable minds
20 could differ as to whether the conduct was sufficiently outrageous. Phillips v. Hardwick, 29
21 Wn. App. 382, 387 (1981).
22
23

24 Here, Plaintiffs again fail to allege or provide any evidence that the conduct of
25 Defendants rises to the level of outrage. Since the Federal Court has ruled that the Town of
26 Ruston and its police officers acted within their legal authority, there can be no Outrage claim
27 in this case. Lawful police activities, authorized by the Constitution and by state law, cannot,
28 as a matter of law, be considered outrageous conduct. There is absolutely no evidence that
29
30

1 any of the conduct of the Defendants went beyond all possible bounds of decency, was
2 regarded as atrocious, or was utterly intolerable in a civilized community. As the Federal
3 Court previously ruled, all of the police activities complained of by the Plaintiffs were
4 authorized by Washington law. See RCW 66.44.010. Further, Plaintiffs provide no medical
5 evidence that she has suffered any emotional distress from the alleged acts of Defendants.
6 Accordingly, this claim against the Defendants must be dismissed.
7

8
9 **H. Plaintiffs Fail to Establish the Elements of Interference With a Business
10 Expectancy.**

11 To establish a claim for inference with business expectancy, a plaintiff must show:

12 **(1) the existence of a valid contractual relationship or business expectancy;**

13 **(2) the defendants had knowledge of that relationship;**

14 **(3) an intentional interference inducing or causing a breach of termination
15 of the relationship or expectancy;**

16 **(4) the defendants interfered for an improper purpose or used improper
17 means; and**

18 **(5) resultant damage.**

19 Hudson v. City of Wenatchee, 94 Wn. App. 990, 998 (1999) (citing Havsy v.
20 Flynn, 88 Wn. App. 514, 518–19 (1997)).

21 If a plaintiff can establish these elements, defendants must “justify the interference or
22 show the actions were privileged.” Hudson, 94 Wn. App. at 998 (citing Pleas v. City of Seattle,
23 112 Wn.2d 794, 800 (1989)).

24
25 In Hudson, a plaintiff locksmith alleged that the defendants, a municipality and its
26 police force, interfered with its business expectancy by allowing its police officers to unlock
27 cars that were unintentionally locked in non-emergency situations. Hudson, 94 Wn. App. at
28 345. When police officers cannot unlock the vehicles on their own, the defendant city, had an
29 informal and unwritten policy to contact locksmiths. Id. Plaintiff alleged that the city and the
30

1 police would only contact his competitors, although in his deposition, Plaintiff admitted he had
2 been called for locksmith services when the police could not unlock a door. Id.

3
4 The Hudson court found the record did not establish the required elements for
5 intentional interference with business expectancy. Id. at 347. There was no contract between
6 the plaintiffs and the city, there was no contract between any of the citizens helped by the
7 police and the plaintiffs, and plaintiffs could not establish the city acted with an improper
8 purpose or used improper means. Id. The court found plaintiffs did not allege any facts to
9 support their “mere allegation” and dismissed this claim against the defendant. Id.

10
11 Moreover, the Plaintiffs have failed to submit sufficient evidence of resulting damages
12 to its business expectancy. As the Court in Life Design Ranch, Inc. v. Summer, 191 Wn. App.
13 320, 338 (2015) held, the plaintiff failed to show resulting damages of the Business
14 Expectancy. Life Design Ranch, Inc.’s Court determined that, without an affidavit from a
15 client, potential client or referral source, the actions of the defendant interfered with their use of
16 the plaintiff’s services, there was insufficient evidence of damages. In this case, the Plaintiffs
17 have submitted no evidence from any potential client and/or former client that the police
18 actions, or the conduct of the Town of Ruston, were of sufficient nature to prevent those
19 individuals from utilizing the business services provided by the Unicorn Bar & Tavern.
20 Without such evidence, the Plaintiffs cannot proceed with this cause of action. The Plaintiffs
21 have nothing but unsubstantiated speculation that customers were interfered with as a result of
22 the actions of the Defendants.

23
24 Again, the Plaintiffs fail to articulate the specific acts of the Defendants that were
25 allegedly improper. As stated above, Collateral Estoppel prevents the Plaintiffs from re-
26 litigating the impropriety of the police officers’ actions with respect to the Unicorn Bar.
27
28
29
30

1 Additionally, as a licensed liquor establishment that is strictly regulated by the State, the Town
2 of Ruston police officers were acting in accordance with their statutory and constitutional
3 authority to enforce the laws of the State of Washington. As such, there is no evidence of
4 improper or illegal acts on the part of the Defendants.
5

6 Since the Plaintiffs cannot establish the elements of the Tort of Interference with a
7 Business Expectancy, this Court should affirm the Superior Court's dismissal of this cause of
8 action.
9

10 **I. Plaintiffs Waived Their Claim for Private Nuisance.**

11 "A waiver is the intentional and voluntary relinquishment of a known right, or such
12 conduct as warrants an inference of the relinquishment of such right." Bowman v. Webster, 44
13 Wn.2d 667, 669 (1954). During argument before the Superior Court, the Plaintiffs' attorney
14 had the following discussion with the Court:
15

16 **THE COURT: So I haven't heard you argue harassment or private
17 nuisance –**

18 **MR. FRICKE: Yeah, and I –**

19 **THE COURT: -- and you've conceded the issues of defamation and
20 unlawful taking.**

21 **MR. FRICKE: And I would concede on the harassment and private
22 nuisance as well, Your Honor.**

23 **THE COURT: Okay. Thank you.**

24 It is clear from this statement that the Plaintiffs have conceded their claim for Private
25 Nuisance, along with their claims for Harassment, Defamation and Unlawful Taking.
26

27 Alternatively, the Plaintiffs have never submitted sufficient facts to establish a claim for
28 Private Nuisance. A private nuisance is defined by statute as any nuisance that is not
29 enumerated as a public nuisance. See RCW 7.48.150. A "nuisance" is defined by statute as
30

1 “whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the
2 free use of property, so as to essentially interfere with the comfortable enjoyment of the life and
3 property.” RCW 7.48.010; Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909 (2013). A
4 plaintiff must show that the inference or annoyance is “unlawful”; the term “unlawful” has
5 been used synonymously with the term “unreasonable.” See Collinson v. John L. Scott, Inc.,
6 55 Wn. App. 481 (1989), citing Karasek v. Peier, 22 Wn. 419 (1900). The burden is placed on
7 a plaintiff to show that use of the property by the defendant is unreasonable in relation to the
8 correlative rights of the two parties. See Lakey, 176 Wn.2d at 923.

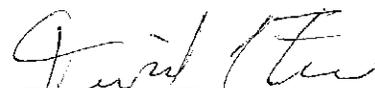
9
10
11 Again, Plaintiffs provide no evidence that the presence of police officers performing
12 business or social checks created a nuisance for Plaintiffs, or, specifically, that the Town of
13 Ruston Defendants’ use of their property created a nuisance. Defendants were performing their
14 duties lawfully and in a reasonable manner. Plaintiffs cannot establish that any of the conduct
15 of Defendants was unreasonable. Accordingly, this claim against Defendants must fail.
16
17

18 V. CONCLUSION

19 This Court should affirm the Superior Court’s findings that the Plaintiffs failed to
20 establish the elements of their claims and affirm the dismissal of their causes of action.
21

22 RESPECTFULLY SUBMITTED this 14th day of JULY, 2017.

23 CARLSON, McMAHON & SEALBY, PLLC

24
25 
26 _____
27 PATRICK McMAHON, WSBA #18809
28 DAVID L. FORCE, WSBA #29997
29 Attorneys for Respondents
30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

Counsel for Appellants

Wayne C. Fricke
Hester Law Group, Inc., P.S.
1008 South Yakima Avenue, Suite 302
Tacoma, WA 98405

- | | |
|-------------------------------------|-----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Hand Delivery |
| <input type="checkbox"/> | Legal Messenger |
| <input checked="" type="checkbox"/> | Email |

Signed at Wenatchee, Washington this 14th day of JULY, 2017.


Francesca Hansen, Legal Assistant

CARLSON, MCMAHON & SEALBY, PLLC

July 14, 2017 - 3:39 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49935-5
Appellate Court Case Title: Kye Barker, et al., Appellants v. Town of Ruston, et al., Respondents
Superior Court Case Number: 14-2-10210-6

The following documents have been uploaded:

- 3-499355_Briefs_20170714153557D2345987_8506.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Response Brief of Respondents 7-14-17.pdf

A copy of the uploaded files will be sent to:

- francescan@carlson-mcmahon.org
- leeann@hesterlawgroup.com
- wayne@hesterlawgroup.com

Comments:

Sender Name: David Force - Email: davidf@carlson-mcmahon.org

Filing on Behalf of: Patrick G. McMahon - Email: patm@carlson-mcmahon.org (Alternate Email: trisha@carlson-mcmahon.org)

Address:
PO BOX 2965
WENATCHEE, WA, 98807-2965
Phone: 509-662-6131

Note: The Filing Id is 20170714153557D2345987