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No. 50228-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

*GEORGE KARL, REBECCA ANN, and a class
of similarly situated individuals,*

Appellants/Cross-Respondents,

v.

CITY OF BREMERTON,

Respondent/Cross-Appellant.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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INTRODUCTION

The City argues for affirmance based on misleadingly asking the Court to “affirm” on res judicata (Brief of Respondents “BR” 1, 8), when the Drivers actually prevailed on this issue.

Rather than res judicata, the trial court’s error here is that it decided, after ruling on the merits, that the Drivers had no “cause of action” to challenge the legality of the fines they received. But the Washington Constitution expressly recognizes that the Drivers can challenge the legality of a municipal fine in Superior Court. Article IV, §6.

The City mainly resorts to misconstruing the trial court’s orders on res judicata and making other arguments designed to evade review, because the City’s arguments on the merits lack supporting authority and are contrary to the pertinent statutes. For example, the City argues that RCW Titles 46 and 47, which expressly state they should be read in *pari materia* and concern the same subject matter, should not be read together. BR 31-33. Similarly, the City argues that under RCW Ch. 46.63 parking citations are not “traffic citations” (BR 30), while the pertinent statutes expressly state that parking citations *are* traffic citations, *e.g.*, RCW 46.63.110(4); RCW 46.64.050.

The Court should reject the City’s arguments.

ARGUMENT

I. THE TRIAL COURT CORRECTLY REJECTED THE CITY'S ARGUMENTS ON RES JUDICATA BECAUSE THE MUNICIPAL COURT DOES NOT HAVE JURISDICTION OVER THE DRIVERS' CLAIMS.

A. The City Misleadingly Asks the Court to "Affirm" the Trial Court's Ruling on Res Judicata, When in Reality the Trial Court Rejected the City's Arguments on Res Judicata Except for One Minor Aspect Concerning "Refunds," Which the Trial Court Explained Are Not the Same as Money Damages or Restitution.

The City argues "[t]his Court should affirm" because "the municipal court judgments bar [the Drivers'] claims under *res judicata*" (BR 1) and "*res judicata* bars this second suit." BR 7. The trial court, however, *denied* the City's motion on res judicata, except for one minor aspect concerning "refunds" as opposed to damages or restitution.¹

In reality, the City is asking the Court to *reverse* the trial court's ruling without appealing the trial court's decision, without assigning error to the trial court's decision, and without applying its arguments to the trial court's decision. BR 6-16. By failing to assign error to the trial court's rulings on res judicata, the City has waived its argument. RAP 10.3(a)(4); RAP 10.3(g); *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003); *Bank of Washington v. Burgraff*, 38 Wn. App. 492, 500, 687 P.2d

¹ The Drivers assigned error to the trial court's ruling on res judicata with respect to "refunds" (Brief of Appellants "BA" 1) due only to the City's erroneous interpretation of that order on "refunds" as barring restitution or damages. However, the trial court expressly ruled that the Drivers' claims for injunctive, declaratory, and monetary relief were not within the jurisdiction of the municipal court and are not barred. Appellants do *not* disagree with the ruling as to "refunds," as the trial court defined them, *infra* at 3-7, 11-12.

236 (1984).²

Contrary to the City's misleading argument, the trial court denied the City's motion to dismiss on res judicata grounds because the Drivers' "claims arise under alleged federal and state violations in enforcing the municipal ordinance." CP 660. It held that "[t]hese claims are not within the exclusive jurisdiction of the Municipal Court." *Id.* The trial court held the "Superior Court has original jurisdiction over equitable claims such an injunctive relief when a party is seeking remedies related to allegations of system wide violations by a municipality enforcing its ordinance." *Id.* "The claims in this case relate to whether the City violated state and federal law." *Id.*, citing *Orwick v. City of Seattle*, 103 Wn.2d 249, 250, 692 P.2d 793 (1984). The trial court further ruled that "declaratory relief cannot be sought at the municipal court level and superior court has jurisdiction over such matters." CP 608.

The trial court also ruled that any request for relief in the form of "refunds" is barred by res judicata. CP 660. The trial court clarified this

² While the City does not need to cross-appeal the trial court's order on res judicata because it is not seeking greater relief on appeal, *i.e.*, it wants a dismissal of this action, it still must follow the Rules of Appellate Procedure. *Kindsvogel*, 149 Wn.2d at 481 (though respondent did not need to file a cross-appeal, the Supreme Court would still not consider additional grounds for affirmance when respondent State did not assign error to trial court's rulings); RAP 10.3(a)(4) (brief must contain "[a] separate concise statement of each error a party," not just the appellant, "contends was made by the trial court." [emphasis added]); RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.") Here, by misrepresenting the trial court's order on res judicata, the City did not assign error or clearly disclose its disagreement with the trial court's ruling, so its argument should not be considered. *Id.*; *Paulson v. Higgins*, 43 Wn.2d 81, 82, 260 P.2d 318 (1953) (party must assign error by the time of "filing of respondent's brief"). Both the Court and Appellants are harmed by the City's misrepresentation of the trial court's ruling on res judicata.

ruling by stating that the named plaintiffs cannot represent a class for “refunds” due to res judicata, but that the named plaintiffs and the class “are not barred from seeking damages[.]” CP 640, 665; VRP 06/04/16 at 5-7, 9. The trial court explained in detail that a “refund” is not the same as damages or restitution, and a “refund” instead means an order from the Superior Court to the Municipal Court to refund (return) the alleged unlawful fines after an appeal. CP 664, 665; VRP 06/04/16 at 5-7, 9. The trial court said that there was no bar to Karl and the class obtaining damages from the City flowing from those claims over which the Superior Court had original jurisdiction and over which the Municipal Court had no jurisdiction. *Id.*

The trial court explained in an extended colloquy with the City’s attorney at the hearing on class certification that its ruling on res judicata barring “refunds” does not bar the named plaintiffs and class from obtaining damages or restitution (VRP 06-04-16 at 5-7, 9):

THE COURT: ... I think a lot of the argument we had in the past was about jurisdiction in terms of whether or not, you know, a municipal court had jurisdiction over declaratory injunctive relief, and it was determined they don’t.

MR. HORTON: They don’t.

THE COURT: So – I mean, that’s obvious. So this Court does have jurisdiction over that, so why can’t these plaintiffs seek monetary damages for the matters which this Court jurisdiction and not what municipal court had jurisdiction over?

* * *

THE COURT: ... [King County Superior Court] Judge McCarthy's opinion³ . . . kind of spelled out the difference in terms of what the Superior Court in King County could hear versus in Seattle Municipal Court. . . . [T]o the extent that the Court would refund money when there isn't an appeal, I think is similar to what Judge McCarthy was saying, but Judge McCarthy indicated still that we have general jurisdiction. I mean these litigants couldn't have argued for injunctive relief or declaratory judgment with Judge Docter [in Municipal Court] as a -- it was pro tem judge, I think.

MR. HORTON: Right.

THE COURT: And so I'm allowing them to proceed on those claims at this point. I am allowing them to seek whatever damages that they can -- if there's liability -- persuade the fact-finder to award.

* * *

MR. HORTON: ... This class -- the plaintiff -- the representative plaintiff can't seek a refund of that fine. So as we've previously briefed and the Court previously determined, this plaintiff can't bring that claim on behalf of other plaintiffs.

THE COURT: Yeah. I guess maybe *the refund of the fine, in my mind, is different that monetary damages*. I mean, a refund would be me signing an order directing the Bremerton Municipal Court to refund every person's fine. [Emphasis added.]

Further, in the above dialogue, the City *conceded* that the municipal court did not have jurisdiction over the Drivers' claims for injunctive and declaratory relief -- "They don't." *Id.*

³ The opinion by King County Superior Court Judge Harry McCarthy was in a hearing concerning the legality of parking fines issued by the City of Seattle is at CP 100-11. In his decision Judge McCarthy explained that King County Superior Court did not have appellate jurisdiction because the individuals fined had not filed appeals and instead had paid their fines. CP 104. The Superior Court, however, had original jurisdiction over the legality of the City's fine. *Id.*

The trial court continued to make this distinction between “refunds” and monetary damages/restitution which can be awarded in an original Superior Court action at the hearing on the Drivers’ motion for summary judgment on damages (VRP 02-06-17 at 21-22):

MR. HORTON: ...[T]here is no damages other than [a] refund.

* * *

THE COURT: The damages may be the same [amount] as the fine that was imposed, but I guess I see it really as two different tracks.

Consistent with the trial court’s statements concerning refunds differing from damages and restitution, the trial court’s order certifying the class acknowledged that the named plaintiffs assert that “the City’s practices violate state law” and “[t]hey also seek for themselves and the class restitution of the allegedly unlawful fine.” CP 640. The trial court said that “[m]onetary relief is available in cases certified under CR 23(b)(2) where the money damages are incidental to the injunctive relief” and “[a]ny monetary relief here flows mechanically from the injunctive and declaratory relief sought in this case.” CP 640. The Court then certified the class under CR 23(b)(2), which would allow the Drivers to obtain incidental damages or restitution, but not “refunds” as the trial court characterized them. CP 640.

The trial court’s decision that “refunds” are different from damages and restitution is correct because plaintiffs can have multiple independent grounds for monetary relief, which may come to the same dollar amount. *Moore v. HCA*, 181 Wn.2d 299, 332 P.3d 461 (2014). The

fact that damages and restitution may come to the same dollar amount as a “refund” in a direct appeal from a municipal court is therefore irrelevant because damages and restitution are independent grounds for monetary relief. *Id.* at 303, 313. “Damages and restitution may happen to provide the same dollar recovery, but they are often triggered by different situations and always measured by a different yardstick.” 1 Dobbs, *Law of Remedies* §3.1 (2d ed. 1993); See also *Moore*, 181 Wn.2d at 303, 315 (approving “alternative methods of measuring damages” that arrived at approximately the same monetary amount).

The City also nowhere explains why it can now argue the Bremerton Municipal Court has “exclusive jurisdiction” over the Drivers’ claims for injunctive, declaratory, and class-wide monetary relief when it *conceded* to the trial court that municipal courts had no jurisdiction. VRP 06/04/16 at 6 (“They don’t”); CP 577 (“the [Superior C]ourt has equitable jurisdiction”). The Court should reject the City’s misleading argument.

B. Because the Municipal Court Had *No Jurisdiction* Over the Drivers’ Claims, as the Trial Court Ruled, the Superior Court Action Was Not Barred by Res Judicata.

Although the City argues that res judicata bars the Drivers’ claims, BR 6-24, it does not dispute the rule that res judicata does not bar an action when the plaintiffs were unable to bring the same action in the first case due to limitations on the subject matter jurisdiction of the first court. BA 17-19, citing *Centennial Flouring Mills Co. v. Schneider*, 16 Wn.2d 159, 132 P.2d 995 (1943); *Noel v. Hall*, 341 F.3d 1148, 1167-68 (9th Cir.

2003) (applying Washington law); Restatement (Second) of Judgments, §26(1)(c). *Accord*, *Woodruff v. Coate*, 195 Wash. 201, 210, 80 P.2d 555 (1938); *Pine Corp. v. Richardson*, 12 Wn. App. 459, 466, 530 P.2d 696 (1975).⁴

The City attempts to evade this res judicata rule by arguing the Legislature enacted a statutory scheme in RCW 3.50.020 that gives a municipal court “exclusive jurisdiction” over the Drivers’ claims and the Superior Court has only “appellate jurisdiction.” BR 10-12.

Just as the trial court ruled here, our Supreme Court has rejected this argument, even when the “factual basis for a claim is related to enforcement of a municipal ordinance,” because a municipal court has no jurisdiction to hear an original action in Superior Court seeking declaratory relief, injunctive relief, and damages under state statutes and the Constitution due to an unlawful municipal fine. *Orwick*, 103 Wn.2d at 250-52. In *Orwick*, the Supreme Court held (103 Wn.2d at 252):

The relevant consideration for determining *jurisdiction* is the *nature of the cause of action and the relief sought*.

Here, petitioners allege system-wide violations of the statutory requirements in RCW 46.63 and state and federal constitutional violations. *Petitioners’ claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not “arise under” a municipal ordinance and, therefore, are not*

⁴ Our Supreme Court also recently held that there is no bar to bringing an independent action in superior court based on the same facts as an earlier action in a forum of limited jurisdiction (the Public Employees Relations Commission), when the forum lacked jurisdiction to decide the claim. *Killian v. Seattle Public School District*, 189 Wn.2d 447, 460-61, 403 P.3d 58 (2017); *accord*, *Sprague v. Spokane Valley Fire Dep’t*, ___ Wn.2d ___, ___ P.3d ___, 2018 WL 547363, ¶¶81-93 (Jan. 25, 2018) (Civil Service Commission).

with the exclusive jurisdiction of the Seattle Municipal Court.

[Citation omitted and emphasis added.]

Orwick therefore held that the plaintiffs could bring claims in Superior Court that sought injunctive relief, declaratory relief, and damages because those claims were not within the exclusive jurisdiction of a municipal court. *Id.*; see also *Miller v. Smith*, 119 Wash. 163, 166, 205 P. 386 (1922) (“Although the actions were between the same parties, the recovery sought in each was entirely different, and the issue in this case could not have been tried out in the former one” so res judicata did not bar the second action.).

Thus, the trial court correctly ruled that the Drivers’ action for injunctive relief, declaratory relief, and damages/restoration under state law, similar to *Orwick*, could not have been brought in the municipal court because the court of limited jurisdiction had *no jurisdiction* over the claims. CP 640, 665; VRP 06/04/16 at 5-7, 9.⁵

The City tries to obfuscate the holding in *Orwick* by arguing that “extraordinary circumstances” are needed for the Drivers to bring their injunction claim in Superior Court. BR 17-21. But that particular language in *Orwick* concerned only the appropriateness of injunctive relief in that specific Superior Court action; it did not relate to the Superior Court’s jurisdiction over the action. *Orwick*, 103 Wn.2d at 252. Thus,

⁵ Unlike superior courts, “Article IV Section 6 of the Washington State Constitution does not grant municipal courts the authority to hear equitable claims.” *Todd v. City of Auburn*, No. C09-1232JCC, 2010 WL 774135, at *2 (W.D. Wash. Mar. 2, 2010), *aff’d*, 425 F. App’x 613 (9th Cir. 2011).

while the Supreme Court cautioned that Superior Courts should only intervene in municipal court evidentiary procedures that are squarely within the municipal court's jurisdiction where there are "extraordinary circumstances." It held "the superior court had jurisdiction to hear petitioners' claim for injunctive and declaratory relief, even though their claims related to the City's enforcement of its traffic ordinances" and "dismissal of petitioners' claim for damages was improper." *Id.* at 252, 257. The discussion in no way supports the City's argument here that the municipal Court here had "exclusive original jurisdiction" to decide the Drivers' claims.⁶ *Id.*

The City argues that *Centennial*, 16 Wn.2d 159, cited in the Drivers' brief (BA 18-21) "is not analogous" because in that action the monetary amount of the plaintiff's claim in Superior Court exceeded a municipal court's "amount in controversy" jurisdiction and it says here "Karl did not seek a judgment in Superior Court in excess of the municipal court's jurisdiction." BR 15. But here the Drivers do seek a judgment in Superior Court completely outside ("in excess of") a municipal court's jurisdiction -- declaratory relief, injunctive relief, and class-wide restitution/damages. CP 660, 664, 665; VRP 06/04/16 at 5-7, 9. And the Bremerton Municipal Court does not have jurisdiction to issue such a

⁶ Unlike the plaintiffs in *Orwick*, the Drivers are *not* seeking any order against the Bremerton Municipal Court at all, let alone an order intervening in municipal court procedures. The challenge here is to the City's policies and ordinances, not to any action of the municipal court.

judgment or grant such relief, as the trial court ruled. *Id.*⁷

The City also tries to buttress its res judicata argument by citing a case on awards of costs in a court of limited jurisdiction. BR 21-23, *citing Doe v. Fife Municipal Court*, 74 Wn. App. 444, 874 P.2d 182 (1994). But *Doe* is not a case involving the legality of a municipal fine, for which the Washington Constitution provides “original jurisdiction” to the Superior Court. BA 12-16; see also *infra* 19-20. In *Doe*, the Court ruled that the court costs imposed by the Fife Municipal Court were not within the limited jurisdiction of that court, so the plaintiffs were not barred by “collateral estoppel or their failure to appeal [*i.e.*, res judicata].” *Doe*, 74 Wn. App. at 451. The criminal defendants in *Doe*, however, could cite no law for “their right to bring an independent action” to challenge a void judgment other than a motion to vacate (*id.* at 453-55). Here, in contrast, the Drivers are bringing an original action in superior court under state statutes and the Washington Constitution. See *infra* 19-20.

The City also refers to the trial court’s order stating that, due to res judicata, a motion to vacate would be the proper procedural remedy to obtain a “refunds of fines.” CP 619. But the trial court said a “refund” is

⁷ The City mentions three cases in which an appellate court reviewed infraction proceeding after accepting discretionary review. BR 12-13, *citing City of Bremerton v. Spears*, 134 Wn.2d 141, 949 P.2d 347 (1998), *City of Spokane v. Wardrop*, 165 Wn. App. 744, 267 P.3d 1054 (2011), and *City of Bellevue v. Hellenenthal*, 144 Wn.2d 425, 28 P.3d 744 (2001). The City, however, does not explain how granting discretionary review in an infraction proceeding changes the jurisdiction of the municipal court. Further, the appellate courts in all these cases granted only the relief that it could, *i.e.*, affirming or dismissing an infraction by way of appeal. None of the cases involved the relief sought here, *i.e.* injunctive, declaratory, and class-wide monetary damages or restitution, which are not within the jurisdiction of the municipal court. *Orwick*, 103 Wn.2d at 252.

different from restitution or damages and it ruled the Drivers can obtain independent monetary relief in Superior Court if they are successful on the state law claims over which the municipal court had no jurisdiction.⁸ See *supra* at 3-7. The trial court, however, did not award the Drivers restitution or damages due to its erroneous decision that the Drivers had no “cause of action” to challenge the legality of the City’s fines. CP 619; see *infra* 17-20.

The City also relies on an unpublished non-binding opinion in a *pro se* action. BR 14, citing *Gordon v. City of Tacoma*, 175 Wn. App. 1027, 2013 WL 3149003 (2013). Contrary to the City’s argument, *Gordon* said that plaintiff’s claims fell within the limited jurisdiction of the district court that decided the first action and thus were barred by res judicata. *Id.* at *4. Indeed, the decision in *Gordon* supports the Drivers because it notes that res judicata does not bar a claim that “could not be

⁸ The City’s argument based on *Doe* is also contrary to the trial court’s unchallenged findings supporting class certification, which are now verities in this appeal. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). These factual findings include: (1) there are over 1,000 class members, (2) it is not practicable for these class members to pursue their claims in separate cases because each individual claim is too small, (3) a class action is the only way that class members may obtain relief, (4) a class action is the only way that the City’s practices can be determined to be unlawful for everyone, and (5) any monetary relief due any class member can be objectively computed based on the City’s records and such monetary relief flows mechanically from the injunctive and declaratory relief sought in the case. CP 639-40.

litigated in the prior adjudication.” *Id.* See *supra* 3-7.⁹

Accordingly, the trial court correctly ruled that *res judicata* does not bar this action in Superior Court because municipal courts have no jurisdiction to decide the Drivers’ claims based on state statutes and claims seeking injunctive relief, declaratory relief, or restitution/damages. The City’s request that the Court “affirm” the trial court on *res judicata* is misleading because the trial court only ruled a “refund” by way of appeal, as opposed to damages or restitution, is barred by *res judicata*. CP 640, 665; VRP 06/04/16 at 5-7, 9.

C. Because the Municipal Court had No Jurisdiction to Decide the Drivers’ Claims, the Claims are Necessarily Different Causes of Action.

The City acknowledges that *res judicata* bars a second action only when the causes of action asserted in both actions are the same. BR 6-7. Here, the Drivers could only file their claims seeking injunctive relief, declaratory relief, and class-wide damages/restitution in Superior Court and the Drivers could not file those claims in Bremerton Municipal Court. See *supra* 3-7. Accordingly, the causes of actions in the Bremerton Municipal Court and the Superior Court are not the same because the

⁹ The City also cites *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987). BR 14. But *Shoemaker* involves the application of collateral estoppel to a civil service commission decision. Our Supreme Court has held that collateral estoppel does not apply to traffic infraction proceedings in municipal court because there is no incentive to litigate due to the small fines. *Hadley v. Maxwell*, 144 Wn.2d 306, 312, 27 P.3d 600 (2001); BA 23-24. And this is particularly true here where it is undisputed that it would cost \$230 to file an appeal of the \$47 municipal fine. CP 68, 70. Our Supreme Court also recently concluded that even in an action factually similar to *Shoemaker* that collateral estoppel will not apply to actions where important issues of public law are at issue. *Sprague*, 2018 WL 547363, ¶¶81-93.

Municipal Court had no jurisdiction to decide the state law claims the Drivers later brought in Superior Court. *Orwick*, 103 Wn.2d at 252; *Mead v. Park Place Properties*, 37 Wn. App. 403, 407, 681 P.2d 256 (1984) (because earlier unlawful detainer action had limited jurisdiction, “there was no identity of cause of action” in later action seeking relief outside the jurisdiction of unlawful detainer action); *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330-32, 941 P.2d 1108 (1997) (“one cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier, . . . thus, res judicata will not operate if the matter was an independent claim not required to be joined.”).

Because the causes of action are different, the trial court correctly rejected the City’s res judicata argument.

D. Assuming *Arguendo* Res Judicata Could Apply Here, the Doctrine Would Not Apply Due to Manifest Injustice.

The City argues that justice (or “injustice”) is irrelevant here because “it does not rely on *collateral estoppel*” and “[u]nlike *collateral estoppel*, *res judicata* does not include consideration of whether application will work an injustice.” BR 16. The City is thus arguing that the Court not consider whether the application of res judicata would cause a manifest injustice. *Id.*

The City is wrong because Washington courts recognize that res judicata is another form of estoppel, a judicially created doctrine, and it is not applied to work an injustice. *Henderson v. Bardahl International*

Corp., 72 Wn.2d 109, 119, 431 P.2d 961 (1967) (“the doctrine of res judicata...is not to be applied to rigidly so as to defeat the ends of justice”); *Kennedy v. Seattle*, 94 Wn.2d 376, 378, 612 P.2d 713 (1980); *Luisi Truck Line v. Wash. Utilities & Transp. Comm’n*, 72 Wn.2d 887, 896, 435 P.2d 654 (1967); *Personal Restraint of Metcalf*, 92 Wn. App 165, 174, 963 P.2d 911 (1998).¹⁰

The City also argues no injustice would result from applying res judicata to bar the claim here. BR 15-16. But this is contrary to our Supreme Court holdings that it is unjust for decisions of courts of limited jurisdiction to bar later Superior Court actions because in the lower courts the parties are not represented by counsel, do not have a full incentive to litigate due to the nominal amount at stake, and important questions of public law are at stake. CP 68, 71; *Hadley* 144 Wn.2d at 312; *Kennedy*, 94 Wn.2d at 378; *Sprague*, 2018 WL 547363, ¶¶81-93. And here the trial court concluded that it is important “for a higher court to really give us some direction on these issues, because we don’t have any Washington State cases directly on these issues” and its decisions are “perfectly ripe” for appellate review. VRP 02/06/17 at 47.

The Drivers noted in their opening brief that the City would definitely *not* agree it is bound in subsequent litigation if Karl or another

¹⁰ The City says a Court of Appeals decision supports its argument that the Court should apply res judicata even when it applies an injustice, but the decision does not support the City’s assertion. BR 16, citing *Irondale Community Action Neighbors v. West. Wash. Growth Management Hear. Bd.*, 163 Wn. App. 513, 529, 262 P.3d 81 (2011) (plaintiff “makes little effort in its briefing to demonstrate that the claims in its new petition differed from those asserted” in earlier action where the “claim had already been decided”).

class member had prevailed in municipal court and then later brought an action in Superior Court seeking an injunction. BA 22-23, citing *Kennedy*, 94 Wn.2d at 312. Any individual decision would only apply to that specific individual, not the class, and the individual would not be able to obtain an injunction to stop the City's unlawful practice or obtain restitution for the class the City unlawfully fined. There is no reason to believe the City would apply the logic of an individual municipal court decision to anyone else. Thus, under the City's argument only the Drivers are bound by res judicata, but the City is not. The City's argument is thus contrary to long-standing Washington law that res judicata must be mutual. *State v. Hastings*, 120 Wash. 283, 311, 207 P. 23, 33 (1922) (“a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case.”).

Moreover, the City's arguments on res judicata -- just like the City's arguments on standing, private right of action, and against equitable relief, and the City's rejected motion to dismiss this appeal -- are designed to shield the City's unlawful fines from review by this Court, and prevent individuals affected by the City's unlawful practices from obtaining *any* relief because under the City's position, individuals would never be able to obtain a declaratory judgment that the fines violate state law, never be able to obtain an injunction to prohibit the City from

collecting the unlawful fines, and never obtain restitution for those individuals who were unlawfully fined so that the City would not profit from its wrongdoing.

The Superior Court's authority to determine the legality of the City's fines, authority which is expressly delegated to the Superior Court in the Constitution (Article 4, section 6), is an important part of the Superior Court's constitutional authority because it ensures that municipalities will only extract fines from individuals when permitted by state law. It would be manifestly unjust to insulate the City entirely from judicial review and effectively allow them to issue illegal fines in perpetuity.¹¹

¹¹ It would also be manifestly unjust to apply *res judicata* here because the City actually knew its blue signs violated the law but it continued to issue unlawful fines to individuals for many months thereafter. BA 5-6, citing CP 11-16. The City now argues the Drivers use a "truncated quote" to assert the City knew the signs were illegal, and the City says "that is not what the email says." BR 34. The City's argument ignores the context and substance of the emails, particularly the final email from Municipal Court Judge James Docter to City Attorney Roger Lubovich recognizing the blue traffic signs violated state law: "**Traffic devices hereafter erected within incorporated cities and towns shall conform to such uniform state standard of traffic control devices so far as practicable.**" CP 14 (Municipal Court Judge Docter's emphasis, quoting RCW 47.36.030(2)). It is uncontested that the City violated this statute when it *replaced lawful correctly colored traffic signs* with blue signs that violated the law. It was thus certainly "practicable" for the City to have traffic signs that complied with the law as those were the precise signs that it replaced with the improper ones. CP 234, 237, 324-25, 372. The City also admitted in response to discovery that if the trial court ruled against it on liability, then the City could replace the blue signs with lawful signs in about two weeks. CP 327.

II. THE CITY DOES NOT HAVE AUTHORITY TO IMPOSE FINES THAT ARE BASED ON UNLAWFUL SIGNS.

A. The Drivers Have Standing and a Cause of Action to Challenge the Legality of the City's Fines.

The City argues that the Drivers do not have “standing” to challenge the legality of the municipal fines they received. BR 24-28. But “[a] party has standing to raise an issue if that party has a distinct and personal interest in the issue.” *Paris American Corp. v. McCausland*, 52 Wn.App. 434, 438, 759 P.2d 1210, *rev. denied*, 111 Wn.2d 1034 (1988), *citing*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). “The doctrine of standing [therefore] requires that a plaintiff have a personal stake in the outcome of the case in order to bring suit.” *Gustafson v. Gustafson*, 47 Wn.App. 272, 276, 734 P.2d 949 (1987).

Here, the Drivers all have a personal stake in the outcome of this action because the City fined them. CP 640. The Drivers thus have standing to challenge the legality of those fines. *Paris American*, 52 Wn.App. at 438; *Gustafson*, 47 Wn.App. at 276.

Although the City’s argument is labeled “standing,” the City does not really argue that the Drivers (plaintiffs and class members) do not have a personal stake in the outcome of this litigation. BR 25. The City instead argues that the statutes governing traffic devices do not provide for a “private right of action.” BR 25-26. The trial court adopted this argument as the grounds for dismissing the Drivers’ claim. The trial court said: “The applicable statutes do not expressly provide an avenue by which individuals can bring a cause of action against a municipality or other

governmental entity from the use of a sign that does not substantially comply with the Manual.”¹² CP 616. The trial court therefore concluded that “[p]laintiffs have not established a cause of action exists...by which they can challenge the [City’s] use of non-compliant parking signage.” CP 619. This was the sole basis on which the trial court dismissed the Drivers’ claim involving the City’s illegal blue signs. *Id.*

For its “private right of action” argument, the City relies on RCW 47.04.280(6), which states that “[t]his section does not create a private right of action.” BR 26 (emphasis added); CP 245. The “section” (-.280) refers to very general “transportation policy goals” in RCW 47.04.280(1)-(5), such as moving people and goods to “ensure a prosperous economy” and to “promote energy conservation . . . and protect the environment[.]” RCW 47.04.280(1)(c), -(1)(e). An individual therefore cannot bring a private action to enforce the general policy goals of the statute.¹³

Moreover, the Drivers are not bringing an action directly under the Manual. This is an original action in Superior Court involving the legality of a municipal fine as provided by the Washington Constitution. Const. art. IV, §6. Under this section “[t]he Superior court shall have *original jurisdiction in all cases at law which involve the . . . legality of any tax, impost, assessment, toll, or municipal fine.*” *Id.* (emphasis added).

¹² The “Manual” is the national “Manual on Uniform Traffic Control Devices”, which is adopted as the state law governing traffic control devices in Washington State. WAC 468-95-010; RCW 47.36.030.

¹³ This is typical; statutory policy statements do not give rise to a cause of action. *Judd v. American Telephone & Telegraph Co.*, 152 Wn.2d 195, 203–04, 95 P.3d 337 (2004).

Original jurisdiction is not “appellate jurisdiction,” which is mentioned later in the same section. *Id.*

Based on the plain language of our state constitution,¹⁴ our Supreme Court has said that under Article IV, section 6, “original jurisdiction is established for the *causes of action listed* and judicial action lies in superior court.” *New Cingular Wireless v. City of Clyde Hill*, 185 Wn.2d 594, 600, 374 P.3d 151 (emphasis added).¹⁵ “Superior courts [therefore] have original jurisdiction in the *categories of cases listed* in the constitution, which the legislature cannot take away.” *ZDI Gaming, Inc. v. State*, 173 Wn.2d 608, 616-17, 268 P.3d 929 (2012) (emphasis added). Therefore, even assuming *arguendo* a statute tried to take away the Superior Court’s original jurisdiction over actions concerning the legality of a municipal fine, the statute would be ineffective because “the legislature cannot take away” the Superior Court’s jurisdiction. *Id.*

Accordingly, because the superior court has original jurisdiction to hear actions involving the legality of a municipal fine, including the action

¹⁴ The principles for interpreting the state constitution are similar to interpreting a statute:

When interpreting provisions of the state constitution, [courts] look first to the plain language of the text . . . and accord it its reasonable interpretation. . . . The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted. . . . [I]f a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.

City of Woodinville v. Northshore United Church, 166 Wn.2d 633, 650, 211 P.3d 406 (1999) (citations omitted).

¹⁵ The City tries to distinguish *New Cingular* by arguing municipal courts have “exclusive jurisdiction” over the Drivers’ claims (BR 8-12), but that argument is groundless here because municipal courts have no jurisdiction over the Drivers’ claims, as the trial court ruled. See *supra* at 3-7.

here, the Court should reject the City's argument that the Drivers need a special "private right of action" under the Manual to bring this action.

B. The City's Argument That RCW 46 and RCW 47 are Not Read Together is: (1) Contrary to the Statutes' Express Language and Subject Matter, and (2) Contrary to the Legislature's Intent to Have "Uniform" Traffic Devices.

The trial court ruled the City's blue traffic signs violated the law (CP 634), and the City does not appeal that ruling. But the trial court declined to rule on the Drivers' motion that the City had no lawful authority to issue fines based on the unlawful blue signs because the trial court ruled that the Drivers did not have a cause of action. CP 500-04, 619. The City now argues that it had legal authority to issue fines based on signs that violate state law. BR 31-34.

The City does not dispute that it can only fine individuals based on official traffic control devices. BA 26-28. The City instead argues that the statutory requirements for "traffic control devices" in cities and counties in RCW Title 47 do not apply to the "traffic control devices" that form the basis for tickets issued by the City under RCW Title 46. BR 31-34. The City's argument that it can fine individuals under Title 46 based on signs that violate Title 47 is entirely based on its contention that the statutory mandates governing traffic control devices in Titles 46 and 47 are not read together, *i.e.*, they are not "in pari materia." BR 31-34.

Statutes are interpreted based on their language, and words in a statute are given their common and ordinary meaning. *Home Street Inc. v.*

State, Dep't of Revenue, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009).

Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself. *Id.*

Here, the plain language in Title 46 RCW is that it be "construed in pari materia with the provisions of Title 47 RCW." RCW 46.98.020. And the express language in Title 47 RCW is that it "shall be construed in pari materia with the provisions of Title 46 RCW." RCW 47.98.020. Thus, contrary to the City's argument, under the Legislature's plain language in RCW 46.98.020 and RCW 47.98.020, Titles 46 and 47 are read together.

Courts also do not interpret statutes in isolation. Instead, even when the plain language in statutory schemes are silent on whether they should be construed in pari materia, courts will still construe statutes that relate to the same subject matter as "constituting one law" so that they are complementary and not in conflict with one another. See, e.g., *Personal Restraint of Yim*, 139 Wn.2d 581, 591-92, 989 P.2d 512 (1999) (Explosives Act and Fireworks Law construed in pari materia); *Beach v. Bd. of Adjustment of Snohomish Cty.*, 73 Wn.2d 343, 346, 438 P.2d 617 (1968).

Here, RCW Title 46 concerns "Motor Vehicles" and RCW Title 47 concerns "Public Highways and Transportation." RCW 46.04.611 defines "official traffic-control devices" as all signs and signals used for "regulating, warning or guiding traffic[.]" RCW 46.61.050 requires drivers to obey all "official traffic control device[s]." RCW 47.36.030(1) provides the secretary of transportation the power to adopt a "uniform

state standard for . . . traffic devices” to, among other things, provide information to drivers “regarding traffic regulations[.]” All signs and signals erected in counties and cities “shall conform to such uniform state standard of traffic devices so far as practicable.” RCW 47.36.030(2).

Accordingly, the statutory provisions in RCW Titles 46 and 47 regarding “official traffic control devices” relate to the same subject matter, *i.e.*, the uniform state standards for traffic devices which the trial court ruled the City’s blue signs violated. CP 634. RCW Titles 46 and 47 are therefore read together not only because the Legislature’s express language requires they be read in *pari materia*, but also because they relate to the same subject matter. *Personal Restraint of Yim*, 139 Wn.2d at 591-92; *Beach*, 73 Wn.2d at 346.

The City requests, however, that the Court disregard the Legislature’s express command that the statutes be read together as well as the fact that the statutory schemes concern the same subject matter because, it says, the definition of “[o]fficial traffic-control devices” in RCW 46.04.611 only expressly mentions “Title 46 RCW.” BR 32. The City argues that the Legislature supposedly “chose not to bring Title 47 sign standards into Title 46 traffic enforcement.” BR 32-33. But “[o]fficial traffic-control devices” that are “not inconsistent with Title 46” (RCW 46.04.611) must necessarily include the standards for official traffic-control devices in Title 47 because Titles 46 and 47 both concern “official traffic-control devices,” are not in conflict, and are read together. *Personal Restraint of Yim*, 139 Wn.2d at 591-92; *Beach*, 73 Wn.2d at 346.

The City's argument is contrary to how statutes in pari materia are read together as one law.

The City's argument also leads to unreasonable results. Under RCW 47.36.030 cities must comply "so far as is practicable" with standards for "official traffic control devices." But according to the City, the standards for "official traffic control devices" have no bearing on which traffic signs the City can enforce with infraction notices and fines under Title 46 RCW. Under the City's argument, every city in the state could have traffic signs with different colors (green stop signs, purple yield signs, or blue no parking signs) under which individuals would be fined because according to the City the sign standards do not apply to enforcement. The City has no statutory support or policy for splitting the meaning of "official traffic control devices" in two.

Furthermore, the City's argument would turn the Legislature's intent on its head because the entire purpose of the statutory scheme on traffic devices is to have uniform standards not only throughout the State, but also throughout the nation. RCW 47.36.030(2) ("uniform"); RCW 47.36.060 ("uniform"); WAC 468-95-010 (adopting federal "Manual on Uniform Traffic Control Devices for Streets and Highways").¹⁶

¹⁶ Uniformity of traffic control devices is necessary because "traffic control devices notify road users of regulations and provide warning and guidance needed for the uniform and efficient operation of all elements of traffic[.]" Manual, §1A.01(02) at CP 184. "The need for uniform standards was [thus] recognized long ago" -- starting in the 1920s. Manual, Introduction, ¶06 at CP 181. Indeed, the "[u]niformity of the meaning of traffic control devices is vital to their effectiveness." *Id.*, §1A.02(07) at CP 184. One could only imagine the chaos that would ensue if each local jurisdiction could design and color traffic control devices in any manner in which they chose, *e.g.*, green stops signs, purple yield signs, blue no parking signs.

The City also seems to argue that the Legislature exempted the City from complying with the law governing traffic control devices because the law has “816 pages of standards.” BR 33. The City may be arguing that the number of standards makes it too hard to follow the law, when the undisputed fact is that it intentionally replaced lawful traffic signs with unlawful blue signs for purely “aesthetic reasons.” CP 234, 237, 324-25, 372. Further, the trial court held the City need only “substantially comply” with state law, but the City’s blue traffic signs were not substantially compliant. CP 624-25, 634.

Finally, the City is unable to cite one case for its position. BR 35-36. In contrast to the City’s position, there is case law throughout the United States holding that municipalities cannot impose fines based on signs that violate uniform state law standards because such signs are “unlawful and unenforceable[.]” *State v. Adams*, 140 N.W.2d 847, 849 (Minn. 1966); see also *City of Maple Heights v. Smith*, 722 N.E.2d 607, 610 (Ohio Ct. App. 1999); *City of Chicago v. Myers*, 242 N.E.2d 14 (Ill. Ct. App. 1968); *City of Madison v. Crossfield*, 877 N.W.2d 651, ¶¶19-23 (Wisc. Ct. App. 2016); *Commonwealth v. Lee*, 10 Pa. D. & C. 692, 698 (Penn. Quar. Sess. 1957); *State v. Trainer*, 670 N.E.2d 1378 (Ohio Mun. 1995). The City contends that these decision are not relevant to this action because (1) the cases are generally direct appeals in traffic infraction proceedings rather than original actions, and (2) the “applicable statutes” in those decisions were more clear in adopting the Manual on traffic

devices than the statutes here. BR 35-36. The City is wrong on both points.

With regard to the procedural posture in the decisions and the action here, the important item the City fails to address is the *holding* of the cases -- *i.e.*, unlawful signs that are not official traffic control devices cannot serve as the basis for traffic infractions. The City also ignores authority that shows injunctive-type relief can be brought in an independent action.¹⁷ *State ex rel. Ohio Motorists Ass'n v. Masten*, 456 N.E.2d 567 (Ohio Ct. App. 1982) (order requiring village to bring traffic control device in conformity with the manual “because the village council has no discretion to erect nonconforming traffic control devices on highway”); *Werden v. City of Milford*, 698 N.E.2d 526 (Ohio Com. Pl. 1998) (writ of mandamus granted requiring city to bring its traffic control devices in compliance with state law). The City is also wrong to argue that these other jurisdictions, unlike Washington, have more clearly adopted the Manual’s uniform standards for signs because Washington specifically adopted the Manual as part of Title 46 RCW and Title 47 RCW. See *supra* 22-25; WAC 468-95-010.

The Court should reject the City’s argument that it has authority to fine individuals based on signs that the trial court ruled do not substantially comply with the law. CP 634.

¹⁷ While these Ohio cases sought a writ of mandamus, similar actions brought in Washington would seek an injunction. *Scannell v. City of Seattle*, 97 Wn.2d 701, 703, 648 P.2d 435 (1982). Here, the Drivers have a cause of action under the Washington Constitution in the Superior Court to obtain the remedies available in Superior Court.

C. The Drivers' Claim Involving the Legality of the City's Municipal Fines Based on Unlawful Blue Signs Is Not Moot.

The City also argues that the Drivers' claim concerning the blue signs is "moot" because it replaced the blue signs as a result of the trial court's ruling in this case. BR 36-38; CP 551.

The City's mootness argument does not affect this Court's review of whether or not the City has statutory authority to issue infractions and impose fines based on unlawful blue signs because the Drivers are also seeking declaratory and monetary relief. The City's argument on mootness relates only to injunctive relief, which the City argues is moot because "no further infraction tickets based on the blue signs will be issued." BR 36.

Moreover, the City has no evidence that injunctive relief is moot. BR 38. In response to the Drivers' continuing request for injunctive relief to stop the City from collecting unpaid fines and/or penalties from class members based on the unlawful blue signs (CP 498 and BA 44-45), the City submitted no evidence that had stopped collecting outstanding fines and/or penalties from class members. Indeed, it still argues that it can continue to do so in the future. BR 31-36. It is undisputed that over 1,000 class members received tickets (CP 639) and the City did not replace all of the blue signs until at least January 2017 (CP 552). The City does cite any evidence to support its implication that there may be no outstanding and unpaid fines. BR 36-38. The City's unsupported assertion should be

rejected. The trial court erred when it said the Drivers' request for injunctive relief was moot. BA 44-45.

Finally, even assuming *arguendo* mootness were somehow pertinent to injunctive relief, the Drivers' claim concerning the blue signs should be reviewed because it raises important issues of public law. The City admits that this issue should be reviewed, even if moot, if it involves matters of "public interest." BR 36. Here, the City maintains that the standards for official traffic-control devices in RCW Title 46, under which cities may issue traffic infractions, are not the same standards for official traffic-control devices on roadways in RCW Title 47. See BR 31-34 and *supra* 21-26. It thus continues to take the position that it can fine Drivers who park by traffic signs that do not comply with the standards in RCW Title 47. BR 31-36. It is important that not only Bremerton, but cities and counties throughout the state receive guidance on this issue. The trial court therefore concluded that it is important "for a higher court to really give us some direction on these issues" and its decisions are "perfectly ripe" for appellate review. VRP 02/06/17 at 47.

The Court should thus reject the City's argument on mootness that, like its argument on *res judicata*, is aimed at shielding the City's practices from the Court's review.

III. PRIVATE IMPARK EMPLOYEES ARE NOT “LAW ENFORCEMENT OFFICERS” AND THEY THEREFORE DO NOT HAVE AUTHORITY TO ISSUE TRAFFIC INFRACTIONS.

A. The Drivers Argument Is that the City Issued Infraction Notices Improperly and the Civil Service Laws Support The Argument that Officers Must Be City Employees; the Drivers Are Not Suing to Have Impark Employees Put into Civil Service.

The City contends the Drivers have no standing to enforce the civil service laws governing the City’s police department. BR 28.¹⁸ But the Drivers are not seeking citizen standing to challenge the City’s violation of civil service laws; the Drivers are instead arguing that private Impark employees have no lawful authority to issue traffic citations because such citations must be issued by actual *law enforcement officers, i.e.,* public employees authorized to enforce the law. BA 30-40, *citing* RCW Ch. 10.93, RCW Ch. 46.63; RCW Ch. 41.12.

The City’s standing argument (BR 28) relates only to the very small portion of the Drivers’ argument, the portion based on RCW Ch. 41.12. The City does not dispute that the Drivers have standing to challenge their parking tickets as void under RCW 10.93.130 (“Contracting Authority of Law Enforcement Agencies”) and RCW 46.63.030 (only a “law enforcement officer has the authority to issue a notice a notice of traffic infraction,” *i.e.* a parking ticket). The City cannot argue that the Drivers do not have standing to challenge their parking tickets because they have a personal stake in the outcome of whether or

¹⁸ In its brief, the City does not argue that contracting with Impark complies with the civil service laws for city police (RCW Ch. 41.12). BR 29-31.

not they received a valid parking ticket. *Paris American*, 52 Wn.App. at 438; *Gustafson*, 47 Wn.App. at 276.

The trial court rejected the City's argument on standing (and the City's other arguments designed to evade review such as *res judicata*) when it ruled on the merits of the Drivers' arguments concerning Impark employees issuing traffic citations.¹⁹ CP 635.

B. The City's Argument That Its Municipal Code Can Authorize Private Impark Employees to Issue Traffic Citations is Directly Contrary to Numerous State Statutes.

The Drivers' brief explains why a law enforcement officer must issue traffic citations, and the City has no authority to contract with private third-party Impark employees to issue such citations. BA 30-40. The City argues in response that a municipal ordinance authorizes private third-party Impark employees to issue parking citations and that its ordinance is not in conflict with any statutes. BR 29-31, *citing*, BMC 10.10.080(d).

A municipal ordinance is invalid, however, if (1) a state statute occupies the field leaving no room for concurrent jurisdiction, or (2) there is a conflict between the ordinance and statute. *Employco Personnel Services, Inc. v. City of Seattle*, 117 Wn.2d 606, 617-18 (1991); *Housing Authority v. City of Pasco*, 120 Wn.App. 839, 843, 86 P.3d 217 (2004).

¹⁹ Like the Drivers' claim that the fines based on the City's blue signs violate state law, the Drivers brought this claim under the Washington Constitution's grant of jurisdiction to hear cases involving "the legality of a municipal fine." Const. art. IV, §6. The trial court did not dismiss this claim for lacking a "private right of action" like it did for the Drivers' claim regarding unlawful blue signs; it decided the merits and dismissed this statutory claim. CP 630-35.

The City does not dispute that in Washington when a statute specifically designates the things or classes of things upon which the statute operates, the Legislature is deemed to have “intentionally omitted” the things or classes that are not included. BA 33-34, *citing Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999); *In re Det. Of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Our Supreme Court recently reaffirmed this rule: “When the legislature expresses one thing in a statute, we infer that omissions are exclusions.” *Killian*, 189 Wn.2d at 459. In addition, “if there is any doubt about whether the power is granted” to a municipal corporation, “it must be denied.” *Wilson v. City of Seattle*, 122 Wn.2d 814, 822, 863 P.2d 1336 (1991), citing *Employco Personnel Services*, 117 Wn.2d at 617 (emphasis added).

Here, the City’s argument and municipal ordinance are invalid because they conflict with multiple statutes. First, the Drivers explained in their opening brief that RCW 10.93.130 explicitly governs the contracting authority of law enforcement agencies. BA 32-33. And RCW Ch. 10.93 only authorizes the City to contract with other law enforcement agencies for law enforcement. *Id.* The statute thus necessarily excludes any authority for municipalities to contract with private third-party corporations to conduct law enforcement because such authority was omitted from the statute. *Killian*, 189 Wn.2d at 459; *Landmark Development*, 138 Wn.2d at 571. The City fails to mention the statutory

scheme governing the contracting authority of law enforcement agencies even once apparently because the City has no response. BR 29-31.

The City also cites the same statutes cited by the trial court where the legislature expressly authorized “[v]olunteers and transit fare enforcement officers” to issue citations in certain limited situations. BR 29, citing RCW 35.58.585, RCW 81.112.210, and RCW 46.19.050; CP 630. But the limited authority to have volunteers enforce disabled parking laws and to contract for transit fare enforcement necessarily means the Legislature did *not* authorize cities to use volunteers or contract with private employees for other non-disabled parking enforcement. *Killian*, 189 Wn.2d at 459; *Landmark Development*, 138 Wn.2d at 571.

The City does dispute that “law enforcement officers” must issue parking infractions. BR 29-31. The City argues that its municipal code authorizes “parking enforcement officers” to issue parking infractions and these “parking enforcement officers” can be private third-party employees. BR 30, citing its municipal code, BMC 10.10.080(a)(2) and (d). The Bremerton Municipal Code itself recognizes that Private Impark “parking enforcement officers” are *not* “law enforcement officers” because law enforcement officers are referenced separately in the same ordinance. See BMC 10.10.080(a)(1), referred to at BR 30.

The City maintains that its ordinance does not violate state law, even though it concedes only a “law enforcement officer” can issue *traffic* citations under RCW 46.63.030(1), because it says a private “officer” can issue *parking* citations under RCW 46.63.030(3). BR 30. The City argues

that parking citations are not traffic citations, and an “officer” who issues parking infraction notices is not a “law enforcement officer” in the statute. *Id.* The City is wrong on both points.

First, the City is wrong in arguing parking infractions are not traffic infractions because RCW 46.64.050 expressly states that “[i]t is a traffic infraction for any person to violate any of the provisions of this title[.]” And RCW 46.63.110(4) expressly refers to “traffic infractions relating to parking[.]” Parking infractions are thus traffic infractions, which must be issued by a law enforcement officer. RCW 46.63.030(1); RCW 46.64.050. Second, the term “officer” in RCW 46.63.030(3) for issuing parking infractions, and in RCW 46.63.030(1)(a), (1)(b), (1)(c), (2), and (4), is shorthand for the “law enforcement officer” that is mentioned in the first sentence of the same section. RCW 46.63.030(1).

Accordingly, RCW Title 46 requires that traffic citations be issued by “law enforcement officers” not private third-party employees. And RCW 46.08.020 expressly states that “no local authority shall enact any law, ordinance, rule or regulation in conflict with the provisions of this title except and unless expressly authorized by law to do so and any laws, ordinances, rules or regulations in conflict with the provisions of this title are hereby declared invalid and no effect.” The City’s private contractor enforcement ordinance is thus contrary to the statutory requirements that “law enforcement officers” must issue traffic infractions. RCW 46.63.030(1).

The civil service statutes additionally require that law enforcement officers be specific types of tenured public employees (and not private contractors) unless the Legislature specifically creates an exception. BA 35-36, *citing* RCW Ch. 41.12, *Teamsters Food Processing Employees, Local v. City of Moses Lake*, 70 Wn. App. 404, 407, 853 P.2d 951 (1993), and *Wash. Fed'n of State Employees v. Spokane Cmty. Coll.*, 90 Wn.2d 698, 702-03, 585 P.2d 474 (1978). Cities therefore cannot contract out these positions except with express legislative authority. *Wash. Fed'n of State Employees v. Joint Ctr. for Higher Educ.*, 86 Wn. App. 1, 6-10, 933 P.2d 1080 (1990) (“The legislature has been told by our Supreme Court that if it intends to create exceptions to the Civil Service Law, it must do specifically.”).

Here, the City does not dispute that parking enforcement is performed by public employees in police departments throughout the state (BA 36 n.17) or that Bremerton Police Department employees performed this job until the City contracted it out. BA 36. The City’s ordinance violates this statutory scheme because there is no express authority to contract out the parking enforcement positions and these traffic citations must instead be issued by public employees. *Id.*

The City only notes that police chiefs and other supervisors can issue parking citations, while they are not in civil service. BR 29. Consistent with the large body of civil service case law, which requires explicit statutory authorization to make any exception to civil service work, there is a specific statutory exceptions for police chiefs and a

limited number of supervisors. RCW 41.12.050. Notably, these exempt employees are still public employees. *Id.* The City is unable to identify a similar provision authorizing it to contract with private employers to conduct parking enforcement.²⁰

Accordingly, the City cannot contract with private corporations to issue traffic citations and its ordinance to permit such contracts is void because it is contrary to state statutory schemes: RCW Ch. 10.93, RCW Ch. 46.63, and RCW Ch. 41.12. *Employco Personnel Services*, 117 Wn.2d at 617-18; *Housing Authority*, 120 Wn.App. at 843.

Law enforcement officers, not private third-party Impark employees, must issue traffic citations under state law. The Court should reverse the trial court and rule that the City does not have authority to contract for private parking enforcement.

IV. THE TRIAL COURT ERRED IN NOT GRANTING THE DRIVERS RESTITUTION OR DAMAGES.

The City does not dispute that the Drivers are entitled to relief if they establish liability, rather the City argues that the Drivers “never established liability” and that the Drivers “falsely claim declaratory relief.” BR 38, 40. However, the trial court *granted* the Drivers’ motion

²⁰ The City also argues that a private Impark employee could be considered an “other official authorized by law to issue a notice of infraction” under IRLJ 1.2(j). BR 31. The City’s argument is directly contrary to the Supreme Court’s ruling that private employees are not “officials” even when they *are explicitly authorized by statute to conduct enforcement*. *State v. KLB*, 180 Wn.2d 735, 328 P.3d 886 (2014). The Drivers cited this case in their opening brief and the City completely failed to address the Supreme Court’s ruling. Contrary to the City’s argument, an “other official authorized by law” would be, for example, a building inspector authorized to enforce the State Building Code under RCW 19.27.050.

for partial summary judgment on liability. CP 634. The trial court later referred back to that ruling and stated that the Drivers obtained a declaration that the blue signs were unlawful and effectively received some injunctive relief (VRP 02-06-17 at 5-6):

MR. FESTOR: And the City agreed [the Municipal Court had no jurisdiction], so the [trial court] said “Well, why can’t they seek injunctive and declaratory relief [here in Superior Court.]?” I guess at the end of --

THE COURT: Which you got. You received that.

* * *

THE COURT: ...[Y]ou received an order from me, indicating that the blue signs were noncompliant with the [M]anual and therefore unlawful. The City, as I understand it, has since replaced all of those signs...

Because the City’s blue signs violate state law, the City had no statutory authority to impose fines based on those blue signs. See *supra* 21-26; BA 25-29.

Further, because the City had no statutory authority to impose the fines at issue here, the Drivers are entitled to receive restitution in the amount of their loss. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007) (“Nelson’s claim for \$79.23,” the amount of tax he was unlawfully charged, “flows directly from Appleway’s liability”); *Moore v. Health Care Authority*, 181 Wn.2d 299, 314, 332 P.3d 461 (2014) (the “most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created” and courts should not render decisions that result

in the “wrongdoer benefitting from its wrongdoing.”); *Wenzler & Ward Plumbing and Heating Co. v. Sellen*, 53 Wn.2d 96, 99, 330 P.2d 1068 (1958). Thus, the City must return the money it unlawfully took from the Drivers. See e.g., *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 599, 94 P.3d 961 (2004); *Dore v. Kinnear*, 79 Wn.2d 755, 766, 489 P.2d 898 (1971); *Covell v. Seattle*, 127 Wn.2d 874, 877, 891-92, 905 P.2d 324 (1995); *Okeson v. Seattle*, 150 Wn.2d 540, 546, 78 P.3d 1279 (2003); *Okeson v. Seattle*, 159 Wn.2d 436, 447, 150 P.3d 556 (2007).

Accordingly, the Court should reverse the trial court’s order denying the Drivers’s request for monetary relief. CP 639-40.

APPELLANTS’ RESPONSE TO CROSS-APPEAL

I. The Court Should Disregard the City’s Cross-Appeal in Its Entirety Because the Trial Court’s Class Certification is Not an Appealable Order Under RAP 2.2(a) and the City Did Not Seek Discretionary Review.

The City cross-appeals the trial court order certifying the class. BR 41-43. The rules on appeal provide: “A party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed.” RAP 5.1(d).

Under RAP 2.2(a), an order certifying a class is not a final order that is appealable. See *Microsoft Corp. v. Baker*, ___ U.S. ___, 137 S.Ct. 1702, 1706-09 (2017). Instead, a class certification order is an interlocutory order that is not a “final decision.” *Id.* A class certification order therefore does not appear in the list of decisions of the superior court that may be appealed as a matter of right. RAP 2.2(a).

In addition, the City is seeking affirmative relief in its cross-appeal, *i.e.*, it asks the Court to “reverse” the class certification order if the Drivers prevail on the merits. BR at 43. It is not an independent ground for affirmance. It must be the subject of discretionary review. See, *e.g.*, *Oda v. State*, 111 Wn.App. 79, 44 P.3d 8 (2002) (defendant obtained discretionary review of order certifying the class); *Miller v. Farmer Bros. Co.*, 115 Wn.App. 815, 64 P.3d 49 (2003) (same).

The Ninth Circuit considered this exact scenario in *Blake v. City of Los Angeles*, 595 F.2d 1367, 1385 (1979). There, the Ninth Circuit declined to rule on the respondent’s cross-appeal of the trial court’s class certification order because, after reversing the trial court’s order on summary judgment, it was subject to “[t]he same considerations that normally bar interlocutory review.” *Id.* The Ninth Circuit reaffirmed this rule in *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 26 (9th Cir. 1981). When the Ninth Circuit reversed the trial court’s order terminating the proceedings, “there no longer exist[ed] a final judgment which support[ed] th[at] court's review of interlocutory orders” and it did not consider the cross-appeal of the class certification order. *Id. Accord, Foy v. Schantz, Schatzman & Aaronson, P.A.*, 108 F.3d 1347, 1350 (11th Cir. 1997); *Milan Exp. Co. v. W. Sur. Co.*, 886 F.2d 783, 785 n.1 (6th Cir. 1989).

Here, the City, however, did not timely (within 30 days) file a notice for discretionary review of the trial court’s May 2016 order certifying the class. CP 636-37. The City instead filed a cross-appeal of

the trial court's order 11 months later, in April 2017. *Id.* Accordingly, since the trial court's decision on class certification is not appealable as a matter of right, and the City failed to timely file a notice for discretionary review of the order, the Court should disregard the City's argument against the class certification order because it is not before the Court.

II. If the Court Does Consider the Cross-Appeal, It Should be Summarily Denied Because It is Again Based on the City Mischaracterizing the Trial Court's Rulings on Res Judicata.

The City's cross-appeals the trial court's order certifying the class. BR 41. The City recognizes that it must show "manifest abuse of discretion" by the trial court. *Id.* An order certifying a class will therefore be upheld if the record shows that the trial court considered the criteria for class certification, and the decision is based on tenable grounds and is not manifestly unreasonable. *Pellino v. Brink's Inc.*, 164 Wn.App. 668, 682, 267 P.2d 383 (2011).

Here, in response to the Drivers' motion for class certification, "[t]he City [did] not object to certification under CR 23(a) and CR 23(b)(2) for declaratory and injunctive relief." CP 118. The City nevertheless contends that the trial court erred in certifying the class because, it says, the certification order "contradicted" an earlier trial court order dismissing the named plaintiffs' request for "refunds" based on the doctrine of res judicata. BR 41. The City says the trial court's earlier order on res judicata "dismissed Karl's damages claim" and "[b]ecause they held no claim for monetary relief, they could not bring a claim on

behalf of a class.” *Id.* at 41, 42. The City says the class certification order is “overly broad because it permitted Karl to assert a claim for monetary relief that was already dismissed.” *Id.* at 43.

The City’s argument is based on mischaracterizing the trial court’s rulings and the trial court itself repeatedly rejected the argument. Contrary to the City’s argument, the trial court’s order on res judicata *did not dismiss* the Drivers’ request for damages and restitution. See *supra* 3-7.

The City’s argument in the trial court against damages/restitution was based on the fact that an order to the Municipal Court requiring refunds, which the trial court ruled was barred by res judicata, would be a similar amount to an order awarding damages or restitution against the City to ensure it did not profit from its wrongdoing. VRP 06-04-16 at 10. The City’s brief, however, ignores a plaintiff’s ability to assert alternative measures of damages and that these alternatives may be based on different legal grounds, but still come to the same amount of monetary relief. See *supra* 6-7. The City’s brief also ignores the trial court’s ruling that the damages or restitution here is based on claims that the Drivers could not have brought in the Municipal Court due to its limited jurisdiction. See *supra* 3-7.

The City also did not challenge the trial court’s findings supporting class certification, and those findings are now verities. *McCleary*, 173 Wn.2d at 514. The verities in this action therefore include that if the class “claim is successful the amount of damages owed to each class member can be readily determined by City records.” CP 639. “Any monetary

relief here flows mechanically from the injunctive relief and declaratory relief sought in this case.” CP 640. “The monetary relief due any individual class member can be objectively computed from the amount any individual class member was fined and is therefore incidental.” *Id.* And “[a] class action is the only way that class members may obtain relief.” *Id.* It was not manifestly unreasonable for the trial court to certify the class based on these verities.

Accordingly, in certifying the class the trial court did not error in refusing to adopt the City’s continued attempt to misconstrue its earlier order on res judicata and “refunds.” Indeed, the trial court would have committed a manifest abuse of discretion if it had adopted the City’s position.

In addition to the City basing its cross-appeal on a misleading history of the case -- *i.e.*, the City says the trial court “dismissed” Karl’s request for monetary relief in the form of damages or restitution (BR 41, 43) -- the City’s cross appeal that the named plaintiffs cannot represent the class also makes no sense. If the Court decides that the Drivers have a cause of action to challenge the legality of the City’s fines and the cause of action is not barred by res judicata, then the Court’s decision will equally apply to the named plaintiffs and to the class. Indeed, the City argues the “class members all have Bremerton Municipal Court judgments” that bar their claims. BR 11. The City’s cross-appeal thus fails to identify any difference between the named plaintiffs and the class that would bar the

named plaintiffs from receiving damages or restitution, but would not bar the class from receiving that same relief. *Id.* at 41-43.

Accordingly, the Court should reject the City's cross-appeal. The cross-appeal is just one more baseless attempt by the City to deny relief to the individuals the City illegally fined.

CONCLUSION

The trial court adopted only one of the City's arguments against review, *i.e.*, it ruled the Drivers do not have a cause of action to challenge the City's fines under its blue traffic signs. The trial court made this ruling *after* it had already ruled the blue signs violated the law. The trial court erred because the Drivers have an action to challenge the City's fines under the Washington Constitution, Article 4, section 6 and state statutes governing the City's practices.

The City's arguments on the merits are contrary to several statutes. For example, under the City's arguments the standards for "official traffic control devices" that cities must follow under RCW Title 47 do not apply to the standards for "official traffic control devices" under which cities can impose traffic citations under RCW Title 46. Under the City's logic, there are no color and shape standards that cities must comply with when fines are issued based on official traffic control devices.

The Court should: (1) reverse the trial court's decision that the Drivers do not have a cause of action to challenge the legality of the City's fines under its unlawful blue signs, (2) reverse the trial court's decisions not granting summary judgment on liability to the Drivers on their two claims, (3) reverse the trial court's decision not granting the Drivers' motion for relief in the form of damages or restitution, and (4) remand for further proceedings consistent with the Court's decision.

Respectfully submitted this 1st day of February, 2018.

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DECLARATION OF SERVICE

I, Anders Forsgaard, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the following parties were served as follows:

On February 1, 2018, I personally delivered a copy of the **Reply Brief of Appellants/Cross-Respondents** to the following parties by email:

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

DATED: February 1, 2018, at Seattle, Washington.



Anders Forsgaard, *Legal Assistant*

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Comments:

Footnote 15 on page 20 had 2 lines cut off in the original submission. Page 20 has been corrected in this submission.

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