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Division II  
State of Washington  
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No. 50228-3

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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

Appellants/Cross-respondents,

v.

CITY OF BREMERTON,

Respondent/Cross-appellant.

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REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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## CROSS-APPEAL REPLY ARGUMENT

### A. The dismissal of appellants' claims rendered the order granting class certification appealable.

The appellants' first response is either frivolous or badly misguided. Reply 37-39. *They* timely *appealed* from the trial court's March 16, 2017 final ruling granting summary judgment on April 17, 2017 (the 30<sup>th</sup> day fell on a weekend). CP 612-13. The City then cross appealed from the trial court's prior order denying class certification on April 20, 2017, less than 14 days after the appellants appealed. CP 636-37. Under RAP 5.2(f), if a timely notice of appeal is filed, any other party who wants relief must file a (second) notice of appeal within 14 days after service of the first notice of appeal. The City's Notice of Appeal was timely and correct.

The appellants' misunderstanding seems to be that because an order certifying a class is not appealable as of right under RAP 2.2 *when it is entered*,<sup>1</sup> it therefore must be subject to discretionary review under RAP 2.3 *forever*. That is wrong. The final order in this case (from which appellants appealed) rendered all prior orders final and appealable, including the order certifying the class. See, e.g.,

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<sup>1</sup> See, e.g., *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn. 2d 178, 35 P.3d 351 (2001) (class-certification discretionary review denied).

RAP 2.4(a) (“The appellate court will, at the instance of the appellant, review the decision *or parts of the decision designated in the notice of appeal*”). The City’s timely notice of appeal designated the order certifying the class. CP 636-37. It is properly before the Court.

Indeed, the “appellate court will grant a respondent [like the City] affirmative relief by modifying the decision which is” subject to review **only** “(1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal. . . .” RAP 2.4(a) (emphasis ours). Even *appellants’* notice of appeal designated “all underlying orders,” which necessarily includes the order certifying the class. CP 612. Again, that order is properly before the Court on cross review.

Appellants seem to claim that the City had to seek discretionary review within 30 days of the interlocutory order. That is incorrect. Discretionary review is permissive, not mandatory, so the failure to seek discretionary review does not preclude a later appeal. RAP 2.3(a) (“a party *may* seek discretionary review of any act of the superior court not appealable as a matter of right”); 2.3(c) (even “*denial* of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision *or the issues pertaining to that decision*”) (emphases ours). Again, the order certifying the class is properly before this Court.

**B. The City did not mischaracterize the trial court’s ruling on *res judicata*, but the appellants misunderstand it.**

Appellants’ second responsive argument also betrays a misunderstanding, this time of the trial court’s order dismissing the fine-refund claim based on *res judicata*. Appellants seem to assert that a claim for refund of fines (if called something other than “fines” – e.g., “restitution” or “damages”) is not a fine-refund claim. The trial court allowed a claim for damages to survive, but only if one could be shown. Only a refund claim could exist, but it is barred. This Court should reverse the certification order if it reverses and remands.

**1. Appellants fundamentally misunderstand the trial court’s *res judicata* ruling.**

The trial court dismissed the claim for a fine refund under CR 12(b)(6). No other claim for damages was pled – nor does any exist. The Complaint states, “the monetary relief here (refunds) flows mechanically from the injunctive and declaratory relief sought in this case. . .”; the specific relief requested was “an order directing the Defendant to refund to the Plaintiffs and the class the amounts paid for their citations for the parking violations challenged here. . .” CP 4. That is the only possible “damages” or “restitution” claim.

The trial court’s memorandum and order granting the City’s CR 12(b)(6) motion to dismiss states (CP 661):

[A] determination as to whether plaintiffs are entitled to a refund of the fine infringes upon the Municipal Court's ruling that the infraction was committed. The defense of the validity of the traffic signs and enforcement was previously raised at the contested hearing to determine whether plaintiffs owed the money. **Any request to recover the fines assessed has already been litigated under the same defense and should have been appealed to the Superior Court.** No timely appeal was filed. [Emphasis added.]

Appellants sought clarification and reconsideration of this order, specifically addressing the court's ruling on prospective class certification. The trial court denied their motion (CP 664):

In order to maintain a class action claim, the individual must be able to sue the defendant in his or her individual capacity. Here, the claim for a refund of the parking ticket is barred by *res judicata* and therefore plaintiffs cannot maintain that claim. Since the plaintiffs cannot maintain the claim, they cannot represent a class with that claim. [Citation omitted.]

The order on class certification contradicts this ruling because the only possible damages are the fines.

**2. The *res judicata* ruling renders the order granting class certification erroneous.**

The appellants' only *possible* damages claim seeks a fine refund. That claim was dismissed on *res judicata* grounds. The appellants cannot represent the class because they hold no claim for that relief. See ***Doe v. Spokane and Inland Empire Blood Bank***, 55 Wn. App. 106, 780 P.2d 853 (1989). Appellants' attempts to create a damage claim by calling what they seek something different

than a “refund” are unavailing: regardless of what they call it, they are seeking recovery of the fine. If this Court reverses on the merits, it should also reverse the certification order.

The Ohio Court of Appeals ruled on almost identical facts, in ***Eighmey v. City of Cleveland***, No. 104779, 2017-Ohio-7092, 2017 Ohio App. LEXIS 3255 (Aug. 3, 2017). That class-action plaintiff sought a refund of the fines for red-light camera infractions. Because she did not contest the infraction, but waited and then filed a class action, the appellate court held that she had no claim for a refund of the fine, so she could not represent the class.

All claims to recover a paid fine are barred. The Karls cannot represent the class. The Court should reverse the certification order.

### **CONCLUSION**

The trial court’s order allowing appellants to represent a class seeking a refund of fines that were reduced to a municipal court judgment is contrary to the trial court’s prior *res judicata* order, and is erroneous. Should the Court reverse the trial court’s ruling dismissing the claims for declaratory and injunctive relief, but not the order dismissing the claims for refund under *res judicata*, this Court should remand with instructions to modify the Order Granting Class Certification. All monetary-relief claims are barred.

RESPECTFULLY SUBMITTED the 5<sup>th</sup> day of March 2018.

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**CERTIFICATE OF SERVICE**

I certify that I caused to be filed and served, a copy of the foregoing **REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT** on the 5<sup>th</sup> day of March 2018, as follows:

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## Transmittal Information

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