

FILED

AUG 12 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ORIGINAL

No. 313701-III

COURT OF APPEALS

DIVISION III

OF

THE STATE OF WASHINGTON

Amanda Sarah Beth McIver and Jamie McIver,
Appellants

v.

**City of Spokane, Spokane Parks and Recreation Department, Mike
Aho, Jane Doe Aho, Kimbre Vega, John Doe Vega, Paladin Alent, and
Jane Doe Alent,**
Respondents

Appeal from the Superior Court of Spokane County

REPLY BRIEF OF APPELLANT

Attorney for Appellants Amanda Sarah Beth McIver and Jamie McIver:
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TABLE OF CONTENTS

| | <u>Page Nos.</u> |
|-----------------------|----------------------|
| Table of Authorities | ii |
| I. ISSUES ON REPLY | 1 |
| II. ARGUMENT ON REPLY | 1-3 |
| III. CONCLUSION | 3 |

TABLE OF AUTHORITIES

| <u>Washington Cases</u> | <u>Page Nos.</u> |
|--|----------------------|
| <u>Orwick v. Seattle</u> , 103 Wn.2d 249, 254, 692 P.2d 793 (1984) | 2 |
| <u>Lawson v. State</u> , 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) | 2 |
| <u>Vallandigham v. Clover Park Sch. Dist. No 400</u> , 154 Wn.2d 16, 26, 109 P.3d 805 (2005) | 2 |

| <u>Other Authorities</u> | <u>Page Nos.</u> |
|--------------------------|----------------------|
| CR 12(b)(6) | 2-3 |
| CR 56(c) | 2 |

I. ISSUES ON REPLY

1. The trial court erred in dismissing Amanda McIver's claims because judicial estoppel bars the City from asserting the factual position it maintained in the Superior Court.

II. ARGUMENT ON REPLY

The City of Spokane states, and heavily relies upon, the assertion that "It is undisputed that booster seats were available on the date of the accident." (Respondent's Brief, 7-8) But the City cited Ms. McIver in April 2009 for not using supposedly available booster seats. But then, on June 10, 2009 the City successfully moved to dismiss Ms. McIver's infraction because the City recently purchased "approved booster seats." (CP 249-251, 254-262) Indeed, the City's position that booster seats were not previously available but subsequently purchased was the sole legal and factual predicate for the dismissal. (CP 254) Yet now the City takes the complete opposite position. This is exactly what judicial estoppel precludes.

More specifically, Ms. McIver maintained that the City of Spokane failed to provide child booster seats. (CP 49-85) And the City responded in its dispositive motions that they "provided actual documentation demonstrating that NEYC 1) was aware that the Washington law required booster seats for children, [and] 2) provided a large number of booster

seats for children...” (CP 205-215) If this latter statement is true, why did the City provide documentary proof in the form of receipts to the Municipal Court that \$3,007.68 worth of booster seats was purchased after the accident? (CP 254-262) Unless the Municipal Court was being misled, the only reason the City would request the court dismiss the infraction against Amanda McIver after making the large purchase is they did not have child booster seats as Amanda McIver maintained. Two things follow from this: either there is a genuine factual dispute that precludes dismissal, or the City has misled one of the two courts.

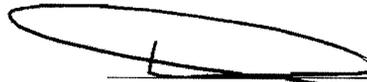
Courts should dismiss a claim under CR 12(b)(6) only “if it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint which would entitle the plaintiff to relief” Orwick v. Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). Under the rule, the plaintiffs’ allegations are presumed to be true. Lawson v. State, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986). Summary judgment is appropriate when “there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law.” CR 56(c) Similarly, all facts are considered in the light most favorable to the nonmoving party. Vallandigham v. Clover Park Sch. Dist. No 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Here, if the doctrine of judicial estoppel is applied to the question of the availability of the booster seats, most if not all of the City's arguments fail. Accordingly, the Superior Court's failure to apply the doctrine requires reversal so it can reconsider the case with a clear record.

III. CONCLUSION

The City of Spokane manipulated the courts by maintaining both that booster seats were not available and that they were available. Judicial estoppel is intended to rectify this manipulation and, once done, preclude summary judgment and 12(b)(6) motions.

Respectfully submitted this *12th* day of August, 2013



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

AMANDA SARAH BETH MCIVER and JAMIE
MCIVER, and the marital community comprised
thereof,

Plaintiffs/Appellants,

v.

CITY OF SPOKANE, SPOKANE PARKS AND
RECREATION DEPARTMENT, MIKE AHO and
JANE DOE AHO, and the marital community
comprised thereof, KIMBRE VEGA and JOHN
DOE VEGA, and the marital community
comprised thereof; PALADIN ALENT and JANE
DOE ALENT, and the marital community
comprised thereof, employees of CITY OF
SPOKANE;

Defendants/Respondents.

Court of Appeals Cause No.
313701

Superior Court Cause No.
11-2-02400-2

DECLARATION OF SERVICE

I, Travis Spannagel, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and am competent to be a witness herein.

That I, as a legal assistant in the office of Phelps & Associates, P.S., served in the manner indicated below, an original and copy of the Reply Brief, on August 12, 2013.

COURT OF APPEALS DIVISION III
500 N. CEDAR
SPOKANE, WA 99201

Legal Messenger
 U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Reply Brief on August 12, 2013.

OFFICE OF THE CITY ATTORNEY
808 W. SPOKANE FALLS BLVD.
SPOKANE, WA 99201

Legal Messenger
 U.S. Regular Mail

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

Signed at Spokane, WA on this 12 day of August, 2013


TRAVIS SPANNAGEL