

FILED

JUN 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

BRIEF OF APPELLANT

Attorney for Appellants Amanda Sarah Beth McIver and Jamie McIver:
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in not applying the doctrine of judicial estoppel to foreclose the City of Spokane from taking an opposite position in this case than it did in previous litigation between the City and Ms. McIver.
2. The trial court erred in applying an incorrect standard in dismissing portions of the plaintiffs' complaint by granting a 12(b)(6) motion and then terminated the action by improperly granting summary judgment by dismissing the balance of the plaintiffs' claims.

II. STATEMENT OF THE CASE

Amanda McIver worked for the City of Spokane's Parks and Recreation Department. On April 23, 2009 Ms. McIver was working at the Northeast Youth Center. Her duties on that day included transporting children in vans furnished by the City of Spokane. (CP 86-109) Ms. McIver had previously expressed concern about her transportation duties because the vans lacked safety seats and booster seats as required under state law. (CP 86-109) Ms. McIver made several requests for these seats without success. While Ms. McIver was transporting children from the youth center, the van she was driving was struck from behind by another City-owned van. Spokane City Police responded and Ms. McIver was issued a citation for not having proper safety equipment, to wit, the safety and booster seats, in the van. (CP 146-155; CP 242-262)

In the immediate aftermath of the accident, Kimbre Vega, the Director of the Northeast Youth Center, came to the scene. (CP 86-109)

Ms. Vega ordered Ms. McIver to lie to the police and state that the safety seats and booster seats were readily available but Ms. McIver failed to use them. Ms. McIver declined. Later, Ms. Vega made statements to the media indicating she did not know why the proper safety equipment was not in use during the day in question; (CP 86-109; CP 156-172; CP 222-237) these statements were made even though she had personal knowledge the safety equipment was not available. Ms. McIver's reputation suffered as a result. (CP 86-109)

Ms. McIver was held to answer in Spokane Municipal Court for the citation she received. The citation was dismissed following the representation of the city prosecutor that safety and booster seats were purchased *after* the vehicle accident. (CP 242-262) Nonetheless, the City of Spokane has subsequently, in this matter, maintained that safety seats *were always available*. (CP 146-155; CP 156-172; CP 205-215; CP 263-268)

Ms. McIver filed suit in Spokane Superior Court, alleging slander, libel, negligent supervision and training, and that she was discriminated against as a whistleblower for not covering up the unavailability of safety seats. (CP 1-11) The trial court dismissed the slander and libel claims pursuant to CR 12(b)(6) (CP 130-132) and the remaining claims were

dismissed on summary judgment. (CP 269-270) This timely appeal followed.

III. INTRODUCTION

The trial court improperly granted dismissal and summary judgment to the City of Spokane because it failed to apply the doctrine of judicial estoppel. Specifically, even though the City of Spokane dismissed the citation against Ms. McIver on the grounds that *after the accident* the City purchased safety seats for its vans (CP 242-262), the trial court, in this matter, allowed the City to maintain throughout this case that safety seats were available on the day of the accident. The City should not have been allowed to advance these inconsistent theories in the two separate cases based upon the theory of judicial estoppel.

Additionally, the trial court incorrectly dismissed allegations against the City of Spokane, et al. first by incorrectly applying the standard on a 12(b)(6) motion and then incorrectly applying the standard on summary judgment.

IV. ARGUMENT

ISSUE 1: The trial court erred in dismissing Ms. McIver's claims because it allowed the City of Spokane to take two different positions in two different cases.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” Bartley-Williams v. Kendall, 134 Wn.App 95 (2006). In evaluating whether the doctrine should apply, a trial court should examine three factors: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39 (2007).

Here, a crucial issue in Ms. McIver's complaint (CP I-11) against the City, if not *the* crucial issue, was whether safety equipment was available on the date of the accident. Following the van collision, Ms. McIver was cited under RCW 46.61.687 (CP 242-262), which delineates the requirements for child safety seating in vehicles. Under RCW 46.61.687(3), however, persons accused of violating this part of the traffic law may seek dismissal of the citation if, subsequent to the infraction, appropriate safety equipment is purchased.

The City of Spokane initiated and prosecuted the infraction issued to Ms. McIver. In that case, however, the City of Spokane dismissed the infraction pursuant to RCW 46.61.687(3), that is, it advised the judicial authority that further prosecution was unwarranted because, *after the citation was issued*, safety seats were purchased. (CP 242-262) Indeed, the City *provided to the court* photocopies of several receipts dated after the accident showing the purchase of numerous safety seats. (CP 242-262) In short, the City advised the trial court in that matter that even though the initial citation was warranted, dismissal was appropriate because equipment was later purchased. The upshot, though, is if the City *already had* the required safety equipment on the date of the accident, it would have been misleading the court in relying upon RCW 46.61.687(3) in the subsequent infraction case.

Despite its representations to the court in the infraction case, the City of Spokane completely reversed course in response to Ms. McIver's civil cause of action. It maintained, and continues to maintain, that safety equipment was readily available for use in the vans but Ms. McIver failed to follow through and use the equipment. But this type of litigation tactic is precisely what the doctrine of judicial estoppel forecloses. So, returning to the elements of the doctrine: First, the City of Spokane's position in the traffic infraction case was clearly inconsistent with its posture in Ms.

McIver's lawsuit. (CP 156-172; CP 242-262) Second, the trial court's acceptance, in this lawsuit, of the City's position that equipment was available the date of the accident clearly demonstrates the court in the infraction case was misled. Indeed, that court would lack the statutory basis to dismiss the infraction absent the City's assurances that equipment was purchased after the accident. Third, the City's about-face clearly works to the disadvantage of Ms. McIver in the present case. The City has relied upon its (new) claim that equipment was always available to argue against and defeat Ms. McIver's lawsuit. Accordingly, all of the elements of judicial estoppel are met, and the trial court erred in allowing the City to change positions and dismissing this action.

ISSUE 2: The trial court erred in applying an incorrect standard in dismissing portions of the plaintiffs' complaint by granting a 12(b)(6) motion and then terminated the action by improperly granting summary judgment and dismissing the balance of the plaintiffs' claims.

This is a civil action seeking damages against the defendants for committing acts under the color of law, and depriving the plaintiff of rights secured by the Constitution and the laws of the United States. It is alleged that the defendants, while employees of the City of Spokane, a municipal corporation in the State of Washington, County of Spokane,

deprived the plaintiff of her rights, privileges and immunities as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Additionally, the plaintiff brought claims for libel, negligent supervision and training, violation of civil rights under the Washington State Constitution, and pursuant to whistleblowers statute RCW 42.40, et seq. and RCW 49.60. (CP 1-11)

Ms. Amanda McIver, plaintiff, was employed by the Spokane Parks and Recreation Department. (CP 86-109; CP 135-145) On April 23, 2009, Amanda McIver was transporting children in the City of Spokane for the Parks and Recreation Department. As Ms. McIver drove the van, she was forced to stop suddenly to avoid a child walking into the street. Her van was then rear ended by a second van driven by another City employee of the Parks and Recreation Department, Alex Aragon. (CP 86-109) The children transported in the vans sustained injury in part because they were not seated in children booster seats required by the Revised Code of Washington and the Spokane Municipal Code. (CP 86-109; CP 242-262)

Ms. Kimbre Vega, Mike Aho, and other City employees arriving on the accident scene told Spokane Police that they were “uncertain” why the proper booster seats were not used as required by the Revised Code of Washington and the Spokane Municipal Code. The truth was that the City

of Spokane failed to provide the proper equipment to comply with the child restraint law. (CP 242-262) Due to these statements, Amanda McIver received a traffic infraction for failing to use the required safety equipment in transporting the children. (CP 86-109; CP 242-262)

Ms. Kimbre Vega, a City of Spokane, Parks and Recreation Department, and Northeast Youth Center employee, arrived on the accident scene before the police. Ms. Vega instructed Ms. McIver to lie to the Spokane police regarding the availability and use of the safety equipment in telling the police that the safety equipment was available for use in transporting the children. When Ms. Kimbre Vega, Mike Aho, and other Spokane City employees spoke with the Spokane Police and the news media, they incorrectly stated that the Spokane City provided proper safety equipment and they were “uncertain” why it was not used. (CP 86-109) The truth is that the City of Spokane had no program for booster seats and no booster seat gear for use prior to this accident. (CP 86-109; CP 242-262) As a result of these statements, Ms. Amanda McIver was given a traffic infraction (CP 86-109; CP 242-262) and wrongfully subjected to public ridicule, humiliation, and community ridicule because of the false statements of Spokane City Parks and Recreation employees. (CP 86-109)

When Ms. McIver refused to violate the law by obstructing law enforcement and lying to the police, she was retaliated against by supervising employees. She was removed from her position and suffered financial loss due to her refusal to misrepresent the facts to the police and obstruct law enforcement in the performance of their duties, a violation of both the Spokane Municipal Code and the Revised Code of Washington. (CP 242-262)

Ms. McIver had prior to the accident requested proper safety equipment to transport the children in her care. (CP 86-109) Mike Aho and Kimbre Vega failed or refused to provide the proper safety equipment. The City of Spokane failed to adequately fund the program to ensure that the safety equipment was available. The false statements of Kimbre Vega and Mike Aho led to the citing of Amanda McIver for law violations and public ridicule for violating the Revised Code of Washington and the Spokane Municipal Code. (CP 242-262; CP 86-109) The misstatements by Kimbre Vega and Mike Aho were made to protect the City of Spokane from public ridicule, but directly led to the public ridicule of the employee of the City of Spokane, Amanda McIver. Kimbre Vega was advised of the ridicule that Amanda McIver was receiving. (CP 86-109) Leroy Eadie of the Spokane Parks and Recreation department in a February 9, 2010 statement acknowledged that, "We did not portray you as a competent

employee who had the children's safety as your number one concern." (CP 86-109) Kimbre Vega sent a letter regarding the accident to all of the parents but did not clarify the false statements made to the press regarding Ms. McIver and the availability of safety seats. (CP 86-109)

CR 12 allows for dismissal of causes of action as a matter of law. The motions are to be used to dispose of cases where material facts are not in dispute and judgment can be rendered by looking only at the pleadings. Under CR 12(b)(6), a complaint can be dismissed if it fails to state a claim upon which relief can be granted. Because a trial court's dismissal under this rule is a holding on a question of law, appellate review is de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984).

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) quoting Corrigan v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961, 577 P.2d 580 (1978). Under this rule, the plaintiffs' allegations are presumed to be true. Lawson v. State, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); Bowman v. John Doe, 104 Wn.2d 181, 183, 704 P.2d 140 (1985). Moreover, a court may consider hypothetical facts not part of the formal record. Halvorson v. Dahl, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978). Therefore, a complaint

survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery. Lawson, at 448; Bowman, at 183

As a practical matter, a complaint is likely to be dismissed under CR 12(b)(6) “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” 5 C. Wright & A. Miller, *Federal Practice* § 1357, at 604 (1969) For the foregoing reasons, CR 12(b)(6) motions should be granted “sparingly and with care.” Orwick, at 254, quoting 27 *Federal Procedure Pleadings and Motions* § 62:465 (1984)

Here, the standard of review on summary judgment rulings are reviewed de novo. Seybold v. Neu, 105 Wn.App 666, 675, 19 P.3d 1068 (2001). When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. Kahn v. Salerno, 90 Wn.App 110, 117, 951 P.2d 321 (1998). Summary judgment is appropriate if the record before the court shows there is no genuine issue as to one material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Ruff v. County of King, 125 Wn. 2d 697, 703, 887 P.2d 886 (1995).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See LaPlante

v. State, 85 Wn. 2d 154, 158, 531, P.2d 299 (1975). If at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial, then the trial court should grant the motion.

Celotex Corp v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265.

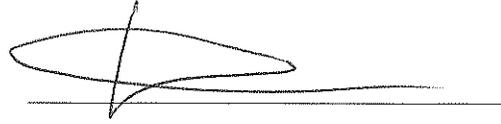
Here, the trial court failed to consider the fact that the government was estopped from arguing that they had proper child seats by their position in the prior proceedings. Further, in looking at the many affidavits provided in this matter, there was a material question of fact about the City of Spokane failing to provide proper equipment and training. Additionally, the plaintiff presented adequate evidence as to her other claims to avoid summary judgment.

V. CONCLUSION

The trial court erred in dismissing Ms. McIver's claims. The root of this error was its refusal to estop the City from changing positions between two cases. Properly applied, the doctrine of judicial estoppel would foreclose dismissal of Ms. McIver's claims. Further, the trial court incorrectly applied the standard of summary judgment and of the 12(b)(6). This court should properly reinstate the plaintiffs' claims and remand to

the trial court for trial.

Respectfully submitted this 20 day of June, 2013

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**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 Appellants' Brief, on June 20, 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 Appellants' Brief on June 20, 2013.

OFFICE OF THE CITY ATTORNEY
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 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 20 day of June, 2013


TRAVIS SPANNAGEL