

FILED

DEC 12 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 328309

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

In the Matter of

CLUB LEVEL, INC., and RYAN FILA

CLUB LEVEL, INC., and RYAN FILA, a single man,

Plaintiffs - Appellants,

v.

CITY OF WENATCHEE, et al.,

Defendants - Respondents

BRIEF OF APPELLANT

Rodney R. Moody, WSBA # 17416
Mark G. Olson, WSBA # 17846
Attorney for Appellants Club
Level, Inc., and Ryan Fila.

Law Office of Rodney R. Moody
2825 Colby Ave., Ste. 302
Everett, WA 98201
(425) 388-5516

Law Office of Mark G. Olson
P.O. Box 836
Everett, WA 98206
(425) 388-5516

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

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR Pages 5

II. STATEMENT OF THE CASE Pages 6-25

 WSLCB/WPD Communication Pages 6-9

 Location of Strategic Interest (LSI) Pages 9-11

 AVN Standard Pages 11-13

 Relocation Pages 13-15

 WPD Timeline Pages 15-17

 Good Neighbor Agreement Pages 17-18

 Factual Documentation Pages 18-19

 Cooperation Pages 19-20

 WPD Policy Pages 20-23

 Silvestre Association/Fila Pages 23

 Police Presence Impact Pages 23-24

 Silvestre Personnel File Pages 24-25

III. COLLATERAL ESTOPPEL Pages 25-30

IV. CIVIL CONSPIRACY Pages 30-33

V. NEGLIGENT SUPERVISION Pages 33-38

VI. DEFAMATION OF CHARACTER Pages 38-41

VII. FALSE LIGHT Pages 41-44

VIII. NEGLIGENT INFLICTION Pages 44-47

IX. TORTIOUS INTERFERENCE Pages 47-49

X. CONCLUSION Pages 49-50

1 **TABLE OF CASES**

2 Bender v. City of Seattle, 99 Wn.2d 582, 601, 664 P.2d 492 (1983); Pg. 39

3 Commodore v. University Mechanical Contractors, Inc., 120 Wn.2d 120,
4 137, 839 P.2d 314 (1992). Pg. 48

5 Corbally v. Kennewick School District, 94 Wn.App. 736, 741; 973 P.2d
6 1074 (1999); Pg. 39

7 Cox v. Roskelly, 359 F.3d 1105, 1112 (9th Cir. 2004); Pg. 40

8 Cummins v. Lewis County, 156 Wn.2d 844, 853, 133 P.3d 458 (2006);
9 Pg. 33

10 Dever v. Fowler, 63 Wn.App. 35, 44, 816 P.2d 1237 (1991); Pg. 35, 36, 50

11 Dunlap v. Wayne, 105 Wn.2d 259, 540, 716 P.2d 842 (1986); Pg. 39

12 Eastwood v. Cascade Broadcasting Company, 106 Wn.2d 466, 470, 471;
13 722 P.2d 1295, 1297 (1986); Pg. 41

14 Elder v. New York & Pennsylvania Motor Express, Inc., 284 N.Y. 350, 31
15 N.E.2d 188, 189, 133 A.L.R. 176; Pg. 29

16 Gilliam v. Department of Social and Health Services, Childcare Protective
17 Services, 89 Wn.App. 569, 584-585, 950 P.2d 20 (1998); Pg. 36, 37, 38

18 Gold Seal Chinchillas, Inc. v. State of Washington, 69 Wn.2d 828, 835;
19 420 P.2d 698, 702 (1966); Pg. 40

20 Harrington v. David D. Hawthorne, CPA, PS, 111 Wn.App. 824, 840- 47
22 P.3d 567 (2002); Pg. 30

23 Herron v. KING Broadcasting Co., 112 Wn.2d 762, 768-69, 776 P.2d 98
24 (1989); Pg. 31

25 Hunsley v. Giard, 87 Wn.2d 424, 436, 553 P.2d 1096 (1976); Pg. 45
26
27

1 Keates v. City of Vancouver, 73 Wn.App. 257, 869 P.2d 88 (1994); Pg.
2 35, 36, 46, 47, 50
3 LaPlant v. Snohomish County, 162 Wn.App 476, 271 P.3d 254 (2011);
4 Pg. 37, 38, 45
5 Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 759 (1995); Pg.
6 28, 29
7 Moe v. Wise, 97 Wn.App. 950, 957 989, P.2d 1148, 1154 (1997); Pg. 39
8 Niece v. Bellevue Group Home, 131 Wn.2d 39, 48-49, 929 P.2d 420
9 (1997); Pg. 36, 37
10 Owens v. Kuro, 56 Wn.2d 564, 568, 354 P.2d 696 (1960); Pg. 26, 28, 29,
11 30
12 Regal v. McLachlan, 163 Wn.App.171, 181, 257 P.3d 1122 (2011); Pg. 27
13 Rodriguez v. Perez, 99 Wn.App. 439, (2000); Pg. 36
14 Sterling Business Forms, Inc. v. Thorpe, 82 Wn.App. 446, 451, 918 P.2d
15 531 (1996); Pg. 31
16 Tasket v. King Broadcasting Company, 86 Wn.2d 439, 445, 546 P.2d 81
17 (1996); Pg. 39
18 Tubar, III, v. Clift, No. C-05-1154-JCC, 2008WL5142932 (W. D.
19 Washington. December 5, 2008); Pg. 37, 38
20 Ullery v. Fulleton, 162 Wn.App. 596, 602, 256 P.3d 596 (2011); Pg. 27
22 Wilson v. State, 84 Wn.App. 332,350-351, 929 P.2d 448 (1996); Pg. 30
23 Young v. Key Pharmaceuticals, Inc., 112 W.2d 216, 234, 770 P.2d 182
24 (1989); Pg. 45, 46
25
26
27

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

I. ASSIGNMENTS OF ERROR

1. Collateral estoppel has been incorrectly applied to support the granting of summary judgment on the civil conspiracy claim.
2. The granting of summary judgment was error when sufficient evidence of an unlawful conspiracy been demonstrated to satisfy the summary judgment standard.
3. The claim for negligent supervision was not duplicative and the granting of summary judgment was error when no claim of negligence against the individual officers was asserted.
4. Defamation of character has been demonstrated to satisfy the standard on a motion for summary judgment when defamatory evidence placed in a personal file was released to the media.
5. It was error to dismiss on summary judgment the claim of false light when sufficient evidence was presented to satisfy the standard on a motion for summary judgment.
6. Legal error occurred when the negligent infliction of emotional distress was dismissed based on an argument that police officers who were not engaged in a criminal investigation enjoy immunity because they are not reachable on a negligence claim.
7. Sufficient evidence of tortious interference with a business was presented to satisfy the standard for summary judgment.

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

II. STATEMENT OF THE CASE

The Appellant filed this Complaint alleging initially seven causes of action. CP 1-27. These causes of action were argued on a motion for summary judgment. CP 50-70. On September 17, 2014, Judge Lesley A. Allan granted summary judgment on all causes of action. CP 1061.

The following facts support the seven causes of action on appeal.

WSLCB/WPD Communication

On November 16, 2010, Ryan Fila (hereafter "Fila") met with Chief Robbins, Capt. Dresker, and Officer Murphy of the Washington State Liquor Control Board (WSLCB). CP 1016. A second meeting involving all of these same individuals with the addition of Sgt. Huson occurred on March 24, 2011. CP 1018. Both of these meetings were initiated by Fila in a proactive step on his part to foster a positive relationship between him and the two law enforcement agencies with which he had to deal on a daily basis to successfully maintain his business. CP 1016. On January 2, 2011, Officer Drolet of the Wenatchee Police Department (WPD) forwarded an e-mail to Officer Murphy requesting that either he or Sgt. Stensatter come to a shift meeting to discuss clarification of RCW 66.44.200. CP 766-768. Officer Drolet was looking for ways to impact the business of Club Level. He specifically stated, "Basically, we are brainstorming how to help Club Level/Volcano from

1 sucking up immense amounts of our time." "I figure a few expensive
2 tickets will slow things down." CP 766-768. Officer Murphy responded
3 stating that he would like to come down and help, and suggested an
4 alternative date and time. CP 766-768. Officer Murphy provided a copy
5 of his Interview Notes including Fila's personal financial information to
6 Sgt. Stensatter on March 30, 2011. CP 816-820. Fila objected to this after
7 he became aware that this information had been shared. CP 1018. On
8 April 21, 2011, Officer Murphy communicated with Officer Miller of the
9 WPD forwarding an e-mail in which he wrote, "I will continue to monitor
10 the location and we have UC in the future that I will attempt to find
11 violations." CP 769-770. Another undated e-mail was obtained in public
12 disclosure in which Officer Matney of the WPD forwarded an e-mail to
13 Officer Murphy. CP 764-765. Sgt. Stensatter purportedly told Officer
14 Matney that the WSLCB was interested in enforcement at Club Level. He
15 stated "let me or Capt. Dresker know if there's anything we can do to help
16 out." Further, "we will be happy to do anything we can to assist in
17 enforcement." CP 764-765. During his Deposition Officer Murphy
18 acknowledged receiving the "few expensive tickets" e-mail from Officer
19 Drolet. CP 690. He recalled having conversations with other officers at
20 the WPD to discuss in general terms how to assist them with doing their
21 job. CP 691. He also acknowledged having discussions with officers
22
23
24
25
26
27

1 from the WPD regarding "walk-throughs and premises checks". CP 692.
2 Officer Murphy also acknowledged having conversations with Capt.
3 Dresker specifically about Club Level. CP 693. Sgt. Stensatter has also
4 had discussions with the WPD administration concerning Club Level.
5 During his Deposition Sgt. Stensatter acknowledged discussing Club
6 Level specifically with Chief Robbins. CP 704. He specifically recalled
7 discussing Club Level with Capt. Dresker. CP 704. Sgt. Stensatter
8 testified that he requested from the WPD administration that they forward
9 their police reports "to me and we would follow them -- investigate them
10 as complaints and follow up on them." CP 705. Capt. Dresker has also
11 drafted communications regarding Club Level. On February 28, 2011,
12 Capt. Dresker forwarded an e-mail to four officers of the WPD, including
13 Sgt. Cheri Smith. CP 916-917. Dresker testified that he has had
14 communications with Officers Murphy and Knowles as well as Sgt.
15 Spencer during the period of time that he has been a captain. CP 713.
16 Capt. Dresker acknowledged the forwarding of at least three police reports
17 directly by him to the WSLCB office including reports 11W1A268,
18 11W11958, and 12W00010. CP 716. In this e-mail he specifically stated
19 **"it's my opinion that if these problems can't be solved, we (WPD)**
20 **need to work more proactively on our own solutions, up to and**
21 **including pressing for Liquor Control to shut the business down."**
22
23
24
25
26
27

1 (emphasis added) This same e-mail was forwarded on March 1, 2011, to
2 many other officers of the WPD including Sgt. Huson. CP 918-919. Sgt.
3 Huson testified that he had not taken classes regarding where a police
4 officer could legally go in a liquor establishment. CP 727. His testimony
5 was that Ofc. Murphy informed him that as a police officer he could enter
6 a liquor establishment, do a walk-through, and enter into anywhere within
7 the location that employees and patrons have access. CP 727.
8

9 **Location of Strategic Interest (LSI)**

10 On March 9, 2011, Officer Murphy communicated with Lt. Kevin
11 Starkey, his immediate supervisor, requesting that El Volcan (Club Level)
12 be designated as an LSI. CP 751-752. This designation was placed into
13 effect on April 1, 2011 by Lt. Starkey. CP 753-754. In an Issue Paper
14 prepared by the WSLCB an LSI was described as a small percentage of
15 licensees which create a disproportional threat to the health and safety of
16 communities throughout the state. CP 734-736. This Issue Paper went on
17 to state "These licensees make a conscious choice to operate their
18 premises in a manner that drains the safety resources of the communities,
19 requires an inordinate amount of attention from regulatory agencies
20 diminishes the quality of life in the adjacent areas and represents a
21 physical threat to patrons and people living adjacent to the location." "The
22 lack of adequate control results in other crimes such as driving under the
23
24
25
26
27

1 influence, assault and disorderly conduct that spiral out into the
2 surrounding communities and highways." CP 734-736.

3 Lt. Starkey testified that the designation of an LSI is specifically
4 driven by the police reports being received from local agencies. CP 699.
5 Lt. Starkey was asked why there had not been a single Administrative
6 Violation Notice (AVN) issued regarding over service at Club Level if
7 there were so many complaints regarding this issue. He testified "Because
8 the officers didn't observe any violations." CP 699. Sgt. Stensatter was
9 also questioned regarding the language described above within the Issue
10 Paper and asked if he could point to any factual information demonstrating
11 that the Plaintiff was making a conscious choice to operate Club Level
12 during the relevant time period in a manner that would be consistent with
13 this statement. He replied, "No, I can't." CP 708.

16 During the time Club Level has been in operation there has not
17 been one sustained AVN issued against this business. The reports
18 regarding the LSI designation of Club Level are attached as CP 757-763.
19 The Plan of Action included "The Wenatchee Office will work with the
20 Wenatchee Police Department on emphasis patrols at the premises."
22 Further, the Wenatchee Office will conduct an undercover operation at the
23 premises to observe normal operations." CP 757-763.
24
25
26
27

1 Lt. Starkey testified that when an establishment is designated as an
2 LSI the owner is notified of this designation and offered education and
3 counseling. CP 698. He testified that the officer assigned to monitor the
4 location would notify the owner without exception. CP 698. Neither the
5 Plaintiff nor Art Rodriguez were notified that Club Level or El Volcan
6 were designated an LSI. CP 1019. CP 1033.

8 AVN Standard

9 Sgt. Stensatter assumed supervision of the geographic area within
10 which Club Level is located in August 2011. This is when he first met the
11 Plaintiff to the best of his recollection. CP 703. At this time he was aware
12 Club Level had received complaints, but that was the extent of his
13 knowledge. CP 703. On August 14, 2011, an individual under 21 years of
14 age was located inside Club Level in a restricted area by Sgt. Smith of the
15 WPD. Sgt. Stensatter issued an AVN to Club Level on August 23, 2011,
16 pursuant to RCW 66.44.310(1)(b). CP 737-738. Lt. Starkey testified that
17 he reviewed this AVN prior to its being issued and approved the AVN.
18 CP 698. Ultimately he agreed that (1)(b) was the wrong citation because
19 the AVN was issued to the business establishment, not the minor. CP 705.

22 Sgt. Stensatter acknowledged that he did not interview Mr. Fila
23 regarding the question of whether he had actual or constructive knowledge
24 that a minor was on the premises. CP 705. Sgt. Stensatter during his
25
26
27

1 investigation did interview the minor in question as well as Josh Lowell,
2 the individual who had called Rivercom (police dispatch agency)
3 informing them that there was a minor inside Club Level. CP 682.

4 Sgt. Stensatter did not make any effort to interview any staff
5 member at Club Level. CP 679. When asked why he would he not be
6 interested in interviewing Fila regarding his knowledge of a minor inside
7 Club Level, Sgt. Stensatter testified that he had no interest because he had
8 no reason to believe that the reporting party would lie about the presence
9 of a minor and Mr. Fila's alleged indifference but he did have "every
10 reason to believe that Ryan might lie because he is looking at a licensee of
11 the business that would want to avoid a violation." "The minor had no
12 reason to lie." CP 706. Sgt. Stensatter himself is a Field Training Officer
13 for the WSLCB. CP 703.

16 This AVN proceeded to a contested hearing on June 7, 2012,
17 before ALJ Mark Kim. During his testimony Sgt. Stensatter testified
18 about all that was required to issue the AVN is that a minor be located
19 within a restricted area. CP 704. ALJ Kim specifically asked Sgt.
20 Stensatter "why did you not ask Mr. Fila about prior knowledge of this
22 minor in his establishment?" CP 681. Sgt. Stensatter replied, "because
23 prior knowledge was irrelevant." CP 681. "The minor had been located
24 on restricted premises and was cited." CP 681. Later during the testimony
25

1 ALJ Kim asked; "It sounds like to me like efforts by the licensee to try to
2 remove a minor from the premises doesn't alleviate liability on the statute,
3 is what you're saying." CP 682. Sgt. Stensatter replied, "that could be
4 what - what we would consider a mitigating factor, but the violation would
5 still have occurred." CP 682. The AVN was subsequently dismissed by
6 ALJ Kim. CP 963-971.
7

8 Lt. Starkey during his Deposition was asked if the mere fact a
9 minor is on the premises in and of itself is not the only factor for
10 consideration. He was asked this question and replied, "Yes." CP 697.
11 Ultimately this AVN was dismissed by a Final Order of the Board dated
12 August 28, 2012. CP 739-742. On August 29, 2012, Sgt. Stensatter
13 issued a second AVN to Club Level for "inadequate lighting." CP 743-
14 746.
15

16 **Relocation**

17 During the summer of 2012, Fila made the business Decision to
18 relocate Club Level to another location within the City of Wenatchee. CP
19 1022. Fila discussed this with Sgt. Stensatter during a discussion inside
20 Club Level. CP 1024. Prior to this pursuant to RCW 4.92.100 Fila
22 through Counsel had served notice on the WSLCB of his intention to file a
23 lawsuit regarding the conduct of the officers in the Wenatchee area. CP
24 972-976. Sgt. Stensatter told Fila that if he was not named in the lawsuit
25
26
27

1 he could assist Fila with making sure that the obtaining of a new license
2 would be "fast, smooth and easy." CP 1022. If he was named in the
3 lawsuit, however, he would not be able to assist and it would be more than
4 90 days for Fila to obtain the new license. CP 1022. Fila proceeded with
5 his plans to relocate Club Level and started the licensing process. CP
6 1025.
7

8 The Final Order of the Board dismissing the first AVN was signed
9 on August 28, 2012. CP 739-742. On August 29, about four days after
10 the alleged failure of Club Level to turn up the lighting, Sgt. Stensatter
11 issued the second AVN for inadequate lighting. CP 743-746. During his
12 Deposition Sgt. Stensatter testified that during his years of employment
13 with the WSLCB this is the only citation he has issued for inadequate
14 lighting. CP 706. On August 30, 2012, Sgt. Stensatter called Elizabeth
15 Lehman who is a customer service representative for WSLCB to notify
16 her that Club Level had been given a violation the previous Friday while
17 the club was operating under a temporary permit. CP 747-750. Ms.
18 Lehman sent an e-mail at 8:00 AM to Sherry Carpenter, who is a
19 subordinate of Eddie Cantu in the licensing division of the WSLCB. Ms.
20 Lehman informed Ms. Carpenter that Sgt. Stensatter wanted to know what
21 could be done to "pull the TPP." He also cited to WAC 314-07-060 (4) as
22 the authority for revoking the temporary permit. CP 747-750. WAC 314-
23
24
25
26
27

1 07-060 addresses the "reasons for denial or cancellation of a temporary
2 license." WAC 314-07-060(4) indicates that it is a basis for cancellation
3 or revocation of a temporary license if the applicant commits a violation
4 while operating under a temporary license. This regulation also states that
5 "refusal by the board to issue or extend a temporary license shall not
6 entitle the applicant to request a hearing." Ultimately the director of
7 licensing, Alan Rathbun, made the determination not to revoke the
8 temporary license because there was no safety violation involved with
9 inadequate lighting. CP 695.
10

11 **WPD Timeline**

12 On September 16, 2011, three separate minor females were
13 stopped by security for Club Level as they were attempting to gain entry
14 into the Club. Two of these young women were together initially and a
15 third was stopped shortly thereafter. She was with her friend in the
16 Ballroom area after having been stopped by security waiting for officers of
17 the WPD to arrive and issue them a citation. CP 958. Sgt. Huson and
18 Officer Kissel of the WPD arrived to address this unlawful behavior.
19 Officer Kissel began to issue a citation to the two young women when
20 their actions were recorded by employees for Club Level on a video
21 camera. Sgt. Huson indicated that they would not be issuing a citation
22 because of this and stopped Officer Kissel from writing the citation. Sgt.
23
24
25
26
27

1 Huson and Officer Kissel escorted the two young women who had by then
2 been joined by the third minor out of the building. The two women were
3 released outside the building and no citation was issued. CP 958.

4 Sgt. Huson testified during his Deposition, "The two females we
5 were processing and writing tickets to, we advised them that they would
6 be cited by mail." CP 728. The minor in question stated under oath that
7 while the officers were writing them a ticket they seemed to receive
8 another call, escorted them outside and told us "we were free to go, no
9 tickets were issued." She further stated she received a ticket in the mail 3-
10 4 weeks later and was surprised. "I was not aware that I was receiving any
11 kind of citation for this until I received one in the mail." CP 958. On
12 September 22, 2011, notification was served on the City of Wenatchee
13 pursuant to RCW 4.96.020 of the Plaintiff intention to file a lawsuit
14 against the City. CP 972-976. Section 15 of this letter points to the fact
15 that Officers of the WPD were selectively engaging in enforcement
16 behavior including the fact that these minors were stopped at the door by
17 security staff and then released by Sgt. Huson without being issued a
18 citation. CP 972-976.

19 Subsequent to receipt of this notification letter by the City, Officer
20 Kissel did in fact issue a citation to the two minors in question on
21
22
23
24
25
26
27

1 September 30, 2011. The citation issued was for a violation of “RCW
2 66.44.310 (c)”, use of a fraudulent ID. CP 952-953.

3 **Good Neighbor Agreement**

4 Following receipt of an e-mail from Sgt. Stensatter dated April 25,
5 2012, informing him that alcohol could no longer be served in the
6 Ballroom Art Rodriguez forwarded this e-mail to the Plaintiff. CP 984-
7 986. This Decision required a last-minute scramble to obtain a special use
8 permit and the near cancellation of a charitable event to benefit Breast
9 Cancer Awareness in the Wenatchee area. As a result the Plaintiff and
10 Mr. Rodriguez made the Decision to form Ballroom, LLC, and acquire a
11 liquor license together for the third-floor area and its joint use. When the
12 WSLCB communicated the fact that this license had been applied for to
13 the City, the response of the City was to draft a Community Good
14 Neighbor Agreement (GNA).
15
16

17 The City expressed clear desire to have the Plaintiff and Mr.
18 Rodriguez agree to this as a condition of obtaining a license. CP 907-913.
19 Communications occurred between Capt. Dresker and Sgt. Stensatter
20 regarding this GNA. Capt. Dresker in an e-mail dated June 7, 2012, to
21 Sgt. Stensatter stated "I think having any nightclub enter into this type of
22 agreement and maybe making their liquor licensing have this as a
23 condition, would be the way to go for the various reasons stated in the
24
25
26
27

1 agreement." CP 902-903. Capt. Dresker communicated with Chief
2 Robbins regarding this GNA on July 2, 2012. CP 914-915. Within this e-
3 mail Capt. Dresker acknowledges that Danielle Marchant, an Assistant
4 City Attorney, drafted the original agreement; "I just modified it a little for
5 Club L." CP 914-915.
6

7 **Factual Documentation**

8 Litigation is ongoing both in this case and against the Washington
9 State Liquor Control Board. From discovery obtained in both of these
10 lawsuits it is now known that between August 2010 and August 2012, 26
11 police reports were forwarded from the WPD to the WSLCB regarding
12 Club Level. CP 1040-1042. During this same time frame at other night
13 clubs in the Wenatchee area including Fuel, Hurricane, and Wally's a total
14 of four reports combined were forwarded to WSLCB from WPD. Of the
15 26 complaints investigated by WSLCB regarding Club Level during this
16 time frame 24 of them were "unfounded." There were two written
17 warnings issued out of these 26 complaints. CP 1040-1042. CP 1054-
18 1055 is a breakdown correlating back to significant events taken by Fila
19 and the resulting conduct of the officers of the WPD. This exhibit shows
20 that each time Fila took some type of action such as filing a complaint
21 with the mayor's office on May 17, 2011, or for example providing notice
22 of intent to file this lawsuit on September 17, 2011, against the City there
23
24
25
26
27

1 was a corresponding spike that occurred in the number of walk-throughs
2 conducted at Club Level. CP 1054-1055.

3 **Cooperation**

4 During his testimony regarding the Interest Paper identified
5 previously Lt. Starkey was asked whether Club Level had been
6 cooperative with his agency. Lt. Starkey testified "[t]he level of
7 cooperation has been acceptable." CP 700. Sgt. Stensatter testified that he
8 personally requested that Club Level no longer be designated as an LSI.
9 When asked why Sgt. Stensatter testified, "[b]ecause we had not had any
10 violations in spite of all the complaints." "It had been going on for almost
11 two years." CP 711.

12
13 CP 920-928 reflects various Instant Message communications of
14 various officers of the WPD regarding Club Level obtained in public
15 disclosure requests. These demonstrate a dislike for Club Level including
16 the comment "I hate Level." CP 920-928. Lt. Starkey testified that the
17 mere fact a minor is on the premises is not in and of itself the only factor
18 for consideration. CP 697. Lt. Starkey was further asked whether officers
19 are trained that to satisfy the requirement of "allowed to remain" under
20 RCW 66.44.310 (1)(a) the bartender must have some knowledge that there
21 is a minor on the premises. Lt. Starkey answered this question "Generally,
22 yes." CP 697. Defendant Kohler was asked, "I assume that you do not
23
24
25
26
27

1 want your officers testifying under oath at administrative violation
2 hearings to a wrong legal standard; is that a fair assumption?" Defendant
3 Kohler testified, "Yes." CP 687.

4 A Formal Complaint that was mailed to Defendant Kohler
5 regarding the actions of Sgt. Stensatter which clearly put Defendant
6 Kohler on notice of the unconstitutional behavior of Sgt. Stensatter.
7 Defendant Kohler acknowledged that the allegations against Sgt.
8 Stensatter were "very strong allegations." CP 686. She also testified "We
9 did not look into any of the issues." "Since the tort claim was filed
10 everything was placed on hold." CP 688. Defendant Kohler further
11 testified because the tort notification had been served upon the Department
12 pursuant to RCW 4.92, "we held onto everything and did not -- and did
13 not start a formal investigation because of the legal issues." CP 686.

16 **WPD Policy**

17 Capt. Dresker testified that during his employment with the WPD
18 he had experienced a similar problem to what he perceived occurring at
19 Club Level. This was at a nightclub called the Keen Spot. CP 714. His
20 response as an officer was to conduct a lot of walk-throughs because of
21 the problems he perceived occurring at that location. CP 714. Capt.
22 Dresker testified during his Deposition that particular officers specialize in
23
24
25
26
27

1 particular areas that they perceive to be a need, including officers who like
2 to work bar checks. CP 718.

3 Capt. Dresker also testified the walk-throughs conducted at Club
4 Level were from his perspective conducted in an attempt to try and curtail
5 activity at that location. CP 717. Capt. Dresker testified regarding
6 parking in the area across from Club Level that this would not be unusual
7 for officers to park in the area if they were concerned about the activity at
8 a certain location. CP 722.

10 Sgt. Huson acknowledged that as a patrol sergeant he has the
11 authority to decide when his patrol is going to conduct a walk-through of a
12 liquor establishment. CP 733. Sgt. Huson testified during his Deposition
13 regarding his policy of conducting walk-throughs. He stated, "I believe in
14 walk-throughs." "Walk-throughs have their purpose." "And so it is
15 standard operating procedure on my shift for walk-throughs to be done."
16 "Bar checks is really what they are called." "So we do a bar check and do
17 a walk-through on a continuous basis." "And that is almost policy for
18 me." CP 733.

20 Sgt. Huson testified during his Deposition regarding an incident
22 that occurred on March 28, 2012, where a group of individuals who
23 perform as impersonators called Levelers were performing at Club Level.
24 Fila was leaving this cordoned off area when Sgt. Huson, who had come
25

26
27

1 into Club Level, approached him from behind. Fila told him specifically
2 that this was a secure area and he was not permitted to come back into this
3 area. As Sgt. Huson reached for the privacy screen, Fila reached for the
4 screen also and clearly told him there were performers in the area who
5 were undressed and he could not go into this area. CP 1028. Sgt. Huson
6 was asked during his Deposition if he recalled this incident. Sgt. Huson
7 testified "Well, I know about it in the sense that a complaint was lodged
8 against me when I went back there." CP 730. Sgt. Huson testified he then
9 told Fila "You need to step back. And I extended my arm, you know, to
10 show him how far he needed to be back. And he stepped back from me."
11 CP 729. He then walked past Fila's outstretched arm, opened the privacy
12 screen, and walked into the cordoned off area where the performers were
13 dressing. Officer Kissel and a third individual in civilian clothes were with
14 Sergeant Huson and they also walked into this cordoned off area. CP
15 1028.

16
17
18 Sgt. Huson was asked during his Deposition why he allowed this
19 civilian ride-along into the club and restricted area with him. He testified
20 "Mr. Long was a ride-along. And I don't restrict my people from getting
21 out of the car and doing walk-alongs when we enter bars." CP 731. Sgt.
22 Huson was then asked "So your understanding, if an area of a bar is
23
24
25
26
27

1 restricted and not open to the public, not open to patrons, can you or can
2 you not go into that area?" Sgt. Huson answered "I can." CP 731.

3 **Silvestre Association/Fila**

4 Stepayne Silvestre stated in her Declaration that the ongoing
5 harassment of her personal friend Ryan Fila by the WPD and the ongoing
6 harassment of herself personally because of her relationship with Mr. Fila
7 led to her decision to resign from the WPD in October 2012. CP 1036.
8 Ms. Silvestre testified that Capt. Dresker on March 24, 2011 asked, "[a]re
9 you still with Ryan?" He then went on to state that "Ryan is the beginning
10 and end of all your problems." CP 1036.

11
12 During his Deposition Capt. Dresker was asked whether he had
13 made a comment to then Sgt. Silvestre that Ryan was the beginning and
14 end of her problems. Capt. Dresker replied, "I did tell her that her
15 problems that appear to be occurring with her career appeared to start or
16 could be traced back to the time when she started hanging out at Club
17 Level with Ryan Fila and that that was -- there appeared to be some
18 connection there." CP 721.

19
20 **Police Presence Impact**

21
22 Capt. Dresker during his Deposition stated that the practice of a
23 police officer being present inside a liquor establishment tends to dissuade
24 people from having issues. He felt that this works for both the bar and the
25
26
27

1 patrons. CP 719. Several questions later this was followed up with asking
2 him whether police presence had any effect or impact upon the patron's
3 desirability of consuming alcohol in the presence of law enforcement. He
4 testified "No." "Not if they are legally in that establishment doing what
5 they are legally able to do, no." CP 719. Sgt. Huson testified during his
6 Deposition that when he chose to arrest one of the security officers under a
7 warrant he did so outside of Club Level, "Because we did not want to have
8 a spectacle inside -- we did not want to cause a scene inside of Club
9 Level." "So we figured it would have less impact on that." CP 732.

11 **Silvestre Personnel File**

12 Capt. Dresker acknowledged he was aware that placing a
13 document inside a police officer's personnel file was discoverable if
14 somebody does a public records request to obtain a copy of the file. CP
15 720. Capt. Dresker was asked what level of investigation was required
16 before placing negative information into a personal file which he knows is
17 susceptible to being obtained by the public. He replied, "I think anything
18 we do as part of our internal investigation for -- in this case for Sgt.
19 Silvestre, and the specific circumstances surrounding that, are part of that
20 case file. And whether we like it or not, we are going into that personnel
21 file, I assume." CP 723-724.
22
23
24
25
26
27

1 The Trial Court's reasoning is flawed because the final
2 judgment applied as collateral estoppel was unilateral to the Plaintiff
3 and not mutual as to both parties. The Court in Owens v. Kuro, 56
4 Wn.2d 564, 568, 354 P.2d 696 (1960), stated:

5
6 It is a rule that estoppels must be mutual; and therefore a
7 party will not be concluded, against his contention, by a
8 former judgment, unless he could have used it as a
9 protection, or as the foundation of a claim, had the
10 judgment been the other way; and conversely no party 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. (Emphasis added)

11 Despite this unequivocal language the City attempts to use the
12 granting of summary judgment on the civil conspiracy claim in favor of
13 the WSLCB in Thurston Court as estoppel in this cause of action even
14 though the City was not a party to that action. The City cannot claim that
15 they were prejudiced by this decision in Thurston County. The City was
16 not a party in that action and the decision granting summary judgment has
17 no effect on their interests. Similarly, had Judge Wickham denied summary
18 judgment on the civil conspiracy claim the Plaintiff would be unable to
19 use this decision to support for example a motion for partial summary
20 judgment on the liability question against an unrelated defendant. The
21 City would not have been in any way prejudiced by a contrary decision
22 and the Plaintiff would be unable to use a decision to support a claim in
23
24
25
26
27

1 Chelan County against an unrelated defendant; therefore collateral
2 estoppel is simply not available to preclude this cause of action moving
3 forward. The Trial Court's ruling to the contrary is legal error.

4 For collateral estoppel, or issue preclusion, to apply the element
5 of privity must exist. Regal v. McLachlan, 163 Wn.App. 171, 181, 257
6 P.3d 1122 (2011); Ullery v. Fulleton, 162 Wn.App. 596, 602, 256 P.3d
7 596 (2011). The four elements of issue preclusion include (1) the issue
8 decided in the earlier proceeding was identical to the issue presented in
9 the latter proceeding; (2) the earlier proceeding ended in a judgment on
10 the merits; (3) the party against whom issue preclusion is asserted was a
11 party to, or in privity with a party to, the earlier proceeding; and (4)
12 application of issue preclusion does not work and injustice on the party
13 against whom it is applied. Ullery, supra at 602. The court clearly
14 stated the rule that a court may apply issue preclusion only if all four
15 elements are met. Id. at 602-03.

16
17
18 The City is an entirely different defendant than the WSLCB and
19 no privity exists between them. Their respective interests while perhaps
20 similar are not identical. The first element fails because no privity exists
21 between the interests of the City and the WSLCB which clearly are not
22 identical.
23
24
25
26
27

1 Under this case law there is no credible argument that can be
2 made that the City of Wenatchee is in privity with the WSLCB. While
3 the City certainly was aware of the litigation taking place in Thurston
4 County, the City did not have any ability to control or influence that
5 litigation in any way. There is no agency or contractual relationship
6 between these two defendants.
7

8 Res judicata also does not apply. Res judicata was discussed at
9 some length in Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887
10 P.2d 759 (1995). The Court stated that res judicata refers to “the
11 preclusive effect of judgments, including the relitigation of claims and
12 issues that were litigated, or might have been litigated, in a prior
13 action.” Id. at 763. Res judicata is designed to “prevent relitigation of
14 already determined causes and curtail multiplicity of actions and
15 harassment in the courts.” Id. at 763. For the doctrine to apply “a prior
16 judgment must have a concurrence of identity with a subject matter in
17 (1) subject matter, (2) cause of action, *and* (3) persons and parties, and
18 (4) the quality of the persons for or against whom the claim is made.”
19 Id. at 763 (emphasis in original) Under the principles of res judicata
20 once again a judgment is only binding upon parties to the litigation and
21 persons in privity with those parties. Id. at 764.
22
23
24
25
26
27

1 The meaning of “privity” for res judicata purposes was
2 discussed in Owens v. Kuro, 56 Wn.2d 564, 354 P.2d 696 (1960), and
3 cited with approval in Loveridge, supra at 764. The Court quoted
4 Owens with approval:

5
6 Privity does not arise from the mere fact that persons as
7 litigants are interested in the same question or in proving
8 or disproving the same set of facts. Privity within the
9 meaning of the doctrine of res judicata is privity as it
10 exists in relation to the subject matter of the litigation,
11 and the rule is construed strictly to mean parties claiming
12 under the same title. It denotes mutual or successive
13 relationship to the same right or property.

14 Privity is establishing cases where a person is in actual
15 control of the litigation, or substantially participates in it
16 even though not in actual control. Mere awareness of
17 proceedings is not sufficient to place a person in privity
18 with a party to the prior proceeding.

19 Loveridge, supra at 764.

20 Loveridge involved a lawsuit including multiple individuals
21 injured in the same automobile accident. The Court made it clear that
22 res judicata did not apply because each individual had their own
23 separate cause of action. Addressing this point, the Court in Owens,
24 quoted Elder v. New York & Pennsylvania Motor Express, Inc., 284
25 N.Y. 350, 31 N.E.2d 188, 189, 133 A.L.R. 176, stating that this
26 quotation correctly stated the controlling rule of law:

27 If, as urged by respondent, we *** permit a reliance
upon a judgment as a res judicata, where identical issues

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

of liability upon a given set of facts are pur at issue in two successive suits, and where a full and complete trial of those issues has been had, and there are no circumstances of record in the second suit which might reasonably justify a court in reaching a result contrary to the prior decision, then it would seem that we would eliminate entirely the requirements of mutuality of estoppel and of privity. In so doing it is submitted that this would overturn fundamental conceptions and overrule authorities. ***

Owens, Supra at 569.

Granting summary judgment based on a determination that the order of Judge Wickham dismissing the conspiracy charge between this Plaintiff and the WSLCB collaterally estops this Plaintiff from moving forward with a conspiracy charge against the City, a party who has absolutely no privity with the WSLCB, is a manifest error of law unsupported by any authority and must be reversed.

CIVIL CONSPIRACY

Other than the argument of collateral estoppel the only legal theory advance to justify summary judgment was a claimed lack of evidence existing to support this claim. Overwhelming evidence of the collusion between these two agencies has been presented including the email of Capt. Dresker dated March 1, 2011, desiring to press the WSLCB to close Club Level. The granting of summary judgment was legal error.

1 In Washington the elements of civil conspiracy are: (1) two or
2 more people engaged in activity to accomplish an unlawful purpose or to
3 accomplish a lawful purpose by unlawful means; and (2) an agreement
4 among such people to accomplish the object of the conspiracy. Wilson v.
5 State, 84 Wn.App. 332, 350-351, 929 P.2d 448 (1996). A finding that a
6 conspiracy exists may be based on circumstantial evidence; however the
7 circumstances must be inconsistent with a lawful or honest purpose and
8 reasonably consistent only with the existence of the conspiracy.
9 Harrington v. David D. Hawthorne, CPA, PS, 111 Wn.App. 824, 840- 47
10 P.3d 567 (2002). Mere suspicion is insufficient ground upon which to
11 base a finding of conspiracy. *Id* at 840.

12
13 Notwithstanding the clear and convincing evidence standard
14 involved in civil conspiracy cases the evidence at issue on a motion for
15 summary judgment must still be construed in light most favorable to the
16 nonmoving party. Sterling Business Forms, Inc. v. Thorpe, 82 Wn.App.
17 446, 451, 918 P.2d 531 (1996). This Court cited to the holding in Herron
18 v. KING Broadcasting Co., 112 Wn.2d 762, 768-69, 776 P.2d 98 (1989),
19 wherein the Court stated:
20
21

22 While the issue turns on what the jury could find, and while the
23 court must keep in mind that the jury must base its Decision on
24 clear and convincing evidence, the evidence is still construed in the
25 light most favorable to the non-moving party and the motion is
26 denied if the jury could find in favor of the nonmoving party.
27

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

The factual evidence as outlined previously in this memorandum demonstrates a significant amount of both direct and circumstantial evidence which supports the finding that a conspiracy exists between the WPD and the WSLCB to force the closure of Club Level, even by the clear, cogent, and convincing standard applicable at trial.

Multiple parties have testified in various Depositions as well as demonstrated through the documentary evidence that continual communication existed between the WPD and the WSLCB officers regarding Club Level. Off. Drolet of the WPD sent an e-mail to Off. Murphy stating that it was his perception a "few expensive tickets" would slow things down at Club Level. CP 766-768. Capt. Dresker of the WPD sent an email to his subordinates stating his desire to be more proactive in his own methods of impacting Club Level's business up to and including **"pressing Liquor Control to close the business down."** CP 918-919. (emphasis added)

Lt. Starkey testified during his Deposition that the driving force behind the LSI designation was the reports forwarded from the WPD. CP 699. Twenty-six reports were forwarded to the WSLCB from WPD officers regarding Club Level during this relevant two year time frame. For every other bar located in Wenatchee combined there were a total of

1 four reports forwarded to the WSLCB. Of the 26 complaints regarding
2 Club Level all 26 were investigated and 24 were ultimately determined to
3 be "unfounded." Two written warnings were issued to Club Level.

4 Club Level was designated as an LSI almost immediately after its
5 creation which is directly contrary to the policy statement issued by the
6 WSLCB. CP 734-736. This evidence clearly demonstrates the desire of
7 the WPD to correlate their actions with the WSLCB to achieve the goal of
8 seeking the assistance of "Liquor Control to close the business down."

9
10 Additional evidence of this correlation between the WPD and the
11 WSLCB is the creation of the Good Neighbor Agreement. This document
12 would have allowed the City of Wenatchee to immediately suspend the
13 City business license without any provision for recourse if in the City's
14 sole perception Club Level were to violate any term of the GNA. CP 907-
15 913. As WSLCB employee Ms. Reid indicated, this GNA would give the
16 City something to which they could hold the applicant accountable. CP
17 902-903. This behavior by the WPD and officers of the WSLCB is
18 inconsistent with a lawful purpose and is reasonably consistent only with
19 the existence of a conspiracy to force the closure of Club Level. When
20 this evidence is viewed in the light most favorable to Fila a jury could find
21 the existence of an unlawful conspiracy even by a clear, cogent, and
22 convincing standard.
23
24
25
26
27

1 contact or privity between the public official and the injured plaintiff
2 which sets the letter apart from the general public; (2) there are express
3 assurances given by the public official; (3) which give rise to justifiable
4 reliance on the part of the plaintiff. Id at 854.

5
6 Fila had several direct meetings with the administration of the
7 WPD specifically to discuss his concerns regarding police activity and
8 clearly expressed his desire to be a good neighbor operating his business in
9 a manner which was positive for all parties concerned. The actions of the
10 officers of the WPD were specifically directed at Club Level and Fila, not
11 at a member of the public in general. The contacts between the officers of
12 the WPD, the administration of the WPD, and Fila were numerous. The
13 actions of the administration and officers of the WPD were specifically
14 directed at Fila and Club Level. This is not a situation in which this duty
15 was owed generally to the public; these interactions all involved the
16 individual and unique relationship between the administration and officers
17 of the WPD and Fila directly.

18
19 Defendants argue; "[i]n Washington, as a general rule law
20 enforcement activities are not reachable in negligence." As authority
22 for this statement the Defendants cite to Dever v. Fowler, 63 Wn.App.
23 35, 44, 816 P.2d 1237 (1991). Dever specifically dealt with a claim for
24 a negligent investigation and did not state this broad assertion. The
25
26
27

1 statement that as a general rule, law enforcement activities are not
2 reachable in negligence was made in Keates v. City of Vancouver, 73
3 Wn.App. 257, 869 P.2d 88 (1994), with citation to Dever. Keates is a
4 case which also dealt with a law enforcement investigation and the
5 interview of a plaintiff who subsequently alleged the infliction of
6 negligent infliction of emotional distress. The Court dismissed the
7 negligent infliction of emotional distress claim stating, "[w]e hold,
8 therefore, that police officers owe no duty to use reasonable care to
9 avoid inadvertent infliction of emotional distress on the subject of
10 criminal investigations." The Court went on to state, "[t]his does not
11 mean that plaintiffs may not obtain emotional distress damages as
12 compensation for the officers' breach of some other duty." *Id* at 269.
13
14

15 Both of these cases were addressing the concept of a negligence
16 claim for negligent investigation, a cause of action which does not exist
17 in Washington State. Similarly, in Rodriguez v. Perez, 99 Wn.App.
18 439, (2000), cited by the Defendants also addresses a cause of action
19 for negligent investigation. The holding in these cases does not extend
20 beyond the limited issue of negligent investigation and are clearly
21 distinguishable from the present facts.
22
23

24 The assertion that Dever, Keates, and Rodriguez stand for the
25 proposition that "law enforcement activities are not reachable in
26
27

1 negligence” is a mischaracterization of the holding of these cases. In
2 fact, as stated in the Keates Decision, police officers are potentially
3 liable for their negligent acts should they breach other duties.

4 When an employee causes injury by acts beyond the scope of
5 employment, an employer may be liable for negligently supervising the
6 employee. Gilliam v. Department of Social and Health Services,
7 Childcare Protective Services, 89 Wn.App. 569, 584-585, 950 P.2d, 20
8 (1998). Under Washington law an employer is not liable for the negligent
9 supervision of an employee unless the employer knew, or in the exercise
10 of reasonable care should have known, that the employee presented a risk
11 of danger to others. Niece v. Bellevue Group Home, 131 Wn.2d 39, 48-
12 49, 929 P.2d 420 (1997). Whether conduct is inside or outside the scope
13 of employment is a question for the jury. Gilliam, Supra at 585.

14 Defendants argue based upon Gilliam that if the Defendants stipulate
15 the actions of the officers of the WPD are within the scope of employment
16 that a cause of action for negligent supervision cannot be maintained. In
17 both the Niece and Gilliam cases the respective Plaintiffs alleged a cause
18 of action for negligence against the individual employee. In both cases
19 because this cause of action for negligence was present the two Courts
20 determined that a second cause of action for negligent supervision was
21 redundant. Both Niece and Gilliam are factually distinguishable from the
22
23
24
25
26
27

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

present case, however, because no underlying cause of negligence has been alleged against any officer of the WPD.

In LaPlant v. Snohomish County, 162 Wn.App 476, 271 P.3d 254 (2011), this issue was squarely addressed. The Court referred to the unpublished Decision of Judge Coughenour in Tubar, III, v. Clift, 2007 WL 214260, No. C051154JCC Washington. In the January 25, 2007, Tubar Decision, Judge Coughenour ruled that because the Plaintiff had not asserted a negligence claim against the individual officer, no such risk of redundancy or irrelevance existed. Tubar, Supra at 7. Judge Coughenour stated, "There (the) mere fact that the City admitted that Clift was acting within the scope of his employment does not prevent Plaintiff from asserting state law negligence claims against the City."

In LaPlant the Court distinguished Tubar from Gilliam because Tubar as in the present case did not assert a negligence claim against the employee individually. The LaPlant Court quoted Judge Coughenour:

Here, there is no such redundancy because Plaintiff has not asserted a negligence claim against Officer Clift for which the City would be vicariously libel by admission. Instead, Plaintiff claims that the City itself is negligent for breaching its own standard of care with respect to the hiring, supervision, and training of Off. Clift. LaPlant, Supra at 483.

The LaPlant Court distinguished Tubar from LaPlant for the same reason. The Court noted that LaPlant asserted a negligence claim against

1 the Deputies for which the County would be vicariously liable. Therefore,
2 “Tubar is inopposite.” Id at 483.

3 The authority of LaPlant and Tubar hold that redundancy is not
4 present when the Plaintiff does not assert a negligence claim against the
5 individual officer. The actions of the WPD officers were not negligent;
6 they were deliberate and designed to achieve the goal of forcing the
7 closure of Club Level. There is no risk of redundancy. Dismissal on
8 summary judgment under a claim that the cause of action is redundant is
9 error.
10

11 DEFAMATION OF CHARACTER

12 Plaintiff’s agree that to recover for defamation four essential
13 elements must be met including: (1) falsity; (2) an un-privileged
14 communication; (3) fault; and (4) damages. Moe v. Wise, 97 Wn.App.
15 950, 957 989; P.2d 1148, 1154 (1997). It is also agreed that because
16 the Fila in this case is a private individual the negligence standard of
17 fault applies. Tasket v. King Broadcasting Company, 86 Wn.2d 439,
18 445, 546 P.2d 81 (1996).
19

20 Defendants assert that in Washington a statement
21 communicating ideas or opinions cannot support a defamation claim, as
22 false ideas are not actionable, citing Corbally v. Kennewick School
23 District, 94 Wn.App. 736, 741; 973 P.2d 1074 (1999). The expression
24
25
26
27

1 of an opinion, however, that is based on undisclosed or assumed facts is
2 actionable. Dunlap v. Wayne, 105 Wn.2d 259, 540, 716 P.2d 842
3 (1986). This is because the audience is incapable of judging the
4 truthfulness of the allegedly defamatory statement themselves due to
5 this lack of information. *Id.* at 540.
6

7 Defendants assert a qualified privilege extends to them pursuant
8 to the holding of Bender v. City of Seattle, 99 Wn.2d 582, 601, 664
9 P.2d 492 (1983). While in some circumstances a qualified privilege
10 exists, as the Court stated, "[t]he right or duty to inform the public...
11 does not include a license to make gratuitous statements concerning the
12 facts of the case or disparaging the character of other parties to an
13 action". *Id.* at 601; Gold Seal Chinchillas, Inc. v. State of Washington,
14 69 Wn.2d 828, 835; 420 P.2d 698, 702 (1966).
15

16 In this case, the Defendants did in fact inappropriately disclose
17 information and thereby disparage Fila. This was accomplished by
18 submitting the Sgt. Silvestre internal investigation to The Wenatchee
19 World, and by also placing this into her personnel file. As pointed out
20 by Defendants, RCW 42.56.040 requires public records to be produced
22 upon request. In Cox v. Roskelly, 359 F.3d 1105, 1112 (9th Cir. 2004),
23 the Court clearly held that placing stigmatizing information into an
24 employee's personnel file constituted immediate publication and
25
26
27

1 violated the Fourteenth Amendment. Id at 1112. Plaintiff's allegations
2 regarding the defamation and false light are contained in paragraphs
3 4.40 and 4.49 of the Complaint.

4 In this case, all of this stigmatizing information was not only
5 released to The Wenatchee World, but also placed into the personnel
6 file of Sgt. Silvestre which itself immediately releases this information
7 to the public. The information included in this personnel file did not
8 provide sufficient information for the audience to ascertain the
9 truthfulness or lack thereof, including for example whether or not the
10 Plaintiff "punched his boyfriend." This defamatory and stigmatizing
11 information was recklessly included with the intention of impacting the
12 reputation of the Plaintiff. The cause of action for defamation of
13 character is sustainable and must survive a motion for summary
14 judgment.
15
16

17 FALSE LIGHT

18 As stated in Eastwood v. Cascade Broadcasting Company, 106
19 Wn.2d 466, 470, 471; 722 P.2d 1295, 1297 (1986), "[a] false light
20 claim arises when someone publicizes a matter that places another in a
21 false light if (a) the false light would be highly offensive to a reasonable
22 person and (b) the actor knew or recklessly disregarded the falsity of
23
24
25
26
27

1 the publication and the false light in which the other would be placed."
2 Id. at 470.

3 The distinction between the cause of action for defamation and
4 false light is that the defamation claim is primarily concerned with
5 compensating the injured person for damage to reputation, while a false
6 light claim is primarily concerned with compensating for injured
7 feelings or mental suffering. Id. at 471. The Court referred to the
8 Restatement (Second) of Torts §652E, comment b, and stated that "[i]t
9 is enough that he is given unreasonable and highly objectionable
10 publicity that attributes to him characteristics, conducts or beliefs that
11 are false, and so is placed before the public in a false position." "When
12 this is the case and the matter attributed to the plaintiff is not
13 defamatory, the rule here stated affords a different remedy, not
14 available in an action for defamation." Id. at 471.

17 Plaintiff's allegations regarding the defamation and false light
18 are contained in paragraphs 4.40 and 4.49 of the Complaint. CP 1-27.
19 In paragraph 4.50 allegation is made that Gillian Bebruyn made
20 comments to Detective Sgt. Kruse that "it was her impression Plaintiff
21 was a manipulative individual who is financially exploiting Ms.
22 Thompson." Several statements to this effect were included in the
23 internal investigation of Sgt. Silvestre. CP 1056-1060.
24
25
26
27

1 Detective Sgt. Kruse forwarded a memorandum dated April 13,
2 2011, to Capt. Kevin Dresker which he subsequently placed into the
3 personnel file of Sgt. Silvestre. The statements in this four page report
4 include allegations that the Plaintiff "did not pay any rent to stay in the
5 home." That since Fila has been running Club Level "he has been
6 neglecting his care of Jan's mother." "It got to the point where the
7 caseworker came to the house and has been trying to get Jan's mother
8 placed into a different home for healthcare reasons." "The caseworker
9 supposedly wanted to file a report that would pull Fila's license as a
10 caregiver." Allegedly Fila "Had recently convinced Jan to sign an
11 option for Fila to purchase her home on Stephanie Brooke for free if
12 she were to die." Ms. Bebrun relayed a concern that Jan had regarding
13 reporting this incident to police because Fila would be tipped off by
14 Sgt. Silvestre. The allegation was made that Plaintiff has "quite a
15 temper." She described Fila as "quite a manipulator" and that he has
16 tried to "scam" her friend. CP 1056-1060.

17
18
19 The report from Detective Sgt. Kruse goes on to relate an
20 interview he had with Janet Thompson. Ms. Thompson allegedly stated
21 that Fila was neglecting her mother to the point that "Fila would no
22 longer be reimbursed to care for her and may get his license pulled." A
23 home health care nurse had also told her that she would be filing a
24 home health care nurse had also told her that she would be filing a
25 home health care nurse had also told her that she would be filing a
26 home health care nurse had also told her that she would be filing a
27

1 report and if her mother did not receive better care "she would be
2 removed from the home on Stephanie Brooke." Ms. Thompson
3 allegedly expressed some fear of Fila stating he was "violent."
4 Detective Sgt. Kruse asked her to explain and Ms. Thompson allegedly
5 described instances where he would "posture" or be "verbally
6 threatening." Detective Sgt. Kruse included within this report the
7 comment, "Thompson heard Fila had punched his boyfriend a few days
8 ago and had wrecked his furniture when the two of them broke up."
9 "Thompson felt manipulated by Fila and also believed Fila had been
10 manipulating Silvestre." CP 1056-1060.
11

12 Additional notes from Detective Sgt. Kruse were included
13 within the Sgt. Silvestre personnel file including his typed comment
14 that "Ryan Fila in my opinion is, "quite a manipulator." "He tends to
15 go after single elderly females and convinces them to give him money."
16 "He has tried to scam Janet." The allegation was further made that, "he
17 would get the property for free if she dies." "Jan has no relationship
18 with Ryan (He is homosexual)." "Jan (in my opinion) is unclear what
19 this means." "Ryan did this once before with a woman named Lucile
20 who did die and Ryan got a \$100,000." CP 1056-1060.
21

22 All of the above information detailed in the preceding several
23 paragraphs was contained within the personnel file of then Sgt.
24
25
26
27

1 Stephanie Silvestre which as outlined above was immediately
2 published. Obviously, this information has little to do with Sgt.
3 Silvestre personally, even though all this information was placed into
4 her personal file. The intention of including this information in the
5 personnel file of Sgt. Silvestre was done recklessly with the intention of
6 causing emotional harm to Fila.
7

8 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

9 It is not disputed that to be compensable a plaintiff claiming
10 damages under the tort of negligent infliction of emotional distress must
11 provide proof that the injury is manifested by objective symptomology
12 pursuant to the holding in Hunsley v. Giard, 87 Wn.2d 424, 436, 553
13 P.2d 1096 (1976). By dismissing the cause of action for negligent
14 infliction of emotional distress on summary judgment based on a
15 finding that Fila failed to provide evidence of objective symptomology
16 the Court held Fila to a different standard than is actually required on
17 summary judgment and a manifest error of law.
18

19 “The respective burdens imposed on the moving and nonmoving
20 party by CR 56 are sometimes confusing.” Young v. Key
21 Pharmaceuticals, Inc., 112 W.2d 216, 234, 770 P.2d 182 (1989). The
22 Court stated that two related points must be kept in mind. “First, while
23 the defendant moving for summary judgment is not required to submit
24
25
26
27

1 affidavits in support of his motion, CR 56 (b), this does not mean he
2 does not bear a genuine and substantial burden in supporting his
3 motion.” “While CR 56 (e) requires the nonmoving party to come
4 forward with facts showing a material issue of fact, this does not occur
5 *unless and until* the defendant meets his initial burden of showing that
6 there is no issue of material fact.” Id. at 234. (Emphasis added)
7

8 Initially the burden is on the party moving for summary
9 judgment to prove by uncontroverted facts that there is
10 no genuine issue of material fact. LaPlante v. State, 85
11 Wn.2d 154, 531 P.2d (1975) at 158 [531 P.2d 299];
12 Rossiter v. Moore, 59 Wn.2d 722, 370 P.2d 250 (1962);
13 6 J Moore, *Federal Practice* ¶ 56.07, ¶ 56.15 [3] (2d ed.
14 1948). If the moving party does not sustain that burden,
15 summary judgment should not be entered, *irrespective of
16 whether the nonmoving party has submitted affidavits or
17 other materials.* Preston v. Duncan, [55 Wn.2d 678,
18 681, 349 P.2d 605 (1960)] at 683 [349 P.2d 605], *see
19 also Trautman, Motions for Summary Judgment: Their
20 Use and Effect in Washington*, 45 Wn.L.Rev. 1, 15
21 (1970) (Emphasis in original)

22 Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152
23 (1977); *accord*, Zamora v. Mobil Oil Corp., 104 Wn.2d
24 199, 208-09, 704 P.2d 584 (1985); Graves v. P. J.
25 Taggares Co., 94 Wn.2d 298, 302, 616 P.2d 1223
26 (1980). Young, *Supra* at 234-235.

27 In all of the materials submitted by the City in support of their
28 motion for summary judgment virtually nothing was submitted
29 claiming that Fila was incapable of objectively providing proof of the
30 emotional harm he has experienced. The City failed to meet their

1 "genuine and substantial burden" in support of the motion for summary
2 judgment by failing to even allege that Fila lacked objective evidence of
3 his emotional damages. Therefore, Fila as a matter of law was under no
4 burden to provide objective evidence of his emotional injuries. The
5 Court's ruling that it was the Court's obligation to require Fila to
6 provide in his responsive materials evidence of objective
7 symptomology under this circumstance is an incorrect statement of the
8 law. When this was pointed out to her on the Motion for
9 Reconsideration Judge Allen changed her position and supported her
10 decision to grant summary judgment based on the Keates decision.
11

12 Keates as cited by Defendants in support of their request to
13 dismiss the claim for Negligence Infliction of Emotional Distress
14 actually supports Fila's position. As already noted Keates dealt with a
15 claim of negligent infliction of emotional harm based on a criminal
16 investigation/interview. Keates specifically held "[t]hat police officers
17 owe no duty to use reasonable care to avoid inadvertent infliction of
18 emotional distress on the subject of criminal investigations." The Court
19 then stated, "This does not mean that plaintiffs may not obtain
20 emotional distress damages as compensation for the officer's breach of
21 some other duty." Keates, Supra at 269.
22
23
24
25
26
27

1 Fila has alleged many facts as outlined in the memorandum
2 which are in no way related to a criminal investigation that have
3 impacted him emotionally in a negative manner.

4 Respectfully, Fila has detailed significant factual information
5 which for the purposes of this Motion must be accepted as true. These
6 actions have been designed to cause personal, financial, and emotional
7 harm to the Plaintiff. These activities extend far beyond the alleged
8 singular act of criminal investigation as argued by Defendants.
9

10 **TORTIOUS INTERFERENCE**

11 A claim for tortious interference with a business relationship
12 requires proof of five elements. These five elements are: (1) the existence
13 of a valid contractual relationship or business expectancy; (2) that the
14 defendant had knowledge of that relationship; (3) an intentional
15 interference inducing or causing a breach or termination of the relationship
16 or expectancy; (4) that defendants interfered for an improper purpose or
17 used improper means; and (5) resultant damage. Commodore v.
18 University Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d
19 314 (1992).
20
21

22 Fila has provided evidence of this contractual relationship. The
23 Declaration of Art Rodriguez who is the partial owner of the building
24 within which Club Level was located was provided wherein he stated:
25
26
27

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

Mr. Fila and I did have a contractual agreement where he would pay me \$4,000 per month to lease the space within which he was operating Club Level on the second floor. Mr. Fila was not able to fully comply with this agreement because of declining sales which he had inside Club Level. At this time Mr. Fila still owes me monies which remain unpaid from the terms of this lease. CP 1032.

This statement alone demonstrates that a contractual relationship existed sufficient for the purposes of defeating a motion for summary judgment. The WPD officers were aware Rodriguez was the owner of the building in which El Volcan and Club Level was situated. There is no serious contest to the element that the Defendants had full knowledge of the business relationship between Rodriguez and Fila.

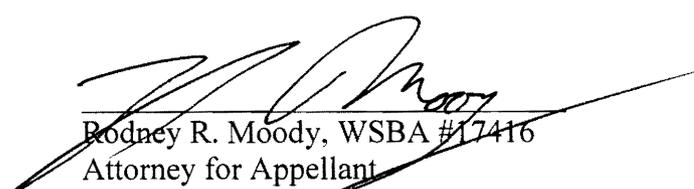
The only element of the five required that is seriously contested is whether the Defendants engaged in the intentional interference with the business relationship between Rodriguez and Fila inducing or causing a breach or termination of the relationship or expectancy.

It is respectfully submitted that when the WPD targeted Club Level in an excessive and unreasonable manner because they wanted to put this nightclub out of business, this evidence is certainly sufficient to defeat a motion for summary judgment on this question. These Defendants interfered with the business relationship between Fila and Rodriguez for an improper purpose because the effect of their actions was to force Fila to relocate the business in a failed attempt to remain viable.

1 these police officers were acting in the furtherance of a criminal
2 investigation and therefore the holding in the Keates is distinguishable.

3 Summary judgment is inappropriate for all of these causes of
4 action. These law enforcement officers do not enjoy qualified immunity
5 nor are they shielded by the public duty doctrine. Overwhelming evidence
6 has been presented clearly demonstrating that material issues of fact exist
7 as to every element of each of these causes of action and summary
8 judgment is not supported by the law or facts presented.

9
10 RESPECTFULLY SUBMITTED this 10 day of December, 2014.

11
12
13 
14 Rodney R. Moody, WSBA #17416
15 Attorney for Appellant
16
17
18
19
20
21
22
23
24
25
26
27